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# The Balance Between National Sovereignty and Economic Migration: Are Quota Systems Discriminatory and Do Foreigners Have a Right to Work Permits?

**Abstract:** This article examines delves into the intricate regulatory framework of residence permits for non-European Union nationals, with a specific focus on quota systems of employment-based permits. Anchored in Article 79 of the Treaty on the Functioning of the European Union (TFEU), the research navigates the complex legal landscape that governs immigration policies. The study aims to critically analyse the extent of sovereign discretion exercised by Member States in issuing residence permits, with particular attention to potential discriminatory practices based on applicants' national origins.

Utilising the Czech Republic as a strategic case study, the research explores the nuanced variations in labour migration regulations across the European Union. The investigation seeks to unpack the significant divergences in national admission policies and permit allocation strategies, illuminating the multifaceted challenges inherent in managing cross-border migration. By examining legislative provisions and judicial interpretations, the article offers a comprehensive scholarly critique of contemporary immigration frameworks.
**Keywords:** migration, labour law, quota systems, non-discrimination

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## Introduction

Residence permits for non-European Union nationals represent a complex and multifaceted regulatory landscape, encompassing a diverse array of administrative classifications. These permits span a comprehensive spectrum, ranging from short-term visas enabling stays up to 90 days to more extensive long-term visas, residence permits for extended periods, familial residency provisions, and ultimately, permanent residence authorizations.

The foundational legal framework for this intricate system is articulated in Article 79(1) of the Treaty on the Functioning of the European Union (TFEU), which delineates an ambitious vision for a holistic immigration policy. This policy is strategically designed to achieve multifaceted objectives: orchestrating migration flows with sophisticated management techniques, ensuring equitable treatment of third-country nationals legally domiciled within Member States, and implementing robust preventative and combative measures against illegal immigration and human trafficking.

Specifically, TFEU's Article 79, Paragraph 2(a) empowers the European Parliament and Council to promulgate comprehensive legislative measures. These regulations meticulously define entry and residence conditions, establishing standardized protocols for the issuance of long-term visas and residence permits, with particular emphasis on facilitating family reunification processes.

Predicated on this legislative mandate, the European Union has progressively developed a series of targeted directives that systematically regulate the conditions under which third-country nationals may secure residence permits, calibrated to the precise motivations underlying their territorial presence.[3]

The present scholarly examination focuses specifically on residence permits issued for employment purposes—a domain of particular academic interest. As will be substantiated in subsequent analysis, labour migration repre-

3 To name some of the key EU directives: Nos. 2016/801, 2014/36/EU, 2021/1883, 2014/66/EU or 2011/98/EU.

sents a remarkable anomaly within European regulatory frameworks, characterized by persistent and significant divergences in Member States' approaches regarding both the quantitative allocation of residence permits and the nuanced modalities of national admission policies.

The article's primary scholarly objective is to conduct a rigorous investigation into the extent of sovereign discretion exercised by Member States in the process of issuing employment-based residence permits. Of particular analytical focus will be the potential for discriminatory practices predicated on applicants' national origins. To contextualize this investigation, the analysis will prominently feature relevant provisions of Czech legislation, supplemented by a critical evaluation of pertinent Czech judicial determinations.[4]

## On the Legal Entitlement to a Residence Permit and Article 79(5) TFEU

Article 79(5) of the TFEU presents a nuanced constitutional provision that ostensibly preserves Member States' sovereign prerogative to determine the quantitative parameters of third-country nationals' entry for employment purposes. This provision immediately raises a fundamental jurisprudential question: Does this constitutional clause effectively negate legal entitlement to various employment-related residence permits?

The fundamental jurisprudential principle underlying administrative decision-making posits that when an applicant satisfies prescribed legal requirements, the administrative authority is inherently obligated to grant the requested authorization. Drawing substantively from the scholarly work of Pavel Porizek[5]—a distinguished scholar in migration law—this analysis critically examines the legal entitlement of foreigners to a residence permits is-

4 The methodological selection of the Czech Republic as a case study is deliberate and multifaceted. Beyond the author's personal national affiliation, the Czech Republic has instituted a distinctive economic migration regulatory system that merits thorough scholarly scrutiny.

