SITUATION ANALYSIS

Assessment of Turkey's Legal and Normative Framework on Labour Migration

DRAFT REPORT

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by

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CAT:	Convention Against Torture
CEDAW:	Convention on the Elimination of All Forms of Discrimination Against Women
CPRD:	Convention on the Rights of Persons with Disabilities
CRC:	Convention on the Rights of the Child
DGMM:	Directorate General of Migration Management
ECHR:	European Convention on Human Rights
ECLSMW:	European Convention on the Legal Status of Migrant Workers
ECPT:	European Committee on the Prevention of Torture
ECtHR:	European Court of Human Rights
ESC(r):	European Social Charter (revised)
EU:	European Union
ICCPR:	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICRMW:	International Convention on the Rights of All Migrant Workers and Members of their Families
ILO:	International Labour Organization
IOM:	International Organization for Migration
LWPF:	Law on Work Permits for Foreigners (No. 4817)
LFIP:	Law on Foreigners and International Protection (No. 6458)
NGO:	Non-Governmental Organisation
TCN:	Third-Country National
UDHR:	Universal Declaration of Human Rights
UNDP:	United Nations Development Program
WHO:	World Health Organization

1. Introduction

In today's increasingly mobile and inter-connected world with growing integration of economies, societies and cultures, creating the capacity needed to manage human mobility is a key priority for governments. Ensuring good governance of migration and labour mobility and protecting fundamental rights of all migrants are critical to this endeavour so as to make migration a true enabler of sustainable development. All governments must endeavour to respond to the complicated and sometimes conflicting demands of meeting labour market needs, ensuring security, and protecting the rights of migrant workers. As will become clear from this report, a complex and interlocking set of international and regional regimes and norms have developed to address these issues. The Turkish government has recently embarked on an ambitious and comprehensive reform of its labour migration regime, with the new Law on Foreigners and International Protection as its core, supplemented by a range of further legislative measures and institutional innovations. The purpose of this report is to analyse the success of this national reform programme in ensuring Turkish compliance with the relevant international and regional norms.

The Turkish situation presents its own unique set of challenges. Historically, Turkey has been affected by diverse migratory movements, and today functions at once as a sending, transit and destination country. Both emigration of nationals and immigration of foreigners for employment purposes have been – and remain – common. Labour migration in Turkey, however, happens to a large degree outwith normal legal and regulatory frameworks, often manifesting itself as "irregular migration".[1] Informal employment particularly affects those migrant workers who primarily work in labour intensive and lower wage sectors, leading to a correspondingly high risk of their labour and social rights' abuse.[2] The irregular status of such workers presents a range of challenges for the Turkish state in terms of protecting their labour and social rights.[3] And of course there are huge challenges caused by ongoing regional instability, and the resulting influx of refugees on to Turkish territory.

Moreover, the last quarter of the century has witnessed a global transformation through free movement of goods, services and capital; spreading of forms of employment without social security; changing structure of the working class; rising of nationality, ethnicity or gender based intra-class differentiations and weakening of labour unions due to endogenous or exogenous impacts.[4] This contemporary transformation process has been coupled with regular and irregular migration of individuals across the board mainly driven by economic motives. As pointed out by Castles[5] and Haas[6], irregular labour migration occurs not only towards developed countries but also the developing ones. The contemporary world order still does not have a multilateral institutional framework regulating international labour

[1] G. Toksöz, S. Erdoğdu, and S. Kaşka (2013) *Irregular Labour Migration in Turkey and Situation of Migrant Workers in the Labour Market***,** IOM Turkey.
[2] K. Lordoğlu, (2010) "Türkiye'deki Çalışma Hayatının Bir Parçası Olarak Yabancı Çalışanlar". *Türkiye'ye Uluslararası Göç Toplumsal Koşullar Bireysel Yaşamlar* içinde. (B. Pusch ve T. Wilkoszewski der.) İstanbul: Kitap Yayınları, 89-109.
[3] *Id.*
[4] S. Erdoğdu, (2006) Küreselleşme Sürecinde Uluslararası Sendikacılık. Ankara: İmge Kitabevi
[5] S. Castles, (2011) "Migration, Crisis, and the Global Labour Market", *Globalizations.* 8(3): 311-324.
[6] H. De Haas, (2008) *Irregular Migration from West Africa to the Maghreb and the European Union,* Geneva: IOM.

migration. Therefore, states (including Turkey) try to coordinate their migration policies through bilateral, regional or inter-regional cooperation frameworks that gradually become more complex.[7]

In response to the shifts in global migratory trends and needs for a change in the policies that govern migration, including the labour migration, the Government of Turkey has commenced a comprehensive reform in migration sphere, including the labour migration management. The aim of this reform is to ensure a coherent, comprehensive, efficient, strong and human rights focused migration system in line also with its EU harmonization process. The adoption of the Law on Work Permits for Foreigners (LWPF) (No.4817) in 2003 was an important step forward in liberalizing access of foreigners to certain occupations.[8] Followed by the adoption of the Law on Foreigners and International Protection (LFIP) (No. 6458) in 2013 and the subsequent establishment of a central migration management authority - the Directorate General of Migration Management (DGMM). Moreover, the on-going institutionalization efforts on migration management have all constituted the main components of the migration reform process of the country.

However, diversification of migratory movements and their impact on Turkish labour market have required further revision of policies related to labour market access of foreigners in Turkey. Within this scope, the Ministry of Labour and Social Security, in coordination with the relevant line ministries, has drafted a Law on Employment of Foreigners – although its date of entry into force is not yet known. The Law on Employment of Foreigners with its two-pillar approach aims to combat the irregular labour migration, on the one hand, and to attract qualified foreign labour in sectors such as engineering and architecture, on the other, in line with the needs of the Turkish labour market. However, the labour migration management still needs some strengthening including the effective implementation of both national and international normative and legal framework, in particular ensuring it is performed in an informed and evidence-based manner, to overcome the problem of irregular migration within the overall objective of combatting informal economy and possible labour exploitation and trafficking that takes place within the framework of unregistered employment.

All of the above coupled with the lack of technical knowledge and expertise that would ensure a comprehensive national approach compatible with international and European practices led to the development of a specific project that would address these needs. Through international and local expertise, the project "Supporting Labour Migration Management in Turkey" was developed in order to support Turkey's efforts in establishing a comprehensive and human rights-based labour migration management system with enhanced

[7] A. Betts (Ed.), (2011) *Global Migration Governance*, Oxford: Oxford University Press.

[8] These occupations has a long list such as related to activities and professions reservd for Turkish Citizens among them almost all activities in the services sector. These included professions such as photography, tourist guiding, transporting persons, acting, singing, waitressing, interpreting, and all other employment in the production sector. The Law on Work Permits for Foreigners (No.4817) also sets the rules in regard to the occupational areas where foreigners cannot be employed and maintains the restrictions for employment of foreigners which, are stipulated in a number of laws. Those occupations include dentistry, pharmacy, veterinary medicine, managerial duties at private hospitals, attorneyship, public notaries, fishing in Turkish waters, carrying air passengers or goods within Turkish airspace, safeguarding, and customs consultancy.

inter-institutional legislative and administrative capacity to tackle irregular migration and promote registered employment of foreigners in Turkey. For that end, a situation analysis (SA) has been prepared in the form of this report in order to assess compliance of Turkey's current and forthcoming legislation in the area of labour migration with key international norms in particularly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, other UN human rights conventions, ILO Conventions and related regional instruments such as the European Social Charter, EU Directives, decisions of the European Court of Human Rights (ECtHR). The goal of the study is to further support the institutional capacity on labour migration management in Turkey.

2. Scope and Methodology

The research team, consisting of two national experts and one international expert, was set up in order to carry out the work under the supervision of the IOM project manager. The methodology of the research team included the desk review of national, international and EU legislation, conducting semi-structured interviews with key relevant stakeholders including governmental officials, members of labour unions, academia, bar associations, NGOs, as well as international organizations. The goal was threefold: firstly, to map the complex and interlocking normative frameworks relating to labour migration at the international and regional levels by which Turkey is bound (or seeking to become bound, in the case of EU law); secondly, to analyse the recent round of legislative reform in Turkey in relation to labour migration, in order to determine whether it is – on paper at least – in compliance with these obligations; and lastly, to determine whether the institutional capacity currently exists to effectively implement the new laws in practice. This will enable the identification of any gaps between the different international and regional obligations, on one hand, and Turkish law and practice on the other, and allow for the formulation of a set of recommendations to address these.

The remainder of the report is structured as follows. The next section provides a brief account of the current legal framework and institutional set-up for regulating labour migration in Turkey, outlining both the key constitutional and legislative provisions and instruments, and the different competences of, and relations between, the institutional actors charged with implementing these. Sections 4 and 5 contain the main body of the analysis: section 4 deals with Turkey's international obligations in the field of labour migration, with a heavy focus on individual rights; whilst section 5 deals instead with the relevant EU *acquis* on this issue, in the context of Turkey's ongoing accession talks. In both of these sections, the method is the same: firstly, an account of the key international and/or regional norms is provided in relation to a specific sub-theme of labour migration. This is followed by an account of the relevant Turkish law on the matter, and an analysis of the extent to which the latter complies with the obligations laid down by the former. Where relevant and available, further information about the actual implementation of the national law by Turkish authorities is provided.

Section 4, on Turkey's actual obligations under international law, is largely focused on individual rights. As Turkey is one of a relatively small number of states to have ratified the core UN human rights treaty in this field, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), this instrument is used as a structuring device. The convention provides a detailed and comprehensive set of human rights for migrant workers, specifying the more general provisions contained in a range of other instruments (for example, the UDHR, the ICCPR and the ICESCR). For ease of reference, the analysis is divided into the different classes of individuals for whom these rights must be ensured: regular migrants; irregular migrants; women; children; people with disabilities; refugees and stateless individuals; and victims of trafficking. Attention is also drawn to international norms on the regulation of migrants in particular professions. Where necessary, the analysis of obligations under the ICRMW is supplemented with obligations drawn from other instruments (such as the CRC, ICERD or CEDAW; the Refugee Convention and the Trafficking Protocol; and various relevant declarations and recommendations of international bodies). In general, however, references to other

instruments will only be made when the labour migration-related obligations they contain go beyond what is required by the ICRMW.

Section 5 focuses instead on the EU law, seeking to establish the extent to which Turkey's recent legislative changes bring it into compliance with the *acquis communautaire* on labour migration. It begins with an analysis of some basic rights that must be afforded to EU citizens (again here, the analysis will be limited to those rights that go beyond what is required under the ICRMW, or other international agreements to which Turkey is a party). Of course, at this stage in the accession process, there can be no reasonable expectation that Turkey will provide the rights to EU citizens – for example, in relation to free movement of workers, or freedom of establishment and to provide services – that will be required upon accession, so this section is relatively brief. But it is worth noting the rights that Turkey will have to be in a position to provide to such individuals immediately upon accession. The report then considers some of the detailed *acquis* regulating the admission and stay of third-country nationals (TCNs).

3. Institutional and Legal Background

3.1 General background

The Turkish labour migration legislation is governed by several acts, including the recently adopted Law on Foreigners and International Protection (Law No. 6458 from 2013), the Law on the Work Permit for Foreigners (Law No. 4817 from 2003), Labour Law (Law No. 4857 from 2003), Social Security and Universal Health Insurance Law (Law No. 5510 from 2006), Citizenship Law, (Law No. 5901 from 2009), Trade Unions and Collective Labour Agreements (Law No. 6356 from 2012) and Occupational Safety and Health (Law No. 6331 from 2012). As it is clear from the adoption dates of these acts, the majority of national labour migration legislation has been amended in recent years, mainly as a result of the pressure by the European Union and the Council of Europe on Turkey in relation to the EU accession negotiation process. Moreover, the legislative initiative in this area includes the current draft Law on Employment of Foreigners (whose date of adoption is as yet, however, unknown).

A number of fundamental rights are provided for in the Constitution of the Republic of Turkey. For the purposes of this report, however, the key constitutional provision is contained in Article 90, as amended in 2004. The amended provision states that all international agreements which have been duly ratified by Turkey form part of the Turkish legal order; and, moreover, in the case of conflict between domestic legislation and an international instrument related to fundamental rights, the latter is to prevail. This means – in theory at least – that there should be no gaps between Turkey's international obligations in general and their transcription into domestic law.

3.2 Key institutional actors

The actors being responsible or being involved in migration management in general and labour migration management in particular in Turkey can be divided into three groups: state institutions, the civil sector - the non-governmental organisations - and the country offices of international governmental organisations, such as IOM, ILO, UNHCR, UNDP, WHO and the EU Delegation to Turkey.

On national (state) level, because of its cross-cutting character, the development of migration policies and their implementation involves a wide range of institutions- from ministries to scientific and research bodies; each in its own expertise plan, shape and implement the migration policies in Turkey. For a comprehensive list of relevant labour-migration institutions, please see *Table XYZ.*

The national institution overseeing migration is the Ministry of Interior. Its responsibilities in this regard include the maintenance of public order within the borders of Turkey, including labour migration management. The newly formed Directorate General of Migration

Management (DGMM)[9] established under the Ministry of Interior is the umbrella institution responsible for development, implementation and coordination of Turkey's migration policies and strategies among relevant agencies and organisations. Its mandate includes actions related to entry, stay and exit of foreigners; their removal; international and temporary protection; legislative initiatives in the field of migration, including actions related to harmonization; protection of victims of human trafficking and provision of administrative support to Migration Policies Board (MPB). Among other permanent boards and committees established by LFIP and overseen by DGMM are the Migration Advisory Board; International Protection Assessment Committee; and the Coordination Board on Combating Irregular Migration. The composition of the DGMM suggests that a significant focus has been put on tackling the irregular migration and providing international and temporary protection. From the labour migration perspective, it is the Foreigners Department and the Migration Policy and Projects Department of DGMM that are of key importance here.

The Migration Policies Board (MPB) is also a newly formed body (2013) that operates under the chairmanship of the Ministry of Interior and is comprised of undersecretaries of 10 relevant Ministries, including the Ministry of Labour and Social Security, Ministry of Family and Social Policies, Ministry for European Union, etc. The Board may invite to its meetings representatives of other national or international agencies or non-governmental organisations and it is convening at least once a year. Among duties of the Board are the determination and implementation of migration policies and strategies; identification of methods and measures for employment in case of mass influx; determination of principles and procedures for admission of foreigners en mass to Turkey on humanitarian grounds; determination of rules relevant to needs for foreign labour force in Turkey, including the seasonal agricultural workers; setting up conditions for the issuance of the long-term residence permits to foreigners; as well as ensuring coordination among the public institutions and agencies working in the field of migration.[10] The Ministry of Interior further established a Directorate General of Provincial Administration, which is responsible to dealing with issues relevant to migration and border security on a provincial basis.

From other ministerial institutions, the Ministry of Labour and Social Security plays a prime role, in particular in relation to work permits, health and safety at work, inspection, social security, employment and professional competency. These issues are dealt with by various departments, such as Directorate General for Labour, Directorate General for Foreign Relations and Foreign Labour Services; Directorate General for Health and Safety at Work, Labour Inspection Board, etc.

The Ministry of Justice, as an organ responsible for the judicial system and institutions is another state body that has a role to play, in particular where rights of individuals (including labour migrants) are at stake. The Turkish judicial system has undergone a significant reform, mainly as a response to accession process to European Union. Some key amendments of Constitution and other key legislation have been adopted in recent years and some institutional changes were introduced in order to ensure the rule of law, avoid possible human rights violations and establish a judicial system, in which people can trust. The recent cooperation of the Directorate General of Migration Management and the Ministry of Justice

[9] Established by the LFIP, No. 6458, in 2013.
[10] LFIP, Article 105.

on development of a "Legal Training Curriculum" for judicial authorities who render judgements in cases regarding migrant smuggling and other related organised crimes is just one example of such progressive developments.

The Ministry of Foreign Affairs and the Ministry of EU Affairs are two other key institutions regulating issues that involve foreign nationals. Among the competencies of the Ministry of Foreign Affairs lies the preparation and monitoring of all international agreements as well as the responsibility for migration, asylum, visa applications (where Turkish embassies are the primary visa application units for any migrants abroad). While the Ministry of EU Affairs is responsible for management of Turkey's candidacy and the whole accession negotiation process to European Union, financial cooperation (including institution building assistance, cross-border programs, etc.).

The Ministry of Customs and Trade, established in 2011, has some responsibilities that affect migrant workers, such as customs revenue collection, fight against smuggling of goods and travellers and development of new policies, plans, programs and strategies in the fields of trade. Also the Ministry of Family and Social Policies, again established in 2011, is responsible for family affairs, social services, children services, disabled and elderly services, status of women, etc. All of these affect equally labour migrants and their families. Finally, it is important to mention also the role of the Prime Ministry Disaster and Emergency Management Authority that is the responsible body for the managing any emergency issues, including the recent influx of refugees from Syria. The Ministry of Development is an expert-based organization which plans and guides Turkey's development process in a macro approach and focuses on the coordination of policies and strategy development, including economic, social and cultural migration policies of Turkey, and the determination of the sectors needing migrant workers as well as the numbers of migrant workers needed by these sectors. Moreover, institutions such as the Ministry of National Education and the Ministry of Food, Agriculture and Livestock have some role to play in regulating issues directly or in-directly related to migrant workers in ensuring some key rights – such as access to education, vocational training; or by adopting adequate measures to facilitate the seasonal work on Turkish farms conducted mainly by migrants. Some other ministerial bodies have some functions that affect migrants and those are the Ministry of National Defence (responsible for national borders and security); the Ministry of Health; Ministry of Transport, Maritime Affairs and Communication; Prime Ministry Presidency for Turks Abroad and Relative Communities and the Turkish Cooperation and Coordination Agency (responsible for economic, social, cultural and development projects across the world).