5 Pavel Porizek is the Head of the Ombudsman's Office of the Czech Republic.

sued for employment purposes in accordance with Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (hereinafter: Directive 2011/98/EU).[6]

Porizek's claims can be summarized as[7]:

(i) In the case of residence permits issued for the purpose of seasonal work pursuant to Directive 2014/36/EU of the European Parliament and of the Council of 26 February on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (hereinafter: Directive 2014/36/EU), the grounds for refusal of the application (Art. 8 of the Directive 2014/36/EU), the withdrawal of the issued authorisation (Article 9 of the Directive 2014/36/EU) and the non-renewal of the authorisation (Article 15 of the Directive 2014/36/EU) are expressed exhaustively, which also applies to the criteria and requirements for the admission of a foreigner (Article 6 of the Directive 2014/36/EU). Critically, according to Porizek, if the requirements laid down are fulfilled and there is no reason to refuse the application, the Member State is obliged to issue the permit.

(ii) In the case of a Blue Card issued pursuant to Directive 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC (hereinafter: Directive 2021/1883), it follows

6 Pavel Porizek, "Další příspěvek k výkladu výhrad veřejného pořádku v zákoně o pobytu cizinců (kde chybí judikatura SDEU) a jak je tomu s nárokovostí zaměstnanecké karty a dalších pobytových titulů," in *Ročenka uprchlického a cizineckého práva: 2022* [*Yearbook of Asylum and Migration Law: 2022*], ed. Dalibor Jílek and Pavel Pořízek (Kancelář veřejného ochránce práv [Ombudsman's Office of the Czech Republic], 2023), 21–101.

7 Porizek, "Další příspěvek k výkladu výhrad veřejného pořádku v zákoně o pobytu cizinců," 101.

from Article 9(1) of the Directive 2021/1883 that a foreigner who fulfils the admission criteria set out in Article 5 and who is not subject to the grounds for refusal under Article 7, "shall be issued with an EU Blue Card." Again, therefore, there is an entitlement to a residence permit.

(iii) In the case of an intra-corporate transfer pursuant to Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (hereinafter: Directive 2014/66/EU), if the foreigner fulfils the admission criteria set out in Article 5 of the directive and the conditions for the application of the grounds for refusal pursuant to Article 7 of the directive are not established, the directive again gives rise to a legal entitlement to the issue of a permit.

(iv) In the case of the single permit issued under Directive 2011/98/EU, there is no exhaustive list of substantive grounds for refusal of an application, its amendment or extension of its validity. At the same time, the criteria and requirements for issuing a residence permit are not provided. The legal regulation of such matters thus remains entirely within the competence of the Member States, whose powers in this area are limited only by recital 17 of the directive, according to which: "The conditions and criteria on the basis of which an application to issue, amend or renew a single permit can be rejected, or on the basis of which the single permit can be withdrawn, should be objective and should be laid down in national law including the obligation to respect the principle of Union." However, according to Porizek, the non-existence of entitlement to the issue of a permit is only illusory. Porizek refers to Article 4(2) and (4) of the directive, which states that: "Member States shall examine an application made under paragraph 1 and shall adopt a decision to issue, amend or renew

> the single permit if the applicant fulfils the requirements specified by Union or national law. A decision to issue, amend or renew the single permit shall constitute a single administrative act combining a residence permit and a work permit" and: "Member States shall issue a single permit, where the conditions provided for are met, to third-country nationals who apply for admission and to third-country nationals already admitted who apply to renew or modify their residence permit after the entry into force of the national implementing provisions." Based on this, Porizek concludes that where a foreigner meets the requirements laid down by national law or EU law, the directive, pursuant to its Article 4(2) and (4), obliges the Member State to issue, amend or renew the single permit, thereby clearly limiting the discretionary powers of the national authorities.[8]

In synthesis, with the exception of permits issued under Directive 2011/98/EU, a legal entitlement to the requested residence permit emerges whenever prescribed grounds for refusal are absent and the requisite admission conditions are comprehensively satisfied. For single permits under Directive 2011/98/EU, the entitlement is contingent upon the specific conditions articulated in national legislative frameworks—though once these conditions are fulfilled, a corresponding legal right to the residence title crystallizes.

This judicial interpretation may potentially elicit significant institutional resistance from Member States, as it effectively establishes a normative pathway that could systematically facilitate labour migration for all applicants meeting objective criteria. Consequently, one might legitimately question whether such an outcome aligns with the European legislator's original strategic intent.

Ultimately, Article 79(5) TFEU remains the sole substantial mechanism through which Member States can modulate migratory flows, enabling them to determine the quantitative parameters of foreign entry. This provision rep-

8 Porizek, "Další příspěvek k výkladu výhrad veřejného pořádku v zákoně o pobytu cizinců," 101.

resents a critical constitutional mechanism that must be conceptually distinguished from the substantive assessment of legal entitlements when directive-prescribed (or nationally legislated) conditions are unequivocally met.

## Determining the Volume of Entries under Article 79(5) TFEU—Assessing Discretionary Powers in Migrant Worker Admission

The critical examination of Article 79(5) TFEU prompts a profound question: Does this provision constitute an efficacious and comprehensive mechanism for Member States to mitigate the potential legal imperative of issuing residence permits to migrant workers? Can Member States leverage this provision to modulate migratory flows through a non-discriminatory approach by selectively determining admission quotas from specific source countries?

A closer look at the relevant texts of the relevant directives reveals the following:

(i) Directive 2021/1883 (Blue Card): The directive's preamble, specifically paragraph 15, explicitly preserves Member States' discretionary powers under Article 79(5) TFEU. It unambiguously articulates the right of Member States to either reject or declare an application inadmissible based on this constitutional provision. Article 6 further reinforces this discretion by affirming the state's prerogative to regulate foreign national entry volumes. Notably, Article 24 mandates transparent communication, requiring states to render entry volume restrictions easily accessible to potential Blue Card applicants.

(ii) Directive 2011/98/EU (Single Permit): Paragraph 6 of the preamble unequivocally acknowledges the individual states' competence in regulating foreign national entry quantities. Article 8(3) provides a particularly robust mechanism, explicitly permitting states to consider applications inadmissible on grounds of managing overall ad-

mission volumes, thereby absolving them of the obligation to process such applications.

(iii) Directive 2014/66/EU (Intra-Corporate Transfers): Article 6 provides clear provisions allowing Member States to declare applications for intra-corporate transfers inadmissible or reject them when invoking the restrictions outlined in Article 79(5) TFEU.

(iv) Directive 2014/36/EU (Seasonal Workers): Consistent with the intra-corporate transfers directive, Article 7 offers comparable provisions enabling Member States to either deem applications inadmissible or reject them under the aegis of Article 79(5) TFEU.

First of all, it should be pointed out that all of these directives, in our view, implicitly provide that a foreigner will at least be allowed to deliver his/her application to the disposal of the state authorities: "… consider an application for an EU Blue Card to be inadmissible; An application may be considered as inadmissible …; … application for an intra-corporate transferee permit may either be considered inadmissible or be rejected; … an application for an authorisation for the purpose of seasonal work may be either considered inadmissible or be rejected." The directives always refer to an application, i.e. an existing legal act, and do not stipulate that the state can just prevent foreigners from entering the territory for the purpose of work by not giving them a chance to submit it. In our opinion, this is also the case with Directive 2011/98/EU, although it states that: "an application … need not to be processed." However, in order for an application to be "an application", a wish to make such a submission must be formed and manifested. However, this conclusion is not universally accepted. To demonstrate this, the legal system of the Czech Republic must be examined.

The application of Article 79(5) TFEU in the Czech Republic is reflected in Section 181b of Act No. 326/1999 Coll, on the residence of foreigners in the territory of the Czech Republic (hereinafter: Residence Act). This legislative provision mandates that the government establishes regulatory mechanisms to

determine the maximum number of applications permissible within a single calendar year. Specifically, these quotas apply to applications for:

- Visas for stays exceeding 90 days for business purposes;
- Long-term residence permits for investment purposes;
- Employee cards issued under Directive 2011/98/EU.

Critically, the legislation allows for strategic allocation of these quotas, permitting the reservation of entire allocation blocks or specific portions exclusively for government-approved economic migration programs designed to facilitate the entry of skilled workers. The relevant embassy is required to maintain transparent communication by publishing current quota information, including available 'vacancies', on both official notice boards and websites.

The implementation is operationalized through the Government Regulation No. 220/2019 Coll., which establishes precise quotas for designated Czech embassies. In certain instances, entire quotas are exclusively reserved for governmental economic migration programs, effectively precluding applications from "non-privileged" foreign nationals.

A pivotal procedural constraint is that (except for some minor exemptions[9]) residence permit applications must be submitted at the Czech embassy located in the applicant's country of origin,[10] eliminating possibilities for jurisdictional arbitrage or "forum shopping".[11]

Complementing this framework, Section 169f of the Residence Act introduces an additional administrative mechanism. Embassies are empowered to mandate pre-arranged appointment dates for application submissions. In contemporary practice, this has become a de facto requirement, rendering spontaneous applications impossible.

9 Nationals of the countries listed in Decree of the Ministry of Interior no. 429/2010 Coll.

10 Alternatively, at the nearest embassy of the Czech Republic in the case of countries where there is either no embassy of the Czech Republic or no consular section.