These key state institutions are assisted on a daily basis by civil society organisations, such as Turkish Red Crescent, The Centre for Asylum and Migration Researches, Centre for Refugee Rights, Association for Research Centre on Asylum and Migration, Association for Solidarity with Asylum Seekers and Migrants, Women Solidarity Foundation, the Human Resource Development Foundation and many others.

As can be seen by the myriad of these institutions and their interlinked and overlapping competencies in this area, it is clear that the regulation and management of the labour migration issues in Turkey requires a great deal of communication, collaboration and coordination.

3.3 'Migrant' versus 'foreigner': A note on terminology

The Turkish legal system has a somewhat different understanding of the term "migrant" than that of most jurisdictions and under international (and EU) law. Although there is no universally accepted definition of the term "migrant", the most common understanding of it is that it refers to "persons, and family members, moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family"[11]. On the other hand, in Turkish culture and law, the term "migrant" is interpreted as relating to someone "descending from Turkish ancestry and culture". This definition, originating from the 1934 Settlement Law (Law No. 2510)[12], is related to the idea of naturalizing newly coming migrants of the same origin during the period of nation-building process. Because the term "Turkish culture" is a fairly wide concept and does not have a precise definition in the national law, this allowed the political authorities to decide upon which incoming groups are to be counted as 'migrants'. In accordance with this definition, the priority was given to Muslim Turkish-speaking migrants or those who were officially considered to be easily assimilated within the Turkish identity such as Bosnians, Circassians, Pomaks, and Tatars from the Balkans (Kirişçi 2007: 93). The 1934 Law was replaced by a new Settlement Law (Law No. 5543) in 2006; however, in the new Law in its Article 3 re-defines the term "migrants" again as "those who are descendants of Turkish ancestry and culture and come to Turkey alone or collectively in order to settle". It seems, therefore, that those that are not descendants of Turkish ancestry and culture are still understood under the Turkish law to be 'foreigners' rather than "migrants".

This special understanding of the term "migrants" is rooted in the official ideology behind the founding of the Turkish Republic to define "migrants" as only those who would be integrated to the targeted homogenous nation through naturalization. Turkey's future immigration policy should, however, endeavor to recognize its "own ethnic and cultural diversity and that Turkey is becoming an immigration country very different than what it used to be" (Kirişçi 2007: 96).

As the position of Turkey is currently shifting from the migrant sending country to a country of transit and receiving country, the need for adoption of an inclusive, realistic definition of the term "migrant" that is in line with the universally understood meaning of this term, might prove to be crucial. This could prove of even more import in relation to Turkey- EU accession negotiations, when the unification of the key terminology might be one of the conditions for Turkish membership.

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[11] "The United Nations defines migrant as an individual who has resided in a foreign country for more than one year irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate. Under such a definition, those travelling for shorter periods as tourists and businesspersons would not be considered migrants. However, common usage includes certain kinds of shorter-term migrants, such as seasonal farm-workers who travel for short periods to work planting or harvesting farm products." Glossary on Migration, IOM (2004), at https://www.iom.int/key-migration-terms .

[12] According to unofficial translation provided by EudoCitizenship, the content of Article 6 (b) of Law No. 2510 refers to "those who are accepted as "muhacir" are given Turkish citizenship by the Council of Ministers. Muhacir are people of Turkish descent or those who either come as an individual to settle in Turkey or who make their application as a group." Source: EudoCitizenship at http://eudo-citizenship.eu/databases/national-citizenship-laws/?search=1&name=Law+No.+2510%2F1934+Settlement+Act+&year=&country=&submit=Search

On the other hand, it is the term "foreigner" or "alien" that's being commonly used by the Turkish national law when regulating any issues relevant to those that have "no bonds of citizenship with the Republic of Turkey".[13] As Ozturk concludes, "[p]er the Turkish doctrine, it is widely accepted that the scope of alien concept includes citizens of foreign states, refugees, and stateless persons, non-Turkish citizens with multiple citizenships and foreign nationals with a special status".[14] This concept further enlarges to not only the natural persons, but also the legal entities (such as various foreign associations, businesses partnerships, etc.[15]

It is therefore crucial to be aware of the discrepancies between the meanings of these key terms and the importance of what this difference in terminology may mean in relation to Turkey's obligations under international and regional law.

[13] Article 3(d) of Turkish Citizenship Law (Law no. 5901 from 2009).
[14] Ozturk, N., *Challenges Regarding Aliens' Right to Work Under Turkish Law,* Human Rights Review, Volume: III, Issue: 1, June 2013, p.26.
[15] *Ibid*.

4. Turkey's International Obligations in Relation to Labour Migration

This section examines Turkey's current legal framework relating to labour migration in the light of its obligations under international law. These obligations are set out in a wide array of instruments, both "hard" and "soft", covering an equally wide range of issues. This makes for a dense, interlocking and frequently overlapping set of normative standards, which is extremely complex. As will be clear, the majority of these standards relate to the human rights of various categories of migrants. This is to be expected: for the most part, international law still leaves sovereign states to determine the management of their own labour markets, to the extent that such management does not infringe on the international human rights of migrants.

In what follows, a number of techniques have been used to focus and structure the analysis. Firstly, it is noteworthy that Turkey (unlike any EU Member State) has both signed and ratified the ICRMW. Given that the very purpose of this treaty is to provide a comprehensive account of how the general human rights set out in the UDHR, ICCPR and ICESCR, along with the other core UN treaties, apply to migrant workers, this instrument is used as the basic structuring device for mapping the normative framework of Turkey's international obligations on labour migration. This does not mean that other instruments will be ignored, but that explicit reference will usually only be made to them when they in some sense add to or go beyond the rights as set out in the ICRMW. Secondly, the report deals only with international conventions to which Turkey is a party. This means that certain treaties – for example, ILO Conventions 097 and 143 – which relate directly to the treatment of migrant workers are not taken into consideration here. Thirdly, it is assumed that Turkey is broadly complying with its human rights obligations in respect of its own citizens: when, for example, analysing whether Turkish law is in compliance with its obligations to afford migrant workers treatment equal to that afforded to nationals, the further question of whether the treatment afforded to nationals complies with international standards is not addressed here. Lastly, the focus is heavily on Turkey's actual international obligations, although reference is made where appropriate to the "soft law" recommendations of a number of international bodies, best practice guidelines, and the like.

The section is structured into three main subsections: rights of all migrant workers (that is, both those in a regular situation and those in an irregular situation); rights of migrant workers in a regular situation; and rights of particularly vulnerable migrant workers. It is worth recalling at this point, however, the importance of Article 90 of the Constitution of the Republic of Turkey, which states that:

> International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional… In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

This result of the second sentence, added as an amendment in 2004, is that international human rights law should prevail over any conflicting domestic law, regardless of whether it was enacted subsequently to the ratification of the international treaty. This will likely in many cases be sufficient to (at least in theory) close any gaps that can be identified in the new Turkish framework on labour migration with regard to the applicable international norms. However, it is worth pointing out that, in a number of cases, the content of the international

agreements has been "fleshed out" by the relevant treaty bodies; but, as this is not formally part of the international agreement, it is not clear that it would be captured by Article 90 of the Constitution. Specific legislation in this regard may be necessary to bring Turkish law in line with what are often regarded as authoritative interpretations – to some degree at least – of international legal obligations.

4.1 Rights of All Migrant Workers

Turkey is obliged to guarantee these rights to all migrant workers, regardless of whether or not they are present on its territory legally. The category of "migrant workers", however, excludes those whose admission and rights are regulated by other international agreements (employees of international organizations, officials of other states, refugees, stateless persons), students and trainees, and seafarers.[16]

4.1.1 Fundamental rights and freedoms

All migrants are entitled to be free from discrimination with regard to the exercise and protection of their rights. The prohibited categories of discrimination in the ICRMW are framed broadly: states must "respect and secure" to all migrant workers the Convention rights, without distinction "of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status".[17] (This does not, of course, mean that all migrant workers have the same rights; the Convention itself mandates that some rights must be granted only to those whose status is regular). It is worth noting that this provision is mirrored in a range of other international instruments to which Turkey is a party,[18] and in particular that the ECtHR has held that "other status" in Article 14 of the ECHR includes categories such as health status or disability, sexual orientation and gender identity.[19] The ECtHR has also made clear that Article 14 ECHR applies to decisions as to whether or not to admit a foreigner on to a State's territory: even though there is no right to be admitted, such decisions cannot be taken on a discriminatory basis.[20]

The ECLSMW creates a further obligation on parties to provide information to prospective migrants on a broad range of topics: residence, conditions and possibilities of family reunion, the nature of the employment, the possibility of a new contract when the first one ends, the required qualifications, working and living conditions (including the cost of living), pay, social security, housing, remittances, and on any taxes or other deductions from wages.[21]

Migrant workers must be free to leave any State (including their State of origin), subject only to restrictions necessary to protect public order, security, health or morals, or the rights and

[16] ICRMW, Art. 3.
[17] *Id.* Art 7.
[18] See e.g. ICCPR Arts. 2(1) and 26; Article E ESC(r).
[19] See e.g. ECtHR, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, 21 December 1999, ECHR 1999-IX; *EB v France [GC]*, no. 4354602, 22 January 2008. See also Yannis Ktistakis, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter* (Council of Europe, 2013) pp. 14-15 (http://www.coe.int/t/democracy/migration/Source/migration/ProtectingMigrantsECHR_ESCWeb.pdf).
[20] ECHR Art. 14; *Abdulaziz, Cabales, and Balkandali v UK*, nos. 9214/80; 9473/81; 9474/81, (1985) 7 EHRR 471; Ktistakis, *op. cit.* n. 19, at p. 20
[21] ECLSMW, Art. 6(1).

freedoms of others.[22] They must also be granted the right "at any time" to return to and remain in their State of origin.[23] Their right to life must be protected,[24] as must their right to be free from torture or cruel, inhuman or degrading treatment;[25] and from slavery or forced labour (although the latter does not include hard labour where such may be imposed as punishment for a crime, service in cases of emergency that threatens the "existence or well-being of the community", or service as part of normal civil obligations that is also demanded of citizens).[26]

States must respect and ensure protection of the rights of all migrant workers (and their family members) to freedom of thought, conscience and religion. This includes the freedom to manifest religious belief, alone or with others, in public or in private, "in worship, observance, practice and teaching.[27] This freedom can only be limited by legal prescription, and where necessary for the protection of "public safety, order, health or morals or the fundamental rights and freedoms of others".[28] States must also respect the liberty of migrant workers to bring up their children in accordance with their own convictions.[29]

Similarly, States must protect the right of all migrant workers and their family members to freedom of expression, including the freedom to impart and receive information "through any… medium of their choice".[30] This freedom can only be restricted by legal prescription, on the basis of a similar but slightly broader set of grounds to the freedom to manifest religion above: for the protection of public safety, order, health or morals; but also to protect the rights or reputation of others; to prevent propaganda for war; or to prevent advocacy of national, racial or religious hatred that constitutes incitement not merely to violence, but also to discrimination or hostility more generally.[31]

States must also ensure that the rights of migrant workers to freedom of association are protected, including to join trade unions, to participate in their meetings and activities, and to seek their assistance. Restrictions on this right must be prescribed by law, and are limited to those "necessary in a democratic society" for protecting public security, order and the rights and freedoms of others.[32]

State law must also protect migrants from arbitrary interference with privacy, home, family or communications.[33] Migrants also have a right not to be arbitrarily deprived of their property, and to fair and adequate compensation should their property be lawfully expropriated under the law of the host State.[34]

[22] ICRMW, Art 8(1). See also ECLSMW, Art. 4(1) and (2).
[23] *Id.* Art 8(2)
[24] *Id.* Art 9.
[25] *Id.* Art 10.
[26] *Id.* Art 11.
[27] *Id.* Art 12(1).
[28] *Id.* Art 12(3).
[29] *Id.* Art 12(4).
[30] *Id.* Art. 13(1) and (2).
[31] *Id.* Art. 13(3).
[32] *Id.* Art. 26.
[33] *Id.* Art. 14.
[34] *Id.* Art. 15.

4.1.2 Arrest, detention and expulsion

All migrants have the right to liberty and security of person, and States have a duty to ensure effective protection against "violence, physical injury, threats and intimidation", whether by public or private actors.[35] Migrants must not be subject – either individually or collectively – to arbitrary arrest or detention; and may only be deprived of liberty on the basis of established law.[36] The ECHR further specifies the circumstances in which deprivation of liberty is permissible:

- lawful detention following conviction by a court;
- lawful detention following non-compliance with a court order;
- lawful detention in order to bring to trial, or when reasonably considered necessary to prevent an offence, of to prevent pre-trial flight;
- lawful detention for the purposes of preventing the spread of infectious diseases, or of mentally ill people, drug addicts, alcoholics or vagrants;
- lawful detention to prevent unauthorised entry to the country, or in furtherance of a deportation or expulsion order.[37]

The ECtHR has further held that even *prima facie* permissible detention might become a violation of Article 5 depending "on the intensity, the length, the nature or the accumulation of the restrictions imposed".[38] In short, these elements of detention must be necessary and proportionate, or "reasonably required for the purpose pursued".[39] Migrants detained for administrative purposes must be held in facilities "appropriate to their situation", and in particular kept separate from prison populations, given that "'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country".[40] The European Committee on the Prevention of Torture (ECPT) has also stated that, as with prisons, police stations are not appropriate places for prolonged immigration detention.[41]

According to the ICRMW, if arrested, migrants should "as far as possible" be informed of the reasons for the arrest in a language they understand; and they must be promptly informed in a language they understand of any charges against them.[42] The ECHR goes perhaps even further, stating simply that "[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him";[43] and the ECtHR has held that this must extend beyond merely setting out the legal basis for

[35] *Id.* Art. 16(1) and (2).
[36] *Id.* Art. 16(4).
[37] ECHR, Art. 5(1)(f).
[38] Ktistakis, *op. cit.* n. 4, at p. 23. See also e.g. *Abdolkhani and Karimnia v. Turkey*, Application no. 30471/08, 22 September 2009; and *Amuur v. France*, Application no. 19776/92, 25 June 1996.
[39] ECtHR, *Kaja v. Greece*, Application no. 32927/03, 27 July 2006, paragraph 49. ECtHR, *Saadi v. the United Kingdom (GC)*, Application no. 13229/03, 29 January 2008, paragraph 4. ECtHR, *Efremidze v. Greece*, Application no. 33225/08, 21 June 2011, paragraph 56. See also Ktistakis, *op. cit.* n. 19, at p. 32.
[40] Saadi v. the United Kingdom (GC), 29 January 2008, paragraph 74.
[41] See the ECPT, *CPT Standards: "Substantive" Sections of the CPT's General Reports*, CPT/Inf/E (2002) 1 - Rev. 2015, pp. 65, 71. (http://www.cpt.coe.int/en/documents/eng-standards.pdf).
[42] ICRMW Art. 16(5).
[43] ECHR Art 5(2).

the arrest, disclosing also the relevant factual basis.[44] Moreover, it has held that this information must be imparted "in simple, non-technical language that can be easily understood", [45] and that "promptly" in this context means "within hours" of the arrest.[46] Anyone detained on a criminal charge must be brought promptly before a judge or other authorised official, and is entitled to trial within a reasonable time or release. Pre-trial detention in custody must not be a general rule, but release may be made conditional on guarantees of subsequent appearance.[47]

Any migrant worker or family member arrested or detained for any purpose can request that the consular or diplomatic authorities of their home State be informed of the detention and the reasons for it. If this request is made, the host State is obliged to carry it out "without delay". The detained person also has the right to communicate with these authorities, to send and receive messages to them "without delay"; and they must be informed of this right "without delay" upon being detained.[48] Detained individuals must also have the right to challenge the lawfulness of their detention before a judge. If they do not understand the language of the host State, an interpreter must be provided (at no cost to the detained individual "if necessary").[49] The ECPT has further recommended that even irregular migrants should be afforded three basic rights upon detention: the right of access to a lawyer; the right to be seen by a doctor; and the right to inform a third party of their choice;[50] and also that "at a minimum, a person with a recognised nursing qualification must be present on a daily basis at all centres for detained irregular migrants".[51] A number of conventions provide further that there must be an enforceable right to compensation for any unlawful arrest or detention.[52]

Migrant workers and members of their families must be treated equally to nationals of the host State before its courts and tribunals.[53] They are entitled to a fair and public hearing to determine their rights and obligations in criminal or civil matters by a competent, independent and impartial tribunal. [54] States must also ensure that the individuals concerned have the right to:

- the presumption of innocence in criminal trials;
- prompt information, in a language they understand, of the nature of and reasons for the charges against them;
- adequate time to prepare a defence, and to communicate with legal advisers of their choosing;
- be tried without undue delay
- defends themselves, either in person or through a legal representative;
- cross examine witnesses, and call their own;

[44] ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, Application no. 12244/86; 12245/86; 12383/86, 30 August 1990; see also Ktistakis, *op. cit.* n. 19, at p.30.
[45] ECtHR, *Abdolkhani and Karimnia v. Turkey*, Application no. 30471/08, 22 September 2009.
[46] ECtHR, *Shamayev and Others v. Georgia and Russia*, Application no. 36378/02, 12 April 2005; *Saadi v. the United Kingdom (GC)*, Application no. 13229/03, 29 January 2008; Ktistakis, *op. cit.* n. 19, at p. 31.
[47] ICRMW Art. 16(6).
[48] *Id.* Art. 16(7).
[49] ICRMW Art. 16(8); see also ECHR, Art. 5(4).
[50] ECPT, *supra* n. 41, at p. 70.
[51] *Id*. At p. 73.
[52] ICRMW Art. 16(9); see also ECHR, Art. 5(5).
[53] See also ECLSMW, Art. 26.
[54] ICRMW Art. 18.

- to have legal assistance provided, without cost if they are unable to pay;
- the "free assistance" of an interpreter if they do not understand the language of the court;
- an appeal or review by a higher tribunal upon conviction;
- protection against double jeopardy;
- compensation for any miscarriage of justice.[55]

Migrant workers and members of their families should not be criminally convicted for any act not a crime at the time of its commission, nor given a heavier penalty than that envisaged by law at the time of its commission. If subsequent to commission, a lighter penalty is introduced, however, that is to be applied.[56] Mere failure to meet a contractual obligation is not a sufficient ground for imprisonment; and nor is it to be grounds for revocation of a residence or work permit, unless these were conditional on the fulfilment of that obligation in the first place.[57] Any authorized confiscation of identity, work, travel or residence document must be verified with a provision of a receipt; and under no circumstances may the passport (or equivalent) of a migrant worker or member of their family be destroyed.[58]

If deprived of their liberty, migrant workers and members of their families must be treated humanely and with dignity.[59] Those detained on the basis of criminal accusations must, save in exceptional circumstances, be held separately from those convicted; and anyone detained for violations of migration law should, "insofar as practicable", be held separately from convicted persons or those awaiting trial. Any minors accused of criminal offences must be held separately from adults, and brought as quickly as possible for adjudication. The "essential aim" of the treatment of imprisoned migrant workers must be "reformation and social rehabilitation",[60] and they are to be granted the same rights as nationals who are in the same situation.[61] If a migrant worker or family member is detained in order to verify whether there has been any violation of migration law, the host State cannot require them to bear any of the costs that arise from that detention.[62] The ECPT has further recommended that independent bodies should be established to monitor the detention conditions in which migrants are being held. These bodies should make "frequent and unannounced" visits, and be empowered to interview migrants in private.[63]

In expulsion decisions, States must take care to abide by the fundamental prohibition on *refoulement*.[64] Collective expulsions are banned: each expulsion decision must be examined individually, and must be taken by a competent authority in accordance with law.[65] Decisions, with reasons (unless to do so would threaten national security), must be provided in a language the individual concerned understands (in writing, if so requested). The costs of the expulsion are not to be borne by the individual or individuals concerned (although they

[55] *Id.* Art. 18(2)-(7).
[56] *Id.* Art. 19.
[57] *Id.* Art. 20.
[58] *Id.* Art. 21.
[59] *Id.* Art. 17(1).
[60] *Id.* Art. 19(2) to (4).
[61] *Id.* Art. 17 (7).
[62] *Id.* Art. 17(8).
[63] ECPT, *supra* n. 41, at p. 73.
[64] See e.g. CAT, Art. 3.
[65] ICRMW Art. 22(1) and (2).

may be required to pay travel costs).[66] There must be a right to have an expulsion decision reviewed (unless the decision was taken as a result of a judicial process, or where there is a risk to national security), and to seek a stay of execution of the expulsion decision pending review.[67] Any individual subject to expulsion must be informed without delay of their right to consular assistance, and the host State must "facilitate the exercise" of that right.[68]

4.1.3 Welfare, education and culture

Under the ICRMW, all migrant workers are to be afforded treatment no less favourable than nationals of the host State with regard to a range of working conditions, including:

- remuneration;
- overtime, ,working hours, weekly rest, paid holidays, occupational health and safety;
- termination of employment;
- minimum age of employment.

States are to take "all appropriate measures" to ensure that migrant workers are not deprived of these rights merely because they are undocumented or in an irregular situation.[69]

Emergency health care (specifically, medical care that is "urgently required for the preservation of their life or the avoidance of irreparable harm to their health) must also be provided to all migrant workers and members of their families on a basis equal to that of nationals of the host state. Such care may not be refused on the grounds that the individuals in question are undocumented or in an irregular situation.[70]

The ECtHR has held that Article 8 ECHR, on the right to respect for private and family life, has some implications for the right to housing of all migrants, regardless of status. While it does not guarantee a right to housing, it does place certain obligations on states with regard to forced evictions or the destruction of migrants' homes. These are only allowed when provided for by law, in pursuit of a legitimate aim, and are necessary and proportionate to the pursuit of that aim.[71]

States are to ensure respect for the cultural identity of migrant workers and their family members, and not prevent them "from maintaining cultural links with their State of origin".[72] Lastly, upon termination of their stay, all have the right to transfer earnings, savings and personal belongings out of the host State.[73]

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[66] *Id.* Art. 22(8).
[67] *Id.* Art. 22(4).
[68] *Id.* Art. 23.
[69] *Id.* Art. 25. See also ECLSMW Art. 20.
[70] *Id.* Art. 28.
[71] ECtHR, *Akdivar and Others v. Turkey (GC)*, Application no. 21893/93,16 September 1996 (protection against destruction of a home under Article 8 ECHR); – ECtHR, *Mentes v. Turkey (GC)*, Application no. 23186/94, 28 November 1997 (protection against forced eviction under Article 8 ECHR); Ktistakis, *op. cit.* n. 19, at p. 54.
[72] *Id.* Art. 31.
[73] *Id.* Art. 32.

4.2 Rights of Migrant Workers in a Regular Situation

The ICRMW also guarantees extra rights, in addition to those outlined above, for migrant workers whose presence and employment in the host State is regular and legal. The rights set out in the ESC(r), although in general more programmatic than those of the ICRMW, are further limited to "nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned".[74]

4.2.1 Fundamental freedoms

Migrant workers and their family members in a regular situation have greater freedoms in some regard than do those present irregularly. They have the right to move freely within the territory of the host State, and to choose their place of residence there (subject only to limitations provided by law, on the basis of public safety, order, health or morals, or to protect the rights and freedoms of others).[75] They also have the right to form associations and trade unions "for the promotion of their economic, social, cultural and other interests" (subject to restrictions "necessary in a democratic society" to protect national security, public order, or the rights and freedoms of others).[76]

Migrant workers also have "the right to freely choose their remunerated activity", but this is subject to a range of possible limitations: for example States may restrict access to certain activities "when necessary in the interests of the State", or in accordance with legislation on the recognition of foreign qualifications.[77] In any event, the mere loss of employment should not be enough to lose a migrant worker their residence permit, or consider them in an "irregular situation",[78] unless they are not permitted to freely choose their remunerated activity and the residence permit was explicitly conditional upon the specific activity for which the migrant in question was admitted.[79]

Migrant workers should be exempt from import and export duties on their personal effects when coming to and leaving the host State.[80] States also have the duty to facilitate remittances by migrant workers in a regular situation. These workers be free "to transfer their earnings and savings, in particular those funds necessary for the support of their families" from the host State to another.[81] They must be free from taxes or other charges higher or more onerous than those imposed on nationals, and they must be granted equivalent deductions or exemptions.[82]

[74] ESC(r), Appendix.
[75] *Id.* Art. 39.
[76] *Id.* Art. 40.
[77] *Id.* Art. 52.
[78] *Id.* Arts. 49(2) and 51.
[79] *Id.* Art. 51.
[80] *Id.* Art. 46.
[81] *Id.* Art. 47. See also ECLSMW, Art. 17; ESC(r), Art. 19(9).
[82] *Id.* Art. 48. See also ECLSMW, Art. 23.

4.2.2 Welfare, education and culture

Migrant workers in a regular situation are to be afforded treatment equal to nationals of the host State with regard to the following:

- Protection against dismissal;
- Unemployment benefits;
- Access to work schemes to combat unemployment;[83]
- Access to educational institutions
- Access to vocational guidance and placement services, and training facilities[84]
- Access to housing, including social housing schemes and protection against exploitative rental practices;[85]
- Access to social and health services ("provided that the requirements for participation in the respective schemes are met");[86]
- Access to and participation in cultural life.[87]

Most other instruments on these issues cover much the same ground; however, on occasion, they do go beyond what is set out in the ICRMW. For example, the ECLSMW provides that States have a general obligation to ensure that housing for migrant workers is "suitable", and carry out inspections "in appropriate cases", to ensure that standards of fitness of accommodation for migrant workers is up to those of nationals.[88] The same instrument obliges States to inspect the working conditions of migrant workers "in the same manner as for national workers".[89]

4.2.3 Family reunification

Many international human rights instruments make special provision for the recognition and maintenance of the family unit.[90] One of the most controversial elements of the ICRMW has been its granting of a right to family reunification to migrant workers in a regular situation. However, the right is formulated terms so weak as to call into question whether it creates any real obligation on States at all. While States are required to take unspecified "appropriate measures" to safeguard the unity of the families of migrant workers, they need merely take those measures "they deem appropriate" to "facilitate the reunification of migrant workers with their spouses" or dependent children.[91]

Other instruments contain stronger obligations, at least in certain circumstances. The ESC(r) requires States to "facilitate as far as possible" the reunion of a regular migrant worker with his family on their territory.[92] The ECtHR has found, for example, that Article 8, on the right to respect for family life, can require a State to facilitate the reunification of a migrant with

[83] *Id.* Art. 56. See also ECLSMW, Art. 16.
[84] ICRMW, Art. 43(1). See also ECLSMW, Art. 14; ESC(r), Art. 20.
[85] ICRMW, Art. 43(1). See also ECLSMW, Art 13(1) and (3).
[86] ICRMW, Art. 43(1)(e); see also ECLSMW Arts. 18, 19.
[87] *Id.* Art. 43(1).
[88] ECLSMW Art. 13(2) and (4).
[89] ECLSMW Art. 21.
[90] E.g. ICCPR, Art. 23; ICESCR, Art. 10.
[91] ICRMW, Art. 44.
[92] ESC(r) Art. 19(6).

his family on the territory of the host State; however, this is only the case where there "insurmountable obstacles" to the maintenance or development of a family life in the country of origin. Restrictions on family unification can, if unreasonable, also violate Article 8 ECHR.[93]

The ECLSMW has what appears to be a stronger obligation still on family reunion: that the spouse and unmarried minor children of the migrant worker "are authorised on conditions analogous to those which this Convention applies to the admission of migrant workers". The State may make the exercise of this right this conditional upon a waiting period "which shall not exceed twelve months", and can also require that the migrant in question "has available for the family housing considered as normal for national workers in the region".[94]

4.3 Vulnerable Migrants

4.3.1 Women

The ECtHR has acknowledged that women constitute a vulnerable group whose specific needs must be taken into account in detention situations; and that failure to do so could amount to "inhuman and degrading treatment".[95] The ECPT has made a series of further statements in relation to the obligations of States in relation to women detainees. These include a requirement for separate accommodation for women detainees, mixed gender staffing of facilities, and equality of access to activities. It also set out a range of requirements concerning ante- and post-natal care, ranging from the need to make "every effort" to meet the dietary needs of pregnant women, to the more general claim that ante- and post-natal care standards should be equivalent to those enjoyed by women not in detention. The ECPT holds that it is "axiomatic" that babies should not be born in jail, and describes as "completely unacceptable" and "inhuman and degrading treatment" the practice of shackling women to items of furniture during gynaecological examinations or delivery.[96]

One of the basic principles contained in Part I of the ESC(r) is that "employed women, in case of maternity, have the right to a special protection." The Charter itself sets out the following obligations on States:

- To provide means from public funds (either by paid leave, or social security benefits) for women to take leave from employment before and after birth for a minimum of 14 weeks;
- "to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave"
- To give nursing mothers sufficient time off for that purpose;

[93] ECtHR, *Bajsultanov v. Austria*, Application no. 54131/10, 12 June 2012,; ECtHR, *Haydarie and Others v. the Netherlands*, Application No. 8876/04, 20 October 2005. See Ktistakis, *op. cit.* n. 19, at pp. 73-74.
[94] ECLSMW, Art. 12(1).
[95] See e.g. *Filiz Uyan v. Turkey*, Application no. 7496/03, 8 January 2009. See also Ktistakis, *op. cit.* n. 19, at p. 42.
[96] EPCT, *supra* n. 41, at pp. 94-95.

- To prohibit the employment of pregnant women or those who have recently given birth in all work "which is unsuitable by reason of its dangerous, unhealthy or arduous nature".[97]

(It is important to recall, however, the restrictions in scope *ratione personae* of the ESC(r), contained in its annex: it applies only to nationals of contracting parties lawfully present on the territory of the State in question.)[98]

Lastly, it is worth noting that the Committee on Migrant Workers has released an important general comment on the obligations of States in relation to domestic workers. (While this is obviously not necessarily limited to women, the Committee itself notes that "women make up the overwhelming majority of these workers". The Committee then makes a range of recommendations to State Parties about how they can fulfil their obligations under the ICRMW in relation to these workers. These include: pre-departure provision of information on the rights and obligations, the types of work available, migration-related fees, etc., for those considering migrating for domestic work; and "know your rights and obligations" sessions, and awareness raising of working conditions, financial literacy, and emergency contacts for those who have decided to travel.

The Committee also affirms that the "rights of migrant domestic workers should be dealt with within the larger framework of decent work for domestic workers". To this end, "labour protections in national law should be extended to domestic workers to ensure equal protection under the law, including provisions related to minimum wages, hours of work, days of rest, freedom of association, social security protection, including with respect to maternity, pension rights and health insurance, as well as additional provisions specific to the circumstances of domestic work." States should then ensure that the obligation under Article 25 ICRMW, to grant treatment no less favourable to migrant workers than to nationals, is applied in this area.

States should also take measures to prevent exploitation of domestic workers, ensuring they have freedom of movement, "including by ensuring that migrant domestic workers are not required to live with their employers or stay in the house during their time off". They should also prohibit employers from removing travel or identity documents from migrant domestic workers. They should also require that migrants have "written terms of employment, in a language they can understand, outlining their specific duties, hours, remuneration, days of rest, and other conditions of work, in contracts that are free, fair and fully consented to". The Committee suggests that it would be good practice to promulgate a model form for such contracts.

Lastly, the Committee notes that, "With a view to preventing irregular migration as well as smuggling and human trafficking, States parties should ensure that migrant domestic workers have access to regular channels for migration based on actual demand".[99]

[97] ESC(r) Art. 8.
[98] *Id.* Annex.
[99] Committee on the Protection of the Rights of all Migrant Workers, *General comment No. 1 on migrant domestic workers*, CMW/C/GC/1, 23 February 2011, paras. 37-41, 51.

4.3.2 Children

One of the most important international legal obligations in relation to children is found in Article 3(1) of the CRC, which states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".[100] In decisions on family reunification, States are obliged to deal with requests involving children in a "positive, humane and expeditious manner".[101] States are also obliged to ensure that children are not separated from their parents, except when competent authorities determine that to do so is in the best interests of the child.[102] And wherever separation does result from State action, the State in question is required to provide information as to the whereabouts of the absent family member (unless, again, doing so would not be in the best interests of the child).[103]

States have further obligations in relation to the arrest, detention and trial of the children of migrant workers. Under the ICRMW, accused juveniles must be detained separately from adults and brought "as speedily as possible for adjudication".[104] Likewise, juvenile offenders are to be kept separate from adult prison populations, and treated appropriately to their age and legal status.[105] Generally speaking, the "arrest, detention or imprisonment of a child" must be used "only as a measure of last resort, and for the shortest appropriate period of time".[106] The ECPT has recommended that children must be interviewed by a fully-qualified professional as soon as possible upon detention, in a language that they understand, and have a full assessment of their particular situation and vulnerabilities. Unaccompanied children should be provided with prompt access to legal representation, and if necessary assigned a legal guardian.[107]

The ECtHR has found that failure to provide appropriate conditions for child detainees can violate the prohibition on inhuman or degrading treatment in Article 3 ECHR, or the right to privacy and family life in Article 8.[108] In one case, the Court found that although the length of the detention was not unreasonable, the rights of the child in question had been violated because the detention had "resulted from automatic application of the legislation in question": that is, there had been no individuated assessment of whether detention was in the best interests of the child, or whether it was necessary as a measure of last resort.[109] The obligation to provide the child with access to education remains when children are detained.[110] These rights obtain irrespective of the regularity of the presence of the child or parents on the territory of the State in question.

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[100] CRC Art. 3.
[101] *Id.* Art. 10.
[102] *Id.* Art. 9(1).
[103] *Id.* Art. 9(4).
[104] ICRMW Art. 17(3).
[105] ICRMW, Art. 17(4).
[106] CRC, Art. 37(b). See also Parliamentary Assembly of the Council of Europe, Recommendation 1985 (2011) *Undocumented migrant children in an irregular situation: a real cause for concern*.
[107] ECPT, *supra* n. 41, at p.
[108] See e.g. ECtHR, *Kanagaratnam and Others v. Belgium*, Application no. 15297/09, 3 December 2011.
[109] EctH, *Rahimi v. Greece*, Application no. 8687/08, 5 April 2011, paras. 104-106. See also Ktistakis, *op. cit.* n. 19, at pp. 27-28.
[110] See e.g. ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application no. 13178/03, 12 October 2006. See also Ktistakis, *op. cit.* n. 19, at p. 39.

Children of migrant workers have the right to a name, registration of birth, and to a nationality.[111] The CRC requires states to make primary education "compulsory and free for all".[112] The ICRMW goes further, requiring states to provide a basic right of access to public educational institutions for the children of migrant workers on an equal basis with nationals of the host State. Again, access to public pre-schools or schools cannot be limited on the basis of the irregularity of the child's presence in the territory of the host State, or that of presence or employment of their parents.[113]

4.3.3 People with illnesses or disabilities

The Convention on the Rights of Persons with Disabilities (CPRD) provides that any disabled persons deprived of their liberty must be provided with "re-enable accommodation" for their disabilities[114] (defined as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden").[115] The Council of Europe has stated that, to the extent possible, adjustments should be made so as to enable detained disabled people to remain with the general adult population of detainees (for example, by installing structures to assist those in wheelchairs); whilst those with "serious mental disturbances", complying with international obligations means caring for them in a hospital or specialised ward.[116] The ECtHR has also found that States must provide conditions of detention appropriate to the physical and mental disabilities of detainees. Failure to do so can result in a violation of Article 3 ECHR.[117] This has also been extended to a failure to provide necessary medical care for people suffering from serious illnesses; the ECtHR has found a violation of Article 3 where States have failed to take all reasonable measures to protect the health of the detainee, and prevent the deterioration of their health (in this case, an HIV-sufferer).[118]

4.3.4 Refugees and asylum seekers

International law generally provides a range of restrictions on the detention of asylum seekers and refugees similar to those outlined above for migrants in administrative detention, with the added requirement that special attention be paid to the particular vulnerabilities of those who seek or receive asylum.[119] It is worth noting, however, that the Convention relating to the Status of Refugees (CSR) contains a number of provisions directly related to their access to the labour market. States are obliged to afford to refugees lawfully on their territory "the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment."[120] Restrictions imposed on aliens

[111] ICRMW Art. 29. See also CRC, Art. 7.
[112] CRC Art. 28(1)(a).
[113] ICRMW Art. 30.
[114] CPRD Art. 14(2).
[115] *Id*. Art. 2.
[116] Council of Europe, Committee of Ministers *Recommendation No. R (1998) 7 on the ethical and organisational aspects of health care in prison*, paras. 50 and 55. See also Ktistakis, *op. cit.* n. 19, at p. 41.
[117] *Id*.
[118] ECtHR, Yoh-Ekale Mwanje v. Belgium, 20 December 2011, para. 98.
[119] For example, these are usually dealt with by the ECtHR as violations of Art. 3 of the ECHR. See e.g. *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011.
[120] CSR Art. 17(1).

in general should not apply to refugees who have completed three years of residence; or who has a spouse or children who are nationals of the state of residence.[121] States must also afford refugees who wish to be self-employed in the fields of "agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies" treatment "as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances". The same holds for qualified individuals "who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession".[122]

4.3.5 Trafficked persons

Lastly, the Protocol to Prevent, Suppress and Punish Trafficking in Persons ("Trafficking Protocol") does make some provision for access to the labour market for victims of trafficking, albeit a very weak one. In its Article 6, it provides that "Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons… in particular, the provision of… [e]mployment, educational and training opportunities".[123]

General Analysis

Turkey has signed up to an impressive array of international and regional obligations relating to labour migration. Indeed, in ratifying the ICRMW, it has gone further than any other major Western nation, and than any EU Member State. Some of these obligations find expression in the Constitution itself, others unsystematically in various pieces of legislation (including, for example, the recent LFIP). However, Turkey appears to rely heavily for domestic implementation of many of its detailed international obligations – at least those contained in instruments for the protection of fundamental rights – on Article 90 of the Constitution, which provides that "[i]nternational agreements duly put into effect have the force of law"; and that in cases of conflict with domestic law, fundamental international rights instruments prevail. In theory, this should be enough to ensure – on paper at least – that there are no gaps in Turkish implementation of its international legal obligations in this regard.

To be sure of this in practice, however, it is essential that Turkey ensure that Article 90 is functioning as it ought at all levels of the legal system; that judges, lawyers and individuals are aware not only of the content of the Constitution, but also of the relevant human rights instruments that it transposes into Turkish law. It is also crucial that judges are kept informed of the latest developments in the interpretation of the norms sat the international level, to ensure that domestic interpretation remains in compliance with international obligations.

[121] *Id.* Art. 17(2).
[122] *Id.* Art. 17(3).
[123] Trafficking Protocol, Art. 6(3)(d).

Recommendations:

- ***That the Turkish Government consider funding research into the actual use and implementation of Article 90 of the Constitution in Turkish courts at all levels, to ensure that the lack of gaps on paper is carried through to legal practice;***
- ***That the Turkish Government ensure, through public information campaigns, that not only lawyers but also the general public are aware of their fundamental rights under international legal instruments, and that these can be relied on directly in Turkish courts;***
- ***That the Turkish Government provide training for judges at all levels to ensure that their knowledge of the content and interpretation of international instruments is and remains up-to-date, to ensure that their own applications of these instruments are in compliance with Turkey's international obligations.***

5. The EU and Turkish Labour Migration

The process of Turkish accession to the European Union has moved forward significantly in recent years, perhaps most notably with the ratification of the Turkey-EU readmission agreement, and the establishment of the so-called "roadmap" for visa liberalisation. It is thus of interest to examine Turkish labour migration law and its implementation not only from the perspective of public international law, as was done in the previous section, but also from that of compliance with the far more detailed EU *acquis* on the subject.

This Part will be divided into two main sections: EU citizens and Third-Country Nationals. These will be further divided into subsections, looking at particular issues or classes of individuals within each. In many respects, in particular in relation to fundamental rights, the EU *acquis* overlaps with the obligations Turkey already has under public international law (whether regional, such as the ECHR, or general). In what follows, the focus will be on those elements of the *acquis* that differ, either in scope or in detail, from Turkey's international legal obligations, examined in the preceding Part.

5.1 EU Citizens

The EU *acquis* contains a wide range of extremely far-reaching rights for Union citizens, many of which bear directly on issues of labour migration. Indeed, two whole chapters of the *acquis* – Chapters 2 and 3 – deal with two of the fundamental pillars of EU law: the free movement of workers, and the freedom of establishment and to provide services, respectively. There is little to be gained, however, in going into great detail on these aspects of the *acquis*: the EU's most recent (2014) progress report on Turkish accession notes that in both, alignment is at an "early stage",[124] and in any event formal negotiations on these chapters remain blocked.[125] The focus here will instead be on two key aspects, on which significant progress can be made (albeit in different ways): freedom of movement of Union citizens (with a focus on visa-free travel, a necessary condition for progress on Chapters 2 and 3, and an important entitlement of Union citizens in its own right); and social security.

..1 Freedom of movement of Union Citizens and Visa Liberalisation

Article 45(1) of the EU Charter of Fundamental Rights reads as follows:

> Every citizen of the Union has the right to move and reside freely within the territory of the Member States.[126]

As part of the process of enabling Turkey to eventually align its legal system with this requirement of the *acquis*, the Visa Liberalisation Roadmap was launched in 2013. The goal of this process is to enable the lifting of visa requirements on Turkish citizens visiting the EU; but this is clearly a vital first step on the road to Turkey being able to align its national law with the EU *acquis* under Chapters 2 and 3, or at least to reap the reciprocal benefits of

[124] European Commission, *Turkey Progress Report*, COM(2014)700 final of 8 October 2014, pp. 27-28.
[125] See e.g. Andrew Rettman, "Turkey and EU Restart Membership Talks", *EU Observer* (26/11/2013) https://euobserver.com/foreign/122001.
[126] Charter of Fundamental Rights of the European Union, OJ C 364/01, 18 December 2000, Art. 45(1).

any such alignment. The Roadmap identified 5 "blocks" to visa-free travel: enhancing the security of Turkish travel documents; migration and border management; the fight against organised crime; fundamental rights protection; and readmission of irregular migrants.[127]

For the purposes of this report, the most important "block" is that relating to migration and border management. The EU has recognised that the introduction of the Law on Foreigners and International Protection, and in particular its establishment of the General Directorate on Migration Management, have been very significant steps forward in this regard, but that more needs to be done to ensure that these developments are carried through and implemented in practice.[128] The Roadmap set out, *inter alia*, the following actions that Turkey should take in order to overcome this "block" and advance towards visa-free travel for Turkish citizens to the EU:

- Allow visa free travel to Turkish territory for all Union citizens;
- Carry out adequate border checks and surveillance at all external borders, particularly those shared with EU Member States, to reduce irregular flows;
- Take steps to make it harder for citizens of certain third countries, particularly those held to pose a risk of irregular migration to the EU, to lawfully gain access to Turkish territory;
- Take various measures to ensure adequate training and funding of, and cooperation between, border guards, customs officials and others involved in law enforcement at the borders;
- Ensure that Turkish law effectively complies with international and European standards on asylum and temporary protection;
- Take a range of actions in relation to the fight against irregular migration, including setting up a body to monitor migration flows and collect data; address the pull factors for irregular migration into Turkey; and conclude readmission agreements with third countries that are important sources of irregular migration flows into Turkey, and onwards into the EU.[129]

Analysis

The recent progress report from the Commission on Turkey's implementation of the Visa Roadmap is a detailed and comprehensive account of these and a wide range of other issues.[130] The European Stability Institute has also produced a "Visa Liberalisation Scorecard", based on the Commission's progress report, which highlights very clearly the areas in which Turkey has partially or completely fulfilled its obligations, and those in which little or no progress has yet been made.[131]

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[127] See generally Report from the Commission to the European Parliament and Council on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap, Brussels, 20.10.2014 COM(2014) 646 final.
[128] *Id.* p. 7.
[129] *Id.* pp. 7-21.
[130] *Id.*
[131] European Stability Initiative, "Visa Lib Scorecard: Turkey's progress on the visa liberalisation roadmap" (December 2014) (http://www.esiweb.org/pdf/ESI%20-%20Turkey%20Visa%20Liberalisation%20Scorecard%20-%20Dec%202014.pdf).

Most strikingly, the Commission notes that the requirement to grant visa-free travel to Turkey to all EU citizens is unfulfilled, as at present this holds for only 19 of the 28 Member States.[132] Many of the obligations relating to the effective coordination of border management officials are held to be unfulfilled, or only partially fulfilled, often because the effective implementation of the relevant policies and laws in not yet certain. (For example, the Commission notes that the:

> National Action Plan for the Implementation of Turkey's Integrated Border Management strategy has only been implemented in a very limited fashion, and one of its key components has not been implemented at all. This component proposed setting up a single, non-military, specialised border organisation, and transferring all the responsibilities and resources for border management to it.

The Commission notes instead that these competences remain shared amongst an array of different institutional actors (customs, police, coast guard, land forces), which creates problems for integrated and coordinated border management. The Commission's recommendation in this regard is that "the Turkish authorities adopt all measures necessary to implement the Action Plan, in particular the legislation required to set up the new border organisation."[133]

Similarly, with regard to the demand that Turkish authorities make it harder for TCNs from countries that are significant sources of irregular migration into the EU to gain legal access to Turkey (in particular by abolishing the availability of visas at the border), the Commission notes that "the Turkish authorities have announced their intention to end the issuing of visas at borders and to replace visa stamps with high-security visa stickers, in line with the rules and features in use in the Schengen system", and that this would represent "a substantial step towards alignment". "However", it continues "none of these reforms have yet been enacted."[134]

This theme of the need for effective implementation to consolidate and develop progress is repeated in the discussion of asylum seekers. In general, the Commission is very complimentary about the Turkish response to the Syrian refugee crisis in particular, noting that it has granted international protection to more than one million refugees from Syria and other countries in recent years, fully respecting international law on, for example, *non refoulement*,[135] and that it provides the former at least with a high standard of accommodation.[136] It also notes that the introduction of the LFIP represents a "significant step" towards the goal of ensuring that refugees can "self-sustain,…access to public services, enjoy social rights and be put in the condition to integrate in Turkey". However, it goes on to note that, for various reasons, "effective access to these rights" – including labour market access rights – "is not guaranteed in the same way everywhere and for everyone in Turkey".[137]

Lastly, the Commission finds that Turkey has made good progress on many of the recommended actions relating to irregular migration: increasing the security of its travel documents, ensuring funding and resources for migration management and training

[132] *Id*. p. 15.
[133] *Id*. p. 8.
[134] *Id*. p. 14.
[135] *Id*. p. 11.
[136] *Id*. p. 18.
[137] *Id*.

programmes, and ensuring effective expulsion of those found to be on its territory illegally. Again, the cautionary notes refer more to actions taken but not yet fully implemented: so the Commission notes that the LFIP requires effective implementation, including via relevant secondary legislation; that the DGMM requires adequate funding to pursue its migration monitoring and data collection functions; and that Turkey could do more to negotiate readmission agreements with its neighbours (including, in some cases, actually ratifying agreements that have already been concluded).[138] It has also noted that Turkey has failed to fully implement the EU-Turkey Readmission Agreement, which entered into force in 2014.

While in this regard Turkey should Turkey should implement the detailed recommendations contained in the Commission's progress report, the following seem particularly important from a labour migration perspective.

Recommendations:

- ***That Turkey abolish normal visa requirements for access to Turkish territory for all Union citizens;***
- ***That Turkey ensure full and effective implementation of its National Action Plan for the Implementation of Turkey's Integrated Border Management strategy;***
- ***That Turkey fully implement the reforms to its visa practices recommended in the Commission's progress report on the Visa Liberalisation Roadmap, and align itself with the Schengen visa* acquis*;***
- ***That Turkey ensure that the relevant provisions of the LFIP on labour market access are implemented effectively and uniformly throughout its territory;***
- ***That Turkey ensure that the new DGMM has sufficient funding and resources to carry out its mandate in full;***
- ***That Turkey conclude, ratify and effectively implement readmission agreements with relevant third countries, in particular those that are a significant source of irregular migration flows to the EU;***
- ***That Turkey fully implement and comply with its obligations under the EU-Turkey Readmission Agreement.***

6.2 Social Security

Another major element of the EU *acquis* in relation labour migration are the social security benefits that must be afforded to Union citizens that have exercised their rights of free movement. These are dealt with by the Regulation on the coordination of social security systems (as amended) of 2004.[139] In broad outline, that Regulation covers the provision of the following benefits:

- sickness benefits;
- maternity and equivalent paternity benefits;
- invalidity benefits;
- old-age benefits;
- survivors' benefits;

[138] *Id*. pp. 19-20.
[139] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30 April 2004.

- benefits in respect of accidents at work and occupational diseases;
- death grants;
- unemployment benefits;
- pre-retirement benefits;
- family benefits.[140]

And it provides in general that, unless otherwise provided for in the Regulation or its annexes, it applies "to general and special social security schemes, whether contributory or non-contributory"[141] (although it excludes social and medical assistance, and a range of other cases where a State assumes liability for the actions of another and provides compensation, such as criminal injuries).[142] This is a complex instrument that provides detailed regulation on each of the kinds of benefits outlined above; detail that is beyond the scope of this report to furnish. It is worth noting, however, the general principle: that, unless stated otherwise in the Regulation, "persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof."

Analysis

It would not be sensible for Turkey to bring its social security legislation into alignment with the EU *acquis* in this regard prior to actual accession, or at least prior to having guarantees that this treatment would be reciprocated for its own nationals on the territory of other states. It is for this reason that the European Commission has recommended that Turkey pursue alignment in this field by means of concluding agreements with individual EU Member States that reflect the EU *acquis* whilst ensuring bilateral reciprocity for Turkish citizens visiting the Member State in question. The Commission notes that Turkey has already concluded 13 such bilateral agreements.[143]

It is also worth noting, however, that – as will become clear in the following section – one of the goals of the EU *acquis* on TCNs is to afford to all those living and working legally on the territory of a Member State as set of rights and responsibilities broadly comparable to those of Union citizens. This means that the more Turkey brings its legislation into alignment with the EU *acquis* on TCNs, the greater its alignment with the *acquis* on Union citizens is likely to be, on a wide range of issues at least.

Recommendations:

- ***That Turkey seek to conclude and ratify bilateral social security agreements that fully reflect the relevant EU* acquis *with the remaining EU Member States;***
- ***That Turkey ensure that these agreements, once ratified, are fully and effectively implemented in practice throughout Turkish territory.***

5.2 Third Country Nationals

[140] *Id*. Art. 3(1).
[141] *Id*. Art. 3(2).
[142] *Id*. Art. 3(5).
[143] Commission Report, *supra* n. 127, at p. 27-28.

5.2.1 Family reunification

The right of family reunification guaranteed to TCNs lawfully resident in a Member State guaranteed by EU law goes in most respects far beyond the relevant provisions of the ICRMW on this issue.[144]

Scope

The Family Reunification Directive[145] applies to TCNs who hold a residence permit issued by a Member State that is valid for a year or more, and who have "reasonable prospects of obtaining the right of permanent residence".[146] Such individuals can act as "sponsors" to bring their TCN family members to the EU. It does not apply to asylum seekers, those under temporary or subsidiary protection,[147] or Union citizens.[148]

The sponsor is entitled, subject to a range of conditions, to bring the following relatives to the EU:

- A spouse;
- The minor children of the sponsor and spouse (including adopted children, where the adoption is recognised by the Member State);
- The minor children of the sponsor or spouse, including adopted children, where these are dependent on the sponsor or spouse, and the sponsor or spouse has custody.[149]

Further, Member States are permitted, but not required, to authorise entry for the following relatives of the sponsor:

- "first-degree relatives in the direct ascending line of the sponsor or his or her spouse" where these are dependent and do not receive adequate familial support in the country of origin;
- Adult unmarried children of the sponsor or spouse, where they cannot provide for their own needs on health grounds.[150]
- The long-term or registered partners of the sponsor, and dependent unmarried children of such persons.[151]

However, in the case of polygamous marriages, where the sponsor already lives with one spouse within the EU, the Member State is not permitted to authorise the family reunification of a further spouse, and may limit the reunification of children of the sponsor and the further

[144] ICRMW, Arts. 44, 45. On this point see generally see Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe* (UNESCO, 2007) pp. 72-73, available at http://unesdoc.unesco.org/images/0015/001525/152537e.pdf.
[145] Directive 2003/86/EC of 22 September 2003 on the right to family reunification, L 251/12, 3 October 2003 (hereafter "Family Reunification Directive).
[146] *Id*. Art. 3(1).
[147] *Id*. Art. 3(2).
[148] *Id*. Art. 3(3). Reunification rights for Union citizens with TCN family members are limited and complex, dependent upon the Union citizen having exercised their free movement rights to take up "sufficiently genuine" residence in another Member State. See e.g. *O. v Minister voor Immigratie and Minister voor Immigratie v B*, C-456/12 (12 march 2014) ECLI:EU: C:2014:135, para. 45ff.
[149] Family Reunification Directive, Art. 1.
[150] *Id*. Art. 2.
[151] *Id*. Art. 3.

spouse.[152] States are also permitted to place a minimum age limit on spouses for the purposes of reunification, to a maximum of 21 years of age.[153]

Analysis

In the Turkish context, it is the LFIP that regulates the scope (Art. 34), conditions (Art. 35) and refusal, cancelation or non-renewal (Art. 36) of "family residence permit".

> A family residence permit for a maximum duration of two years at a time may be granted to the:
>
> a) foreign spouse;
>
> b) foreign children or foreign minor children of their spouse;
>
> c) dependent foreign children or dependent foreign children of their spouse;
>
> of Turkish citizens, persons within the scope of Article 28 of Law № 5901 or, foreigners holding one of the residence permits as well as refugees and subsidiary protection beneficiaries. However, the duration of the family residence permit cannot exceed the duration of the sponsor's residence permit under any circumstances whatsoever.[154]

In cases of a polygamous marriage, the Turkish law is in line with the EU rules and it issues only one of the spouses a family residence permit. However, a family residence permit may be granted to the foreigner's children from other spouses.

Moreover, for family residence permits issued to children, if any, the consent of the mother or the father who lives abroad and who shares custody needs to be sought. The holders of the family residence permit according to Turkish law, are entitled to receive primary and secondary education until the age of 18 without the need to obtain a student residence permit.

Also, persons who resided in Turkey for a minimum of three years on a family residence permit and reached the age of 18, if they demand, their residence permits can be transferred to a short-term residence permit.

In the event of divorce, a short-term residence permit may be issued to a foreign spouse of a Turkish citizen, provided that [he or she] resided on a family residence permit for at least three years. However, in cases where it is established by the relevant court that the foreign spouse has been a victim for reasons of domestic violence, the condition for three years residence shall not be sought.

Finally, in the event of the death of the sponsor, a short-term residence permit may be issued without any [minimum residing] time condition attached to those who have resided on a family residence permit in connection with the sponsor.

Conditions

[152] *Id.* Art. 4.
[153] *Id.* Art .4(5)
[154] LFIP, Art. 34.1.

Member States are permitted to place the following restrictions on applications for family reunification:

- That the sponsor must demonstrate that he or she has "accommodation regarded as normal for a comparable family in the same region";
- That the sponsor have sickness insurance for him- or herself and family members;
- That the sponsor have "stable and sufficient resources" to maintain him- or herself and family members;[155]
- That the sponsor and/or family members comply with integration measures[156] (such as language or cultural knowledge tests)
- That the sponsor be lawfully resident on the territory for a certain period (not exceeding 2 years) prior to making an application for family reunification.[157]

Applications for family reunification, or for renewal of family members' residence permits, may be based on the grounds of public policy, public security, or public health.[158] However, renewal may not be rejected, and no removal may be ordered, solely on the basis of illness or disability once the residence permit has been issued.[159]

In the Turkish context, the conditions for family residence permits according to Article 35(1) of LFIP are the following:

> With regard to family residence permit applications, the following conditions shall apply to the sponsor to:
>
> (a) have a monthly income in any case not less than the minimum wage in total corresponding not less than one third of the minimum wage per each family member;
>
> (b) live in accommodation conditions appropriate to general health and safety standards corresponding to the number of family members and to have medical insurance covering all family members;
>
> (c) submit proof of not having been convicted of any crime against family during the five years preceding the application with a criminal record certificate;
>
> (ç) have been residing in Turkey for at least one year on a residence permit;
>
> (d) have been registered with the address based registration system.

Again, here the conditions follow the EU standards, with some additions – such as the condition of non-criminal conviction for the preceding five years (which is, however, not applied to some groups of foreigners, such as holders of residence permit or work permit for the purposes of scientific research; who are within the scope of Article 28 of Law № 5901; or foreigners who are married to Turkish citizens).

The following conditions, however, apply to foreigners applying for a family residence permit to stay with a sponsor in Turkey (Article 35(1)):

> (a) to submit information and documents that they are within the scope of paragraph one of Article 34;
> (b) to assert that they live or intend to live together with those persons listed in paragraph one of Article 34;

[155] *Id.* Art 7(1)(a), (b) and (c).
[156] *Id.* Art 7(2).
[157] *Id.* Art 8.
[158] *Id.* Art 6(1).
[159] *Id.* Art 6(3).

(c) not to have entered into the marriage for the purpose of obtaining a family residence permit;
(ç) to be over 18 years of age for each spouse;
(d) not to fall within the scope of Article 7 (foreigners who are refused entry into Turkey).

The conditions set forth in first paragraph of Article 35 LFIP may, however, not be sought for refugees and subsidiary protection beneficiaries who are in Turkey.

Procedures

Applications must be accompanied by relevant documentary evidence of the claimed family relation. Interviews with the sponsor and family members may be carried out, along with other investigations.[160] Normally, applications should be made before family members are on the territory of the Member State.[161] Written notification of a decision on the application must be given, normally within 9 months of the date of application, and reasons for the decision must be provided.[162] The decision-maker must have "due regard" for the best interests of any minor children.[163]

Analysis

The LFIP is silent on these procedural aspects of the application procedure for a family residence permit.

Withdrawal

Member States can withdraw family members' residence permits (or refuse to renew them) in a range of circumstances:

- Where the conditions in the Directive are no longer satisfied (for example, where the sponsor cannot maintain his or her family without recourse to the social security system of the host state);
- Where the individuals in question no longer live in a genuine marital or family relationship;
- Where false information or other fraud was used in the application for family reunification;
- Where the marriage or partnership was entered into for the sole purpose of facilitating entry to the Union;
- When the sponsor's residence comes to an end;[164]

In any rejection, withdrawal or expulsion decision, the Member State must take into consideration the nature and strength of the relationships, the duration of residence, and the existence of ties to the country of origin. Sponsors and their family members must have the

[160] *Id.* Art 5(2).
[161] *Id.* Art 5(3).
[162] *Id.* Art 5(4).
[163] *Id.* Art 5(5).
[164] *Id.* Art 16.

right to mount a legal challenge in respect of any rejection, withdrawal or expulsion decision.[165]

Analysis

Turkish law regulates the refusal, cancelation or non-renewal of family residence permits in Article 36(1) of the LFIP.

> Under the following cases a family residence permit shall not be granted, shall be cancelled if has been issued, and shall not be renewed when:
>
> a) conditions set out in paragraphs one and three of Article 35 are not met or no longer apply;
> b) short-term residence permit [application] is refused when the conditions for obtaining a family residence permit no longer apply;
> c) there is a valid removal decision or an entry ban to Turkey in respect to the foreigner;
> ç) it is determined that the family residence permit is used for purposes other than of those it is issued for;
> d) [the foreigner] lived outside of Turkey for longer than one hundred and twenty days in total during the year preceding the application.

It's important to note that the Turkish law also regulates the issue of marriages of convenience. According to Article 37 of LFIP, where there is a reasonable doubt prior to granting or renewing a family residence permit the governorates shall investigate whether the marriage have been entered into solely for the purpose of obtaining a family residence permit. When it is so determined upon investigation family residence permit shall not be granted or, cancelled if has been issued. Further, after issuing a family residence permit, the governorates may carry out inspections in order to establish whether the marriage is of convenience. And finally, residence permits obtained through a fraudulent marriage and cancelled later, shall not count towards the summing of residence durations stipulated in the Turkish law.

Rights of Family Members

Successful application for family reunification grants the following rights to family members:

- Authorisation of their entry to the Member State;
- An entitlement to a residence permit of at least 1 year's duration, renewable;[166]
- Rights of access to education; to employment and self-employed activity (subject to some restrictions); and to vocational guidance and training. These access rights are to be guaranteed on the same basis as they are to the sponsor (and not necessarily with nationals);[167]
- A right to an autonomous residence permit, independent of the sponsor, after 5 years of residence.[168]

[165] *Id.* Art. 18.
[166] *Id.* Art. 13.
[167] *Id.* Art. 14.
[168] *Id.* Art. 15(1).

Analysis

The LFIP is silent on precisely what rights are to be afforded to those on a family residence permit, beyond a right to education in the primary and secondary educational institutions until the age of 18;[169] and providing that persons reaching the age of 18 who have resided immediately prior to this in Turkey for a minimum of three years on a family residence permit "may, upon application transfer to a short-term residence permit".[170]

Generally speaking, then, Turkish law on paper appears largely compliant with the EU *acquis* on family reunification; however, it is lacking in detail at one or two points.

Recommendations

- ***That the Turkish Government introduce secondary legislation to ensure that the procedural safeguards relating to applications for family reunification set out in the Directive are required, and effectively implemented, in Turkey.***
- ***That the Turkish Government introduce legislation ensuring that family members get the full range of rights owed to them under the EU* acquis*, and that these rights are respected in practice.***

5.2.2 Long-term residents

Scope

The Long-Term Residents Directive[171] applies to all TCNs legally residing on the territory of a Member State. There are a number of exceptions, including students, seasonal workers, *au pairs*, or those with diplomatic status,[172] for whom special regimes apply. Any other migrants who have been legally resident for a period of five years on the territory of the State are entitled to apply for long-term resident status, which brings with it a range of rights. It is important to note that previously, refugees and those under international protection were excluded from the scope of the Directive, but this was amended in 2011 to include them.[173]

Analysis

In Turkish legislation (LFIP, Art. 42) a long-term residence permit is issued by the governorates, upon approval of the Ministry, to foreigners that have continuously resided in Turkey for at least eight years on a permit or, foreigners that meet the conditions set out by the Migration Policies Board. Contrary to the recently amended EU Directive, in Turkey, the refugees, conditional refugees and subsidiary protection beneficiaries as well as persons

[169] LFIP, Art. 34(4).
[170] *Id.* Art. 34(5).
[171] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 016, 23 January 2004 (hereafter "Long-Term Residents Directive")
[172] *Id.*, Art. 3(2).
[173] Parliament and Council Directive 2011/51/EU of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L 132/1, 19 May 2011.

under temporary protection or humanitarian residence permit holders are still not entitled to the right of transfer to a long-term residence permit.[174]

Conditions

Long-Term Resident (LTR) status is to be granted if a number of conditions have been fulfilled, including:

- Proof of stable resources sufficient to maintain the applicant and his or her family;
- Proof of adequate health insurance

States can also require that the applicant fulfil further integration conditions[175], for example language or cultural knowledge tests, provided that these do not undermine the objectives pursued by the Directive.[176] They may also refuse applications on the basis of public policy or security concerns, but these must not be grounded in economic considerations.[177] Further, applications may be refused if the applicant constitutes a threat to public health, but only on the basis of diseases recognised by the WHO under applicable instruments, or other contagious diseases that are the subject of protective provisions in relation to nationals. Member states cannot introduce extra restrictions for TCNs, and nor can they use a subsequently-contracted disease as grounds for revocation of LTR status or expulsion.[178]

Analysis

In the Turkish context, the conditions to the issuance of the long-term residence permit are outlined in Article 44.1 of LFIP:

> a) having continues residence in Turkey for at least eight years;
>
> b) not having received social assistance in the past three years;
>
> c) having sufficient and stable income to maintain themselves or, if any, support their family;
>
> ç) to be covered with a valid medical insurance;
>
> d) not to be posing a public order or public security threat.

The LFIP extends the right to receive the long-term residence permit also to foreigners who are considered appropriate for a long-term residence permit due to meeting the conditions determined by the Migration Policies Board. In this case, the above conditions outlined in paragraph 1 of Article 44 (save the one in (d)) do not apply.

The most obvious conflict here is the eight years envisaged by the LFIP, in contrast to the five years mandated by the EU *acquis.* The requirement that they not have received social assistance in the past three years is arguably justifiable with reference to the "stability" of the

[174] LFIP, Art. 42(2).
[175] Long-Term Residents Directive, Art. 5.
[176] *Commission v Netherlands*, C-508/10, EU:C:2012:243, para. 65.
[177] Long-Term Residents Directive, Art. 6.
[178] *Id*. Art 18.

level of resources of the applicant, which must be such that they do not have to have recourse to the social security apparatus of the State. Otherwise, the LFIP appears compliant with the *acquis*.

Procedures

Written notification of decisions must normally be given within 6 months of the date of application, although in exceptional circumstances this can be extended.[179] Reasons must be provided for any decision to reject an application for LTR status, or to withdraw that status. The individuals concerned must also be notified the available procedures for redress and the applicable time limits.[180] Member states must provide individuals with the possibility to mount a legal challenge against decisions to reject or withdraw LTR status.[181] Once granted, the permit must be valid for a period of at least five years, automatically renewable on application where necessary on expiry.[182]

Analysis

The LFIP is silent on these procedural aspects of the application for long-term resident status. It does, however, provide in Article 25 that all decisions to reject an application for a residence permit must notify the applicant as to the legal means and appropriate forum for appealing against the decision.

Withdrawal

Once granted, long-term resident status is to be permanent:[183] it can only be withdrawn under a limited set of circumstances, such as proof of fraud in the acquisition of the status; absence from the territory of the State for 12 months;[184] being a "threat to public policy";[185] and under an expulsion order, where the individual is found to represent "an actual and sufficiently serious threat to public policy or public security"[186] (again, this cannot be based on economic considerations,[187] and States must take into consideration factors such as the age of the individual, the length of stay, links with the countries of residence and origin, and impact on family members of any expulsion).[188] Long-term residents must have an avenue for judicial appeal of any expulsion decision, and legal aid must be made available to them on the same basis as to nationals.[189]

[179] *Id*. Art. 7(2).
[180] *Id*. Art. 10(1).
[181] *Id*. Art. 10 (2).
[182] *Id*. Art. 8(2).
[183] *Id*. Art. 8(1).
[184] *Id.* Art. 9(1).
[185] *Id*. Art. 9(3).
[186] *Id.*, Art. 12 (1).
[187] *Id*. Art. 12 (2).
[188] *Id*. Art. 12 (3).
[189] *Id*. Art. 12 (4) and (5).

Analysis

The long-term residence permit issued in Turkey "shall be cancelled" when the foreigner:

> a) poses a serious public security or public order threat;
>
> b) stays out of Turkey continuously for more than one year for reasons other than health, education and compulsory public service in his/her country.

These grounds for cancellation are compliant with the EU *acquis* set out above. What is missing, however, is an affirmation that, absent these circumstances, the long-term resident permit should be permanent: indeed, the LFIP only states that withdrawal is compulsory in the circumstances noted; as such, it leaves open that there may be unspecified further circumstances in which it may be permissible. This possibility is in conflict with the entitlements of those with long-term resident status under the EU *acquis*.

Equal Treatment

The Directive provides that LTRs must be treated equally to nationals in relation to:

- Access to employment, self-employment, education and vocational training;
- Recognition of professional qualifications
- Social security
- Tax benefits
- Access to goods and services
- Freedom of association and membership of organisations representing workers
- Access to the whole territory of the Member State.[190]

Certain restrictions on equal treatment are allowed where, under national or EU law, positions are restricted to national or EU citizens. And Member States may "limit equal treatment in respect of social assistance and social protection to core benefits",[191] defined in the preamble as including at least "minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care".[192] Lastly, upon Turkish accession to the EU, it will have to grant residence permits to LTRs resident in other EU Member States,[193] and their family members,[194] subject to a similar set of conditions[195] and procedures[196] to those governing the grant of LTR status itself.[197]

It is worth noting in passing that these equal treatment requirements seem to be less demanding than those of Art. 45 of the ICRMW in certain respects. Firstly, the list of "core" social rights seems less than is envisaged in the ICRMW; and more importantly, the ICRMW guarantees these rights to *all* regular migrants. The clear implication of the Directive,

[190] *Id.* Art. 11(1).
[191] *Id.* Art. 11(3).
[192] *Id.* Preamble, recital 13.
[193] *Id.* Art. 14.
[194] *Id.* Art. 16.
[195] *Id.* Art. 15.
[196] *Id.* Arts. 19, 20.
[197] *Id.* Arts. 17, 18.

however, is that they only have to be granted only to those granted LTR status.[198] This being the case, if Turkey is in compliance with its obligations under the ICRMW, it will already be guaranteeing a greater level of protection in this regard.

Analysis

According to Article 44, "subject to conditions stipulated in applicable legislation governing the enjoyment of rights", those in possession of a long-term residence permit "shall benefit from the same rights as accorded to Turkish citizens", with a few areas exempted (compulsory military service; the right to vote and be elected, the right to enter public service; and exemption from customs duties when importing vehicles). This provision thus seems fully compliant with the EU *acquis* on the rights of long-term residents (indeed, it seems to go beyond what is required) – although this will, of course, depend on the substance of "the conditions stipulated in applicable legislation" noted at the outset.

There is also some potential conflict here in terms of access to the labour market. Under the EU *acquis*, long-term residence is a permanent status that requires access to the labour market on a basis equal to nationals. Article 6 of the Turkish Law 4817 on Work Permits for Foreigners (LWPF), however, limits the provision of "indefinite" work permits to those who have lived legally and uninterruptedly in Turkey for at least 8 years, or who have legally worked for a total of at least 6 years.[199] Again, reducing this from 8 to 5 years would likely be necessary to bring Turkish law into compliance with the EU *acquis* on long-term residents.

Recommendations:

- ***That the LFIP be amended to allow for the granting of long-term resident status after 5, rather than 8, years' residence.***
- ***That the LWPF likewise be amended to allow the granting of "indefinite" work permits after 5, rather than 8, years' residence.***
- ***That the Turkish Government introduce secondary legislation to ensure that the procedural safeguards relating to applications for long-term resident status set out in the Directive are required, and effectively implemented, in Turkey.***
- ***That the Turkish Government introduce legislation to ensure that long-term resident status cannot be lost or revoked for reasons other than those set out in the LFIP.***

5.2.3 Highly-Qualified Workers

[198] On this point, see Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe* (UNESCO, 2007) pp. 73-74, available at http://unesdoc.unesco.org/images/0015/001525/152537e.pdf.
[199] LWPF, Art. 6.

The "Blue Card" Directive was adopted in 2009, seeking to "attract and retain" highly qualified TCNs to the EU,[200] as part of the drive to meet the goal set out in the Lisbon Strategy of 2000 to turn the EU into a "knowledge-based economy".[201] The functioning and scope of the Directive are currently under review, as there are concerns that it is not fully achieving its goal (in its first two years of operation, only 16,000 Blue Cards had been issued; and 13,000 of these had been issued by a single Member State); a period of public consultation came to an end in September 2015 as to how best to improve the Directive.[202] Amongst other issues, one proposal being considered is extending its scope to cover foreign entrepreneurs seeking to invest in an EU Member State.[203]

Scope

The Blue Card Directive applies to all TCNs admitted to the territory of an EU member for the purposes of highly qualified employment. It does not apply to those who have either applied for or been granted temporary or international protection; researchers; family members of Union citizens; long-term residents; seasonal or posted workers.[204] It is worth further noting that the Directive is also "without prejudice to the right of the Member States to issue residence permits other than an EU Blue Card for any purpose of employment". Where other permits are used, they do not confer the right of residence in other EU Member States afforded to Blue Card holders. This means, however, that national regimes for the attraction of highly skilled workers can continue to coexist with the Blue Card regime. In any event, the Blue Card Directive is without prejudice to the right of Members to determine the number of TCNs it admits to its territory.[205]

To be eligible for a Blue Card, a TCN must present:

- A valid work contract or offer of highly-qualified employment of at least one year;[206] the gross annual salary must in most cases be "at least 1.5 times the average gross annual salary in the Member State concerned";[207]
- Proof of qualifications at the level required of Union citizens for the same employment;
- A valid travel document (States can require that this be valid for the duration of the permit applied for);
- Evidence of health insurance for all risks normally covered for nationals of the Member State;[208]

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[200] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employed , OJ L 155/17, 18 June 2009. (Hereafter "Blue Card Directive"); Preamble, recital 4.
[201] Andrej Stuchlik and Eva-Maria Poptcheva, "Third-country migration and European labour markets: Integrating foreigners", European Parliamentary Research Service Briefing (July 2015), p. 4; available at: http://www.eesc.europa.eu/resources/docs/european-parliament_third-country-migration-and-european-labour-markets---integrating-foreigners-briefing-july-2015.pdf.
[202] See e.g. http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting_0029_en.htm.
[203] Commission Communication, *A European Agenda on Migration* COM(2015) 240 final, 13 May 2015), http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0240&from=EN.
[204] Blue Card Directive, Art. 3(2).
[205] *Id*. Art. 6.
[206] *Id*. Art 5(1)(a).
[207] *Id*. Art 5(3)

Procedure, Refusal and Withdrawal

Member States are each to set a standard period of validity for Blue Cards, which should be from 1 to 4 years. Where the work contract is for less than a year, the blue card should be for the duration of the contract plus three months. Blue cards are to use the uniform format laid down in Regulation (EC) No 1030/2002, and must, *inter alia*, set out the conditions for access to the labour market of the card holder. The relevant regulation contains a wide range of detailed technical specifications relating to printing, laminating, the integration of photographs and signatures, the information contained, "machine readable areas", and the like.[209]

Applications are to be refused whenever the applicant does not meet the criteria outlined above, or where documentary evidence is fraudulent. This is the only circumstance in which the Directive mandates rejection; but it does make rejection permissible on a wide range of other grounds: for example, if the vacancy could be filled by national or EU citizens; if the employer has been sanctioned for undeclared work or illegal employment; in order to ensure ethical recruitment where there is a lack of qualified workers in the country of origin; or even simply as part of the State's right to determine the volume of TCNs it will admit.[210] Similar considerations apply to withdrawal or non-renewal of Blue Cards: these must be withdrawn if fraudulently acquired, or if the criteria are no longer met, or if the card holder is residing for purposes other than those authorised.[211] Blue Cards *may* be withdrawn for reasons of public policy, health, or security; or if the holder does not have sufficient funds to sustain himself and family without recourse to the social assistance of the State; or if the card holder "has not communicated his address".[212] Temporary unemployment is not, in and of itself, a reason for withdrawing a Blue Card, unless the period of unemployment exceeds 3 months.[213]

In terms of procedure, Member States are themselves to decide whether applications are to be made by the relevant TCN, or the prospective employer. The application is to be decided either when the applicant is outwith the territory of the State in question, or on its territory in possession of a valid residence permit or long-stay visa (although States may also allow applications from those present who don't have such permits, provided their presence is legal).[214] Decisions are to be notified in writing no later than 90 days from the date of application – unless the documentation supplied is insufficient, in which case the 90-day period is suspended, and the applicant given a reasonable deadline to provide full documentation.[215] Reasons must be given for any rejection, withdrawals or non-renewals, along with possible avenues for redress and the relevant time-limits. Negative decisions must be open to legal challenge.[216]

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[208] *Id*. Art. 5(1) (b)-(f).
[209] Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, OJ L 157, 15 June 2002.
[210] Blue Card Directive, Art. 8.
[211] *Id*. Art. 9(1).
[212] *Id*. Art. 9(2).
[213] *Id*. Art. 13(1).
[214] *Id*. Art. 10.
[215] *Id*. Art. 11(1) and (2).
[216] *Id*. Art. 11(3).

Rights of Blue Card Holders

The Blue Card Directive also sets out a range of rights that must be granted to Blue Card holders. Firstly, they are entitled to enter, re-enter and stay in the territory of the Member State for the duration of the Card's validity.[217] For the first two years of legal employment in the Member State, the cardholder's access to the labour market is to be limited to exercise of the employment activities for which they were admitted. After this period, States *may* grant access to highly qualified employment on a basis equal to that of nationals.[218] During the first two years, any change in employer is subject to written authorisation by the competent authorities of the State.[219] Member States may retain restrictions on labour market access where, for example, these are limited by national law to nationals, or EU/EEA citizens.[220]

Blue Card holders are to be afforded equal treatment to nationals of the Member State with regard to a range of issues:

- Working conditions, pay, dismissal protections, and health and safety requirements;
- freedom of association and affiliation of organisations representing workers;
- education and vocational training;
- recognition of qualifications;[221]
- provisions in national law relating to a range of social security benefits, as set out (and detailed) in Regulation (EEC) No 1408/71. These include maternity and sickness benefit, family benefits, benefits relating to accidents at work, and death grants;[222]
- Income-related statutory old-age pensions;
- Access to goods and services made available to the public, including housing procedures and employment counselling;
- Free access to the entire territory of the Member State within limits provided for by national law.[223]

Equal treatment may be restricted with regard to grants and maintenance loans for higher education and vocational training.[224] Further restrictions are also allowed if the card holder moves to a second Member State (apart from to freedom of association, and the recognition of qualifications). If the second State allows the card holder to work on its territory, however, equal treatment in all areas mentioned above must be granted.[225]

The Family Reunification Directive applies to family members of Blue Card holders, with a few modifications.[226] Firstly, the Blue Card holder need not have "reasonable prospects" of gaining permanent residence, or meet the minimum period of residence requirement, before

[217] *Id*. Art. 7(4)(a).
[218] *Id*. Art. 12(1).
[219] *Id*. Art. 12(2).
[220] *Id*. Art. 12(4).
[221] *Id*. Art. 14(1)(a)-(d).
[222] *Id*. Art. 14(1)(e); see also Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJL 149 , 5 June 1971, Art. 4(1).
[223] Blue Card Directive, Art. 14(1)(f)-(h).
[224] *Id*. Art. 14(2).
[225] *Id*. Art. 14(4).
[226] *Id*. Art. 15(1).

the right to family reunification applies.[227] Where conditions are fulfilled, family reunification permits should be granted in no more than 6 months;[228] and the duration of validity of these permits should be the same as that of the Blue Card in question.[229] Member States are also not allowed to apply the usual time limits with regard to the right of family members to access the labour market.[230] The Long-Term Residents Directive similarly applies,[231] with modifications that relate mostly to the fact that the five-year period can be accumulated by time spent as a blue card holder in different Member States (provided there has been two years' residence in the State where the application is made immediately prior to the application), and the lengths of time that the Blue Card holder can be absent from EU territory without interrupting the 5-year residency requirement.[232] Once long-term resident status has been granted, former Blue Card holders can be absent from Union Territory for up to 24 months without losing that status.[233]

Lastly, Article 18 of the Directive states that, after 18 months legal residence as an EU Blue Card holder in one Member State, the individual may move to another for the purpose of pursuing highly-qualified employment. A new application must be made no later than one month after such a move for a Blue Card from the new host State. This has to be considered following the procedures outlined above (and can be rejected for the same reason).[234] Where authorised, the applicant's family members shall also be authorised to join him or her, as long as the family was already constituted in the first Member State.[235] The Member State may require evidence that the family members resided lawfully as family members in the first Member State, evidence of health insurance,[236] and evidence that the Card holder has accommodation "regarded as normal for a comparable family in the same region"; and has stable and regular resources sufficient to support his family without recourse to social assistance.[237]

Analysis

Neither the LFIP nor the LWPF make explicit reference to, or create a specific regime for, the authorisation of entry and access to the labour market for highly-skilled workers. It is, of course, true, that Turkey would be entitled under EU law (as it currently stands at least) to maintain its own regime for these purposes quite distinct from that established by the Blue Card Directive; it would upon accession, however, have to have a Blue Card regime of its own in place in order to be in compliance with the EU *acquis*, even if it was rarely used. On that basis, while this does not appear to be a priority, the Turkish Government may want to consider establishing an analogous regime for highly-qualified workers to that envisaged by the Blue Card Directive, ensuring that the relevant procedural protections, and entitlements

[227] *Id*. Art. 15(2).
[228] *Id*. Art. 15(4).
[229] *Id*. Art. 15(5).
[230] *Id*. Art. 15(6).
[231] *Id*. Art. 16(1).
[232] *Id*. Art. 16(2)-(3).
[233] *Id*. Art. 16(4).
[234] *Id*. Art. 18,
[235] *Id*. Art. 19(1).
[236] *Id*. Art. 19(3).
[237] *Id*. Art. 19(4).

for those thus authorised, are in place, in order simply to ease accession when the time comes.

Recommendations:

- ***That the Turkish Government consider establishing a close analogue to the regime for highly-qualified workers envisaged by the Blue Card Directive, which tracks the relevant procedural protections and entitlements.***
- ***That the Turkish Government ensure that the necessary modifications to the relevant time periods for long-term residence eligibility, and to the family reunification regime, are in place for highly qualified workers.***
- ***That the Turkish Government ensure that the documentation issued in any such regime complies with the technical specifications referred to in the Blue Card Directive.***

5.2.4 Researchers

The Directive on Researchers[238] seeks to establish a procedure whereby TCNs with advanced educational qualifications can be granted. The first part of the Directive lays down a procedure by which research organisations within the Member State can be registered for the purposes of inviting TCN researchers to engage in research projects.[239] Once registered (usually for a minimum period of 5 years),[240] the organisations can conclude "hosting agreements" with the researchers, subject to the following conditions:

- The project must have been approved by the relevant authorities in the organisation, both in terms of its duration and costs, and the qualifications of the researcher;
- The researcher must have sufficient resources to meet his or her expenses without recourse to the social security system of the host state;
- The researcher has health insurance;
- The hosting agreement specifies the legal relationship and working conditions of the researcher;[241]

Moreover, the researcher must have a valid travel document (States may require this to be valid for the duration of the project); and must not be considered a threat to public policy, public security or public health.[242] Where these conditions are met, a residence permit of at least 1 year (shorter if the duration of the project is less than 1 year) should be issued, renewable as long as the conditions continue to be met.[243] The residence permit can be

[238] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289/15, 3 November 2005.
[239] *Id.* Art. 5.
[240] *Id.* Art. 5(2).
[241] *Id.* Art. 6.
[242] *Id.* Art. 7.
[243] *Id.* Art. 8.

withdrawn if it was obtained fraudulently, if the conditions under which it was granted no longer obtain, or for reasons of public policy, public security or public health.[244]

Any decision on an application should be notified to the applicant as soon as possible, and the notification must specify the available avenues for redress and the time limits for pursuing these. Where an application is rejected or permit withdrawn, the researcher must have the right to mount a legal challenge against the decision.[245]

Researchers admitted under the Directive have the right to teach, in accordance with national law.[246] They also are to be granted equal treatment with nationals as regards recognition of educational and professional qualifications; working conditions (including pay and dismissal); certain branches of the social security system; tax benefits; and access to goods and services.[247]

Analysis

In the Turkish context, Article 31 of LFIP stipulates that the short-term residence permit may be granted (among others) to foreigners who arrive to conduct scientific research or to foreigners who attend an education programme, research, internship or, a course by way of a public agency. The LFIP is, however, entirely silent on the other elements of the *acquis* outlined above (apart from, as noted above, the general provisions of Article 25 which require that rejections be challengeable in court, and that notifications contain the relevant information about how to go about doing so).

Recommendation

- ***That the Turkish Government introduce legislation ensuring that researchers admitted under Article 31 LFIP have the right to teach, and to equal treatment with nationals in recognition of qualifications, working conditions, tax benefits, and the relevant branches of the social security system.***

5.2.5 Students

The Directive on Students[248] covers not only TCN students, but also exchange pupils, unpaid trainees and volunteers. The Directive provides a detailed set of regulations on the entry and stay of these individuals, conditions for the granting and removal of residence permits, etc. However, as none of these categories of individual is usually thought of as forming part of the labour market, we will not focus on them here.

[244] *Id.* Art. 10.
[245] *Id.* Art. 15.
[246] *Id.* Art. 11.
[247] *Id.* Art. 12.
[248] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375/12, 23 December 2004.

The key provision in the Directive from a labour migration perspective is Article 17, which relates to economic activities by students (and only students; there are no comparable provisions for the other categories of individual covered by the Directive). This states that students "shall be entitled" to be employed, and to carry out self-employed activity (with the proviso that the state of the host labour market may be taken into account).[249] Each Member State is to set the maximum number of hours that students can work (with a minimum level of ten hours per week).[250] This right to work may be restricted for the first year of residence, and host states are permitted to require either students or employers to report that they are engaged in employment activity.[251]

Analysis

Students are also allowed to Turkey on a short-term residence permit according to Article 31 of LFIP (foreigners that arrive to attend educational or similar programmes as part of student exchange programmes or agreements to which the Republic of Turkey is a party to; foreigners that attend a Turkish language course or an education programme). The short-term residence permit is issued for duration of a maximum of one year at a time and if it is issued for purposes of attending a Turkish language course, it can be issued only twice.

However, there is a special type of residence permit – student residence permit – in Turkey, which is issued to foreigners who

- attend an associate, undergraduate, graduate or postgraduate programme in a higher education institution in Turkey;
- receive primary and secondary education and whose care and expenses shall be covered by a natural or legal person, subject to the consent of their parents or legal guardian a one year student residence permit shall be granted and renewed throughout the course of their study.[252]

The student residence permit does not entitle the parents as well as more distant family members of the foreigner the right of obtaining residence permit. And in cases where the period of study is less than one year, the duration of the residence permit may not exceed the period of study.

Foreign students attending an associate, undergraduate, graduate or postgraduate programme in Turkey are allowed to work, provided that they obtain a work permit. However the right of work for associate or undergraduate students starts after the first year of their study and the weekly working hours are not not exceed maximum twenty-four hours.

These entitlements and restrictions are in compliance with the labour migration-related elements of the Directive on Students outlined above.

[249] *Id.* Art. 17(1).
[250] *Id.* Art. 17(2).
[251] *Id.* Art. 17(4).
[252] LFIP, Art. 38.

5.2.6 Seasonal workers

Scope

The recently-adopted Seasonal Workers Directive[253] provides a comprehensive set of regulations on entry and residence for TCNs seeking to work in the Union for part of each year, usually in agriculture or tourism.[254] It also sets out the rights of these workers. A "seasonal worker" is defined as a TCN who has his or her principal residence in a third country, but who comes legally and temporarily to the EU "to carry out an activity dependent on the passing of the seasons".[255]

There is no specific regulation or directive on seasonal workers in Turkish legislation. However, seasonal workers are subject to regulations of Labour Law (No. 4857). It is important to note, though, that in 2010, the Prime Ministry published a notice (circular letter) concerning seasonal migratory agricultural workers' rights entitled "Notice on the Improvement of Social Life and Working Conditions of Seasonal Migratory Agricultural Workers (no. 2010/6)" focused on transportation, accommodation, education of children in this context; and assigning special duties to central and local authorities on these issues.

Conditions

The Directive sets out the conditions under which an authorisation for the purposes of seasonal work might be granted (there are different conditions for work of periods of more or less than 90 days' duration). Both require:

- A valid contract that spells out the employment and working conditions;
- Evidence of having applied for health insurance;
- Evidence that the seasonal worker will have adequate accommodation;
- That the seasonal worker is to have no recourse to the social security systems of the host state;
- That the seasonal worker does not pose a risk of becoming an irregular migrant.[256]

In addition, those applying for authorisation for periods greater than 90 days:

- Must have a travel document whose validity covers the whole duration of the contract;

[253] Parliament and Council Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375, 28 March 2014 (hereafter "Seasonal Workers Directive").
[254] See e.g. Andrej Stuchlik and Eva-Maria Poptcheva, "Third-country migration and European labour markets: Integrating foreigners", European Parliamentary Research Service Briefing (July 2015), available at: http://www.eesc.europa.eu/resources/docs/european-parliament_third-country-migration-and-european-labour-markets---integrating-foreigners-briefing-july-2015.pdf.
[255] Seasonal Workers Directive, Art. 3.
[256] *Id.* Arts. 5 and 6.

- May be required to have a travel document that is less than 10 years old, that is valid for up to three months longer than the duration of the contract, and that contains at least two blank pages.[257]

Rejection and Withdrawal

States can refuse an authorisation on a range of grounds: for example, there is to be no authorisation for TCNs who are considered to be a threat to public policy, public security or public health,[258] or if the worker is staying for purposes other than those authorised,[259] or if there has been any falsification or fraud in the documents submitted to demonstrate that the conditions set out above are met.[260] Many grounds for rejection or withdrawal focus, however, not on the TCN but on the prospective employer: thus, if the employer has been sanctioned previously for illegal employment, or if the employer is insolvent or no economic activity is taking place, or if the employer has been sanctioned for a breach of its obligations under the Directive, then the application "shall, if appropriate" be rejected.[261]

Further, states *may* withdraw an authorisation where "the employer has failed to meet its legal obligations regarding social security, taxation, labour rights, working conditions or terms of employment",[262] or has failed to abide by the terms of the work contract itself.[263] Likewise, the authorisation may be withdrawn where, within the preceding 12 months, the employer abolished a full-time position in order to create the seasonal opening;[264] or where the seasonal worker applies for asylum or some other form of international protection.[265]

Member State obligations

Member states are obliged to make available and accessible to the seasonal worker information relating to entry and stay, including their rights and obligations under the Directive, and any complaints procedure.[266] Request for seasonal worker permits are to happen via a single application procedure.[267] Decisions on applications must be notified in writing to the applicant no later than 90 days from the date of application.[268] If the decision is a rejection or withdrawal, reasons must be provided in writing,[269] along with a specification of the relevant judicial body with whom an appeal can be lodged. Member States are obliged

[257] *Id.* Art. 6(7).
[258] *Id.* Art. 6(4).
[259] *Id.* Art. 9(1)(b).
[260] *Id.* Art. 9(1)(a).
[261] *Id.* Art 9(2).
[262] *Id.* Art. 9(3)(b).
[263] *Id.* Art. 9(3)(c).
[264] *Id.* Art. 9(3)(d).
[265] *Id.* Art. 9(4).
[266] *Id.* Art. 11.
[267] *Id.* Art. 13(2).
[268] *Id.* Art. 18(1).
[269] *Id.* Art. 18(4).

to provide a forum for a legal challenge for any decision to reject or withdraw an authorisation.[270]

Member States must also determine a maximum period of stay for seasonal workers, which can be a minimum of 5 and a maximum of 9 in any twelve month period. At the end of this period at the latest, all seasonal workers are required to leave (unless they have been granted a different type of residence permit).[271] States must allow workers to extend their contract once with the same employer (or, under certain conditions, with a different employer),[272] and may do so more than once, provided that the maximum time-limit set is not breached.[273]

Seasonal workers who have fully respected the conditions of their stay are entitled to have their re-entry facilitated by the state for a period of 5 years. This may include accelerated application procedures, exemptions from having to provide evidentiary documentation, or priority in the application process.[274]

Member States are also obliged to enforce "effective, proportionate and dissuasive" sanctions against employers who breach their obligations under the Directive, including banning them from hiring TCN seasonal workers for serious breaches.[275] The Member State is obliged to obtain evidence that the seasonal worker will be provided with accommodation that provides an adequate standard of living,[276] and to take measures (such as monitoring and inspection of employers) to ensure there are no abuses.[277] Lastly, it is obliged to establish a procedure whereby seasonal workers can register complaints about employers, and protect them from retaliation for using it;[278] and to maintain statistics on the numbers of authorisations granted and – where possible – those extended, renewed or withdrawn.[279]

Rights of Seasonal Workers

Seasonal workers are entitled to the following:

- The right to enter and stay on the territory of the Member State (for the duration fo the authorisation);
- Free access to the entire territory of that state, in accordance with national law;
- The right to carry out the employment activity authorised.[280]

They are also to be granted equal treatment with nationals in respect of:

- Terms of employment (conditions, pay, dismissal, hours, leave, health and safety);
- The right to strike and take industrial action, and freedom of association and affiliation with groups representing workers;

[270] *Id.* Art. 18(5).
[271] *Id.* Art. 14(1).
[272] *Id.* Art. 15(3).
[273] *Id.* Art. 15(1).
[274] *Id.* Art. 16.
[275] *Id.* Art. 17.
[276] *Id.* Art. 20.
[277] *Id.* Art. 24(1).
[278] *Id.* Art. 25.
[279] *Id.* Art. 26(1).
[280] *Id.* Art. 22.

- The right to back-payment of any outstanding wages by employers;
- Certain branches of social security;[281]
- Access to goods and services provided to the public (except housing)
- Advice services on seasonal work, vocational and educational training;
- Recognition of diplomas and qualifications;
- Tax benefits where the worker is deemed resident for tax purposes.[282]

Analysis

There is no specific instrument regulating the entry and stay of seasonal workers in Turkish legislation. However, such workers are subject to regulations of Labour Law (No. 4857). This law, however, makes no specific provision in relation to migrant workers. This element of the *acquis* was introduced after the enactment of the LFIP. It may therefore be worth a further, specialised legislative instrument in order to bring Turkey fully into alignment with the EU *acquis* on this matter.

Recommendation

- ***That the Turkish Government introduce legislation regulating the entry and stay of migrant seasonal workers, in a way that closely tracks the procedural protections and entitlements provided by the Seasonal Workers Directive.***

5.2.7 Intra-corporate transferees

Scope

Another recent instrument, the Intra-Corporate Transferees Directive,[283] sets out "the conditions of entry to, and residence for more than 90 days in, the territory of the Member States, and the rights, of third-country nationals and of their family members in the framework of an intra-corporate transfer".[284] It also contains provisions relating to the entry and residence of TCNs who have been granted an inter-corporate transferee permit in another Member State. Students, researchers, the self-employed, and posted workers are excluded from its scope.[285]

Intra-corporate transfers are, in turn, defined in Art. 3(b).[286] They refer to the transfer of any TCN for employment or training purposes from an undertaking established outwith the EU to

[281] These are set out in Art. 3 of the Parliament and Council Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems, OJ L 166/1, 30 April 2004. The branches covered are: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; (j) family benefits.
[282] Seasonal Workers Directive, Art. 23. There are some permissible restrictions to equal treatment, set out in Art. 23(2).
[283]
[284] Parliament and Council Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157/1, 27 May 2014.
[285] *Id.* Art. 2(2).
[286] "the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the thirdcountry national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the

an entity belonging to that undertaking (or group of undertakings) established within the territory of a Member State. The individual must reside outwith the territory of the EU at the time of application for the intra-corporate transfer permit, be bound by contract of employment to the original undertaking prior to and during the transfer, and be transferring to the position of manager, specialist or trainee in the host undertaking.

Admission, rejection and withdrawal

Article 5 sets out the criteria to be granted an intra-corporate transferee permit. Either the host entity or the TCN must provide, *inter alia*: proof that the entities are part of the same undertaking; proof of at least three months employment in the undertaking in the country of origin; a work contract; evidence that the TCN will be able to transfer back at the end of the transfer period; evidence of the qualifications of the TCN; evidence of having sickness insurance (unless not necessary due to bilateral agreements with the country of origin).[287] States may require that these documents be translated into their official language where necessary.[288] They must ensure that the remuneration of the intra-corporate transferee (ICT) "is not less favourable than the remuneration granted to nationals of the Member State" for comparable work.[289] States can also require that the ICT can prove that they have sufficient resources to sustain themselves and their family members without recourse to social security.[290] No-one who is "considered to pose a threat to public policy, public security or public health" is to be admitted under the Directive.[291]

As Member States retain the right to determine the number of TCNs they admit, any application may be rejected on that basis.[292] Moreover, States are to refuse permits where any requirement of Article 5 hasn't been met; where documents have been obtained or altered fraudulently; where the host entity was established for the purposes of facilitating the entry of ICTs; if the maximum duration of stay (3 years for managers and specialists, 1 years for trainees)[293] has been reached.[294] Permits can be withdrawn for largely the same reasons.[295] There are a range of procedural entitlements and obligations: States are to provide access to information on all aspects of process for applying for ICT permit, and the rights of ICTs.[296] Decisions are to be notified in writing not later than 90 days from the date of application, along with reasons if the decision is a rejection. States must inform applicants if their applications are incomplete, and set a reasonable deadline for the receipt of missing

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same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States."

[287] *Id.* Art. 5(1).
[288] *Id.* Art. 5(2).
[289] *Id.* Art. 5(4)(b).
[290] *Id.* Art. 5(5).
[291] *Id.* Art. 5(8).
[292] *Id.* Art. 6.
[293] *Id.* Art. 12.
[294] *Id.* Art. 7(1)
[295] *Id.* Art. 8.
[296] *Id.* Art. 10.

documents. Rejection decisions must be open to challenge in the courts,[297] and States are allowed to charge "handling fees", as long as these are not "disproportionate or excessive".[298]

Also of note are the provisions relating to the employer or host undertaking. States are to reject applications or withdraw permits "where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment".[299] States may also hold host undertakings responsible for failure to comply with the conditions of admission and stay, and "effective, proportionate and dissuasive" sanctions are to be applied. States are also obliged to provide for "monitoring, assessment and… inspection" measures to ensure compliance.[300]

Rights of ICTs

ICTs are granted the following basic rights:

- Right to enter and stay on territory of Member State;
- Free access to entire territory, in accordance with national law;
- Right to carry out the employment authorised under the permit[301] (although States are not to issue other work permits of any kind).[302]

In addition, they are to be granted equal treatment with nationals in relation to:

- "Freedom of association and affiliation and membership of an organisation representing workers";
- Recognition of qualifications and diplomas;
- Provisions relating to branches of social security, including: maternity or paternity; sickness, invalidity and old age benefits; workplace accidents and occupational diseases; unemployment benefit, death grants, pre-retirement benefits and family benefits;
- "Access to goods and services and the supply of goods and services made available to the public" (with the exception of housing).[303]

Lastly, the Directive relaxes some of the provisions of the Family Reunification Directive for ICTs, most importantly removing the requirements that the TCN in question must have "reasonable prospects" of securing permanent residence or a minimum period of residence before the right applies. Family permits should be for no longer than the duration of the transfer, and should allow the holder access to employment and self-employed activity in the host State.[304]

Analysis

[297] *Id.* Art. 15.
[298] *Id.* Art. 16.
[299] See e.g. *Id.* Art. 8(4).
[300] *Id.* Art. 9.
[301] *Id.* Art. 17.
[302] *Id.* Art. 13(5).
[303] *Id.* Art. 18.
[304] *Id.* Art. 19.

The LFIP makes no special provision for intra-corporate transferees. This is perhaps unsurprising, as the Directive was only introduced after the LFIP was enacted. As was the case above, then, it may therefore be worth a further, specialised legislative instrument in order to bring Turkey fully into alignment with the EU *acquis* on this matter.

Recommendation

- ***That the Turkish Government introduce legislation regulating the entry and stay of migrant seasonal workers, in a way that closely tracks the procedural protections and entitlements provided by the Intra-Corporate Transferees Directive.***

5.2.8 Refugees and asylum seekers

As with public international law, the EU *acquis* in relation to asylum and refugees covers a wide range of different topics. Here our focus is on those elements that impact directly on labour migration and markets, and closely related issues.

Labour Market Access

The Labour market access of asylum seekers is dealt with in the recast Reception Conditions Directive.[305] It provides that Member States must ensure that all applicants for international protection have access to the labour market no later than 9 months from the date of application, if no decision has been reached and provided the delay was not the fault of the applicant.[306] Member States can, however decide the conditions for that access, with the only proviso that it be "effective".[307] States are permitted, but not required, to allow applicants access to vocational training, whether or not they have access to the labour market.[308]

While states are obliged to provide material conditions and healthcare to ensure an adequate standard of living for applicants, they are also entitled to do so only if the applicant does not have sufficient means to do so for him- or herself;[309] and they are entitled to require applicants to contribute to or cover these costs if the applicant has the resources (for example, "if the applicant has been working for a reasonable period of time").[310]

The position of those who have been granted refugee status is regulated by the 2011 Qualification Directive.[311] It provides that Member States must authorise access to employment and self-employment activities for the refugee immediately following the grant of internationally protected status;[312] and that they have access to "employment-related

[305] Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 June 2013.
[306] *Id*., Art. 15(1).
[307] *Id*., Art. 15(2).
[308] *Id*., Art. 16.
[309] *Id*., Art. 17(3).
[310] *Id*., Art. 17(4).
[311] Council and Parliament Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337/9, 20 December 2011 (hereafter "Qualification Directive 2011")
[312] *Id.* Art. 26(1).

education opportunities for adults, vocational training, including training courses for upgrading skills, practical workplace experience and counselling services afforded by employment offices" on a basis equivalent to nationals.[313] (The Qualifications Directive 2011 alters in some ways its namesake of 2004, [314] which provided for slightly weaker entitlements for those granted subsidiary protection as opposed to refugee status. The 2011 Directive makes clear that "international protection" covers both categories, and grants the same labour-related rights to both). The national law relating to remuneration, access to social security systems relating to employment or self-employment activities, and "other conditions of employment" apply.[315] Minors granted internationally protected status must be provided with access to the general education system on a par with nationals;[316] whilst adults must be given educational and training opportunities on a par with legally resident TCNs.[317] They must also receive equal treatment with regard to the recognition of educational and professional qualifications.[318]

Subsequent articles deal with social security and health care; although Member States are entitled to limit access to the former to certain "core benefits", these benefits must be "provided at the same levels and under the same eligibility conditions" as nationals.[319] Access to health care is to be provided to internationally protected persons "under the same eligibility conditions as nationals" Lastly, there is a further requirement to ensure adequate health for individuals with special needs, such as pregnant women, disabled people, victims of torture or rape, or other forms of exploitation.[320]

Analysis

In the Turkish context, it is the role of LFIP to regulate (among other things) international protection. Articles 61 defines refugee as "a person who as a result of events occurring in European countries and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his citizenship and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his former residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted refugee status upon completion of the refugee status determination process." It is important to highlight here that Turkey limits the application of internationally recognized definition of the term "refugee" to people fleeing European countries and stateless persons. There is, however, a concept of "conditional refugees" in Article 62 of LFIP that opens the scope of international protection in Turkey to people fleeing from events occurring outside of European countries. Moreover, Turkish law also provides subsidiary protection to foreigners or stateless people that do not qualify to be

[313] *Id.* Art. 26(2).
[314] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 304/12, 30 September 2004.
[315] Qualification Directive 2011, Art. 26(4).
[316] *Id.* Art. 27(1).
[317] *Id.* Art. 27(2).
[318] *Id.* Art. 28.
[319] *Id.* Arts. 29 and 30.
[320] *Id.* Art. 30(2).

recognized as refugees or conditional refugees according to LFIP. Finally, any applicants that receive protection or assistance from UNHCR or other organs or agencies of the United Nations are excluded from international protection granted under LFIP.

Art. 89 of the LFIP is on "access to assistance and services" for international protection beneficiaries. Art 89(4) defines the rights relevant to access to labour market as follows:

> a) an applicant or a conditional refugee may apply for a work permit after six months following the lodging date of an international protection claim.
>
> b) the refugee or the subsidiary protection beneficiary, upon being granted the status, may work independently or be employed, without prejudice to the provisions stipulated in other legislation restricting foreigners to engage in certain jobs and professions. The identity document to be issued to a refugee or a subsidiary protection beneficiary shall also substitute for a work permit and this information shall be written on the document.
>
> c) access of the refugee and the subsidiary protection beneficiary to the labour market may be restricted for a given period, where the situation of the labour market and developments in the working life as well as sectorial and economic conditions regarding employment necessitate, in agriculture, industry or, service sectors or a certain profession, line of business or, administrative and geographical areas. However, such restrictions shall not apply to refugees and subsidiary protection beneficiaries who have been residing in Turkey for three years; are married to Turkish citizens; or, have children with Turkish citizenship.
>
> ç) The principles and procedures governing the employment of applicants or international protection beneficiaries are to be determined by the Ministry of Labour and Social Security in consultation with the Ministry.

Art. 29 of the Temporary Protection Regulation (2014/6883) is related with access to labour market for persons benefiting from temporary protection:

> (1) Principles and procedures regarding the employment of persons benefiting from temporary protection shall be determined by the Council of Ministers upon the proposal of Ministry of Labour and Social Security after receiving the opinion of the Ministry.
>
> (2) Persons, who hold a Temporary Protection Identification Document, may apply to the Ministry of Labour and Social Security for receiving work permits to work in the sectors, professions and geographical areas (provinces, districts or villages) to be determined by the Council of Ministers.
>
> (3) Provisions under this Article are without prejudice to the provisions stipulated in other legislation regarding the jobs and professions in which foreigners may not be employed.
>
> (4) Validity period of the work permits given to the persons benefiting from temporary protection shall not be longer than the duration of the temporary protection. The validity of the work permits issued within this scope shall end upon the end of temporary protection.
>
> (5) The work permits issued to persons benefiting from temporary protection shall not substitute residence permits regulated in the Law.

These restrictions appear broadly in line with what is required and permitted by the EU *acquis* on this issue. The granting of labour market access to applicants after 6 months is clearly in compliance with the Reception Conditions Directive (although a significant question-mark remains as to whether the category of "conditional refugee" can also be treated in this manner as a matter of EU law. While, given Turkey's leading role in welcoming those fleeing instability in the region, a great degree of leeway will be necessary in the application of these provisions, it remains questionable as to whether, as a matter of EU or indeed

international law, the limitation of refugee status proper to those fleeing European countries is compliant).

In similar manner, the access granted to refugees and subsidiary protection beneficiaries seems in line with EU requirements, and the limitations envisaged seem likewise permissible. It is noteworthy that, in granting the same access to subsidiary protection beneficiaries as to refugees, the LFIP is compliant with the updated Qualification Directive of 2011.

It is less clear, however, that the rest of Article 89 is fully compliant with the EU *acquis*. For example, Article 89(1) provides that applicants for and beneficiaries of international protection "shall have access to primary and secondary education", it does not stipulate that this must be on a par with the treatment afforded to nationals. Likewise, the LFIP appears silent on the other issues required by the *acquis*: equal treatment to nationals in relation to working conditions, and access to social security systems is not provided for (the former is deferred to determination by the Ministry of Labour and Social Security in Article 89(4)(ç), whilst paragraph (2) merely notes that "access to social assistance and services may be renewed" to applicants or beneficiaries who are "in need"). The provisions of Article 89(3) on access to health care appear broadly compliant.

Family Reunification

Chapter V of the Family Reunification Directive contains provisions specifically directed at refugees. States are permitted to limit these provisions to family members that predate the entry onto their territory of the refugee in question.[321] States are also permitted to allow the reunification of any family member dependent on the refugee, not merely those listed in Article 4.[322]

Refugees are also exempt from having to provide evidence that they fulfil the requirements of Article 7 (adequate accommodation, health insurance and resources), provided that the application is submitted within a period of 3 months immediately following the grant of refugee status.[323] Likewise, in respect of refugees the state is not permitted to require that the refugee be resident for a fixed period of time prior to being allowed to make an application for family reunification.[324]

The 2011 Qualification Directive also contains some relevant provisions in this regard: Member States are to "ensure that family unity can be maintained",[325] and family members of internationally protected persons are to be afforded the entitlements outlined above even if they do not themselves qualify for internationally protected status, "in accordance with national procedures and as far as is compatible with the personal legal status of the family member".[326] These entitlements may be reduced or withdrawn for reasons of national security or public order.[327]

[321] Family Reunification Directive, Art. 9(2).
[322] *Id.* Art. 10(2).
[323] *Id.* Art. 12(1).
[324] *Id.* Art. 12(2).
[325] 2011 Qualification Directive, Art. 23(1).
[326] *Id.* Art. 23(2).
[327] *Id.* Art. 23(3).

Analysis

Article 34 of the LFIP does affirm that international protection beneficiaries are entitled to apply for family residence permits. Article 35(4) provides that "the conditions set forth in the first paragraph" – relating to income, residence and accommodation requirements – "may not be sought for refugees and subsidiary benefits beneficiaries who are in Turkey". This therefore appears in conformity with the provisions of the Family Reunification Directive (although it does not make it an explicit requirement that the international protection beneficiary actually be on the territory of the State concerned to benefit from having these conditions waived).

The LFIP is, however, silent on whether the family members granted permits are to be afforded the same entitlements as the beneficiary of international protection themselves, as required (with caveats) by the 2011 Qualification Directive. Only Article 89(1), on access to education, makes specific reference to the entitlements of family members in this context.

Long-Term Residence

It is also worth recalling here a point made above: that while refugees were initially excluded from the list of migrants who could obtain LTR status, this position was reversed by Directive 2011/51/EU of 11 May 2011. Art. 4(b) of the amended Long-Term Residents Directive now provides that at least half of the period from the lodging of the application for international protection to the granting of refugee status is to count towards the 5-year qualification period (or all of it, if longer than 18 months). However, a new Art. 9(3a) provides that LTR status may be withdrawn if a decision is taken to revoke, end or refuse to renew international protection, when LTR status was obtained on the basis of that protection.

Analysis

Article 42(2) of the LFIP states clearly that beneficiaries of international protection "are not entitled to the right of transfer to a long-term residence permit". This seems straightforwardly in conflict with the EU *acquis*, as reflected in the amended Long-Term Residents Directive above.

Recommendations

- ***That the LFIP be amended to clarify that beneficiaries of international protection are to be afforded access to primary and secondary education on basis equal to nationals.***
- ***That the LFIP be amended to clarify that beneficiaries of international protection are to be afforded treatment equal to nationals with respect to working conditions, and access to certain branches of social security.***
- ***That the LFIP be amended to clarify that the family members of beneficiaries of international protection are to be afforded (largely) the same entitlements as the beneficiaries themselves.***
- ***That the LFIP be amended to allow beneficiaries of international protection to transfer to a long-term residence permit should the relevant time periods be met, as required by the updated EU*** **acquis.**

5.2.9 Other TCNs

Apart from the Directives relating to particular groups of TCNs outlined above, the EU *acquis* on labour migration has one important general instrument: the Single Permit Directive. Its goal is to provide for a single permit (obtained as the result of a single application procedure) to cover both working and residence for TCNs, and with it a set of entitlements that will grant the permit holders "rights and obligations comparable to that of EU citizens".[328] Importantly, as will become clear, the majority of the rights set out in the Directive are not limited to holders of a Single Permit, but apply to TCNs legally resident and working in general.

Scope

The Directive applies to TCNs legally resident in a Member State for the purposes of work.[329] It does not apply to family members of Union citizens or those who enjoy free movement rights equivalent to Union citizens; to posted workers, seasonal workers, or intra-corporate transferees; to those who have applied for or been granted temporary or international protection; to long-term residents; or to those admitted as self-employed workers.[330] As outlined above, the majority of these excluded categories of workers have their own dedicated instruments under the EU *acquis*. Member States may also exclude TCNs who have been authorised to work in their territory for not more than 6 months, or those admitted for the purposes of study.[331]

Single application procedure

The Directive obliges Member States to establish a single application procedure for a single permit (combining both work and residence permits; although a Member State may still require a separate visa for initial entry).[332] As in many of the other regimes discussed above, Member States can decide whether applications are to be submitted by the TCNs themselves, or their prospective employers (or, indeed, either).[333] Decisions are to be taken as soon as possible, and no later than 4 months from the date the application was lodged (unless there are exceptional circumstances).[334] Where the application is incomplete, the competent authority is to notify the applicant in writing of the additional documentation required, and set a reasonable deadline for its provision (the 4 month time limit is suspended in such cases).[335] Decisions must be notified to the applicant in writing.[336] Decisions rejecting an

[328] Directive 2011/98/EU of the European Parliament and Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343/1, 23 December 2011 (hereafter "Single Permit Directive"); preamble, recital 2.
[329] *Id*. Art. 3(1).
[330] *Id*. Art. 3(2).
[331] *Id*. Art. 3(3).
[332] *Id*. Art. 4(3).
[333] *Id*. Art. 4(1).
[334] *Id*. Art. 5(2).
[335] *Id*. Art. 5(4).

application must be accompanied by written reasons.[337] Such decisions must be open to legal challenge, and the written notification must specify the forum for appeals and any relevant time limits.[338] Generally, States must provide full information to TCNs and prospective employers as to what is required for a successful application. States can charge fees for handling applications, but these must be proportionate.[339]

As with the Blue Card above, Single Permits must conform to Regulation (EC) No 1030/2002 and its annexes, which contain a wide range of detailed technical specifications relating to printing, laminating, the integration of photographs and signatures, the information contained, "machine readable areas", and the like.[340] States are not to issue additional permits as proof of a Single Permit holder's right to access the labour market.[341]

Rights of Single Permit holders

The Directive provides for certain rights for TCNs who are holders of Single Permits issued as a result of the single application procedure it lays down. These are as follows:

- To enter and reside in the territory of the State that has issued the Single Permit;
- to have free access to the entire territory of that state, within the limits provided by national law;
- to exercise the specific employment activity authorised by the Permit; and
- to be informed about their rights under the Directive and/or national law.[342]

Rights of all TCNs legally working and covered by the Directive

The Directive also provides that TCNs covered by the Directive have, if present and working legally on the territory of the Member State in question, a right to equal treatment with nationals with regard to a wide range of different matters (analogous to those afforded to highly qualified workers under the Blue Card Directive, outlined above). These include:

- Working conditions, pay, dismissal protections, and health and safety requirements;
- freedom of association and affiliation of organisations representing workers;
- education and vocational training;
- recognition of qualifications;[343]
- branches of social security, as set out in Regulation (EC) No 883/2004. These include maternity and paternity benefit, family benefits, unemployment benefits, benefits relating to accidents at work, and death grants;[344]

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[336] *Id*. Art. 5(3).
[337] *Id*. Art. 9(1).
[338] *Id*. Art. 9(2).
[339] *Id*. Art. 10.
[340] Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, OJ L 157, 15 June 2002.
[341] *Id*. Art. 6.
[342] *Id*. Art. 11.
[343] *Id*. Art. 12(1)(a)-(c).

- access to goods and services made available to the public, including housing procedures and employment counselling;
- tax benefits
- services offered by employment offices.[345]
- any statutory pension due based on employment history in the Member State, even if the TCN or his or her surviving descendants have moved to a third country.[346]

States may, however, restrict equal treatment on a range of issues. For example, educational and vocational training can be restricted either to those in employment, or those who have been employed but are registered as unemployed; or to those admitted for the purposes of study; or by excluding maintenance grants and loans from the scope of equal treatment.[347] Equal treatment with regard to "branches of social security" can be restricted, but not for those who either are in employment or have been in employment for a minimum period of 6 months. States may also decide to limit family benefits to TCNs who are authorised to work for a period less than 6 months, or those admitted for the purposes of study, or those whose right to work depends on a visa.[348] Access to goods and services made available to the public can be limited to those in employment only, and can also be generally limited with respect to housing.[349]

Analysis

Article 27 of the LFIP provides, in part, as follows:

> A valid work permit as well as Work Permit Exemption Confirmation Document issued pursuant to Article 10 of the Law on Work Permits of Foreigners, № 4817 of 27/02/2003, shall be considered a residence permit.

This does provide a rudimentary form of the Single Permit, and the single application procedure envisaged by the Single Permit Directive. However, it seems clear that there are important gaps here between Turkish law as currently expressed in the LFIP and LWPF. Firstly, the EU *acquis* seems to provide more procedural protections (for example, the requirement – common to most of the EU instruments – to provide reasons for rejection of applications); although some of the procedural protections are met (Article 25 LFIP, for example, states that notification of a decision to reject should also contain information on the right to appeal and other relevant rights and obligations; whilst Article 12 LWPF provides that a decision on a duly submitted and complete application for a work permit will be given within 30 days at the latest). It is also not clear whether the single work/residence permits referred to in Article 27 LFIP would meet the technical specifications required by the EU *acquis*.

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[344] *Id*. Art. 12(1)(e). These are set out in Art. 3 of the Parliament and Council Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems, OJ L 166/1, 30 April 2004. The branches covered are: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; (j) family benefits.
[345] *Id*. Art. 12(1)(f)-(h).
[346] *Id*. Art. 12(4).
[347] *Id*. Art. 12(2)(a).
[348] *Id*. Art. 12(2)(b).
[349] *Id*. Art. 12(2)(c).

Secondly, it should be borne in mind that the Single Permit Directive provides that all TCNs covered by its provisions, who are residing and working legally on the territory of a Member State, are to be afforded equal treatment with nationals on a wide range of issues. The LFIP is generally silent on the rights to be afforded to TCNs in general (as opposed, for example, to long-term residents or beneficiaries of international protection).

Recommendations

- ***That the Turkish Government introduce secondary legislation ensuring that all of the procedural protections envisaged by the Single Permit Directive for TCNs are respected in the analogous Turkish procedure.***
- ***That the Turkish Government ensure that the documentation issued as a result of this procedure is compliant with the technical standards set out in the Single Permit Directive.***
- ***That the Turkish Government introduce legislation that explicitly grants to the broad class of TCNs encompassed by the Single Permit Directive an entitlement to equal treatment with nationals on the matters and to the extent envisaged therein.***

6 Summary of Conclusions and Recommendations

6.2 Turkey's International Obligations

Turkey has signed up to an impressive array of international and regional obligations relating to labour migration. Indeed, in ratifying the ICRMW, it has gone further than any other major Western nation, and than any EU Member State. Some of these obligations find expression in the Constitution itself, others unsystematically in various pieces of legislation (including, for example, the recent LFIP). However, Turkey appears to rely heavily for domestic implementation of many of its detailed international obligations – at least those contained in instruments for the protection of fundamental rights – on Article 90 of the Constitution, which provides that "[i]nternational agreements duly put into effect have the force of law"; and that in cases of conflict with domestic law, fundamental international rights instruments prevail. In theory, this should be enough to ensure – on paper at least – that there are no gaps in Turkish implementation of its international legal obligations in this regard.

To be sure of this in practice, however, it is essential that Turkey ensure that Article 90 is functioning as it ought at all levels of the legal system; that judges, lawyers and individuals are aware not only of the content of the Constitution, but also of the relevant human rights instruments that it transposes into Turkish law. It is also crucial that judges are kept informed of the latest developments in the interpretation of the norms sat the international level, to ensure that domestic interpretation remains in compliance with international obligations.

Recommendations

1. *That the Turkish Government consider funding research into the actual use and implementation of Article 90 of the Constitution in Turkish courts at all levels, to ensure that the lack of gaps on paper is carried through to legal practice.*
2. *That the Turkish Government ensure, through public information campaigns, that not only lawyers but also the general public are aware of their fundamental rights under international legal instruments, and that these can be relied on directly in Turkish courts.*
3. *That the Turkish Government provide training for judges at all levels to ensure that their knowledge of the content and interpretation of international instruments is and remains up-to-date, to ensure that their own applications of these instruments are incompliance with Turkey's international obligations.*

6.2 Alignment with EU *Acquis*

6 EU Citizens

Turkey is still at the early stages of aligning itself with the most important labour migration-related aspects of the EU *acquis* in relation to Union citizens, most notably the freedom to work and the freedom of establishment and to provide services (Chapters 2 and 3 of the *acquis*, respectively). However, important steps can still be taken in relation to free movement (as part of the broader Visa Liberalisation Roadmap) and social security.

Free movement and visa liberalisation

Recommendations

4. *That Turkey abolish normal visa requirements for access to Turkish territory for all Union citizens.*
5. *That Turkey ensure full and effective implementation of its National Action Plan for the Implementation of Turkey's Integrated Border Management strategy.*
6. *That Turkey fully implement the reforms to its visa practices recommended in the Commission's progress report on the Visa Liberalisation Roadmap, and align itself with the Schengen visa acquis.*
7. *That Turkey ensure that the relevant provisions of the LFIP on labour market access are implemented effectively and uniformly throughout its territory.*
8. *That Turkey ensure that the new DGMM has sufficient funding and resources to carry out its mandate in full.*
9. *That Turkey conclude, ratify and effectively implement readmission agreements with relevant third countries, in particular those that are a significant source of irregular migration flows to the EU.*
10. *That Turkey fully implement and comply with its obligations under the EU-Turkey Readmission Agreement.*

Social Security

Recommendations

11. *That Turkey seek to conclude and ratify bilateral social security agreements that fully reflect the relevant EU* acquis *with the remaining EU Member State.*
12. *That Turkey ensure that these agreements, once ratified, are fully and effectively implemented in practice throughout Turkish territory.*

6.2.2 Third-Country Nationals

The EU *acquis* now contains a range of Directives on the labour migration of various different categories of third-country national workers. Given that one of the aims of this set of instruments is to ensure that those living and working legally on the territory of a Member State have a range of rights and obligations comparable to those of Union citizens, ensuring alignment with EU *acquis* in relation to TCNs will go, in many regards, some distance to ensuring similar alignment with relation to Union citizens.

Family Reunification

Recommendations

13. *That the Turkish Government introduce secondary legislation to ensure that the procedural safeguards relating to applications for family reunification set out in the Directive are required, and effectively implemented, in Turkey.*
14. *That the Turkish Government introduce legislation ensuring that family members get the full range of rights owed to them under the EU* acquis*, and that these rights are respected in practice.*

Long-Term Residents

Recommendations

15. *That the LFIP be amended to allow for the granting of long-term resident status after 5, rather than 8, years' residence.*
16. *That the LWPF likewise be amended to allow the granting of "indefinite" work permits after 5, rather than 8, years' residence.*
17. *That the Turkish Government introduce secondary legislation to ensure that the procedural safeguards relating to applications for long-term resident status set out in the Directive are required, and effectively implemented, in Turkey.*
18. *That the Turkish Government introduce legislation to ensure that long-term resident status cannot be lost or revoked for reasons other than those set out in the LFIP.*

Highly-Qualified Workers

Recommendations

19. *That the Turkish Government consider establishing a close analogue to the regime for highly-qualified workers envisaged by the Blue Card Directive, which tracks the relevant procedural protections and entitlements.*
20. *That the Turkish Government ensure that the necessary modifications to the relevant time periods for long-term residence eligibility, and to the family reunification regime, are in place for highly qualified workers.*
21. *That the Turkish Government ensure that the documentation issued in any such regime complies with the technical specifications referred to in the Blue Card Directive.*

Researchers, Seasonal Workers and Intra-Corporate Transferees

22. *That the Turkish Government introduce legislation ensuring that researchers admitted under Article 31 LFIP have the right to teach, and to equal treatment with nationals in recognition of qualifications, working conditions, tax benefits, and the relevant branches of the social security system.*

23. *That the Turkish Government introduce legislation regulating the entry and stay of migrant seasonal workers, in a way that closely tracks the procedural protections and entitlements provided by the Seasonal Workers Directive.*
24. *That the Turkish Government introduce legislation regulating the entry and stay of migrant seasonal workers, in a way that closely tracks the procedural protections and entitlements provided by the Intra-Corporate Transferees Directive.*

Refugees and Asylum Seekers

Recommendations

25. *That the LFIP be amended to clarify that beneficiaries of international protection are to be afforded access to primary and secondary education on basis equal to nationals.*
26. *That the LFIP be amended to clarify that beneficiaries of international protection are to be afforded treatment equal to nationals with respect to working conditions, and access to certain branches of social security.*
27. *That the LFIP be amended to clarify that the family members of beneficiaries of international protection are to be afforded (largely) the same entitlements as the beneficiaries themselves.*
28. *That the LFIP be amended to allow beneficiaries of international protection to transfer to a long-term residence permit should the relevant time periods be met, as required by the updated EU* acquis.

Other TCNs

Recommendations

29. *That the Turkish Government introduce secondary legislation ensuring that all of the procedural protections envisaged by the Single Permit Directive for TCNs are respected in the analogous Turkish procedure.*
30. *That the Turkish Government ensure that the documentation issued as a result of this procedure is compliant with the technical standards set out in the Single Permit Directive.*
31. *That the Turkish Government introduce legislation that explicitly grants to the broad class of TCNs encompassed by the Single Permit Directive an entitlement to equal treatment with nationals on the matters and to the extent envisaged therein.*