11 Or in a country where he/she is a long-term or permanent resident and has been lawfully residing for at least 2 years. See section 169g(1) of the Residence Act.

The operational implications are profound: when quota allocations are exhausted, applicants receive only minimal notification—typically a referral to Section 181b and the relevant Government Regulation. No formal administrative procedure is initiated, and no substantive decision is rendered. But what do the national courts think of such a procedure?

This approach was recently scrutinized in a significant judicial review by the Regional Court in Brno.[12] The court controversially argued that European legal frameworks permit not only limitations on actual residence permit issuances but also on application submissions themselves. The court additionally highlighted the inherent capacity constraints of embassy processing systems.

We believe that the arguments of the Regional Court in Brno are flawed. The judgment fundamentally misinterprets the nature of an "application" under relevant directives.[13] A genuine application, in our view, requires the applicant's formal intent to be placed before the public authority—a threshold not met by merely expressing interest in an embassy appointment.

The Regional Court's assessment that Article 8(3) of Directive 2011/98/EU does not imply that the Member States are obliged to accept the application first and can only then declare it inadmissible because of the fact that the article in question is intended to mean that the application does not have to be processed at all is, in our view, not correct.

In our opinion, in order for an application to be considered an application within the meaning of the directive, it is necessary that the will of a person to obtain a specific permit (= of the applicant) is placed at the disposal of the public authority, whereas mere interest in an appointment at the embassy is not enough. It is only after the application has been submitted that it could subsequently be assessed as inadmissible on the grounds of the existence of quotas. This conclusion is drawn in light of the reasoning on the grounds for the decision set out below.

12 Judgement of the Regional Court in Brno, Case No. 55 A 38/2022—155, 21 February 2024.
13 The Czech Republic has only introduced quotas in relation to Directive 2011/98/EU.

An unresolved legal question remains: Can Member States effectively regulate incoming migration by strategically managing embassy staffing and processing capacities? In the Czech context, even when specific embassy quotas are not explicitly defined, the application process remains constrained by the embassy's willingness and capacity to accept applications.

## Decision on the Application and Its Justification

If we accept that a Member State should at least accept the foreigner's submission, a critical jurisprudential question emerges: Is it legally sufficient to provide a perfunctory response citing quota exhaustion, or does procedural fairness demand a more substantive explanation that elucidates (i) the rationale underlying quota implementation, and (ii) the methodological considerations determining specific numerical limitations?

This issue has been addressed by Johan Rochel.[14] In her article on proportionality and procedural safeguards in the field of European migration law, she argues that the national regulation of labour migration in the Member States is substantially constrained by European legal frameworks and the foundational principles undergirding EU jurisprudence. Central among these principles is the fundamental right to a comprehensively reasoned administrative decision.[15] According to Rochel, when a foreigner's application is deemed inadmissible (under Article 79(5) TFEU and the above-mentioned directives), it is necessary for the Member State to provide: "… empirical background for its decision, such as the number of current labour immigrants, current figures on the unemployment rate, and current figures on situation of specific economic sectors."[16] Rochel derives this obligation both from the right of the person

14 Johan Rochel, "Working in Tandem: Proportionality and Procedural Guarantees in EU Immigration Law," *German Law Journal* 20, no. 1 (2019): 89–110, https://doi.org/10.1017/glj.2019.1.

15 Rochel, "Working in Tandem," 98.

16 Rochel, "Working in Tandem," 105

concerned to be told the empirical considerations leading to the decision on the application and from the simple observation that any different approach would be disrespectful to the applicant.[17] Although in labour migration cases the justification may be relatively minimalist, according to Rochel, it should not be entirely absent.[18] These conclusions are supported by the case-law of the CJEU confirming the right of a person to a reasoned decision[19] or Article 18 of the non-binding European Code of Good Administrative Behaviour.[20] The discussion will return to these arguments later in the article.

Given that in the field of labour migration, the broad discretion of Member States in regulating migration flows clashes with the right to a proper justification of the decision on the application, Rochel proposes an approach based on the application of the principle of proportionality, i.e. to provide applicants with at least a justification that reveals the basic information on why the application should be considered inadmissible.

What Rochel characterizes as an "extreme case"—rejecting applications solely through quota mechanisms without substantive justification[21]—paradoxically emerges as the standard administrative approach within the Czech legal system. Notably, national judicial frameworks have consistently found no procedural irregularity in such practices.

17 Rochel, "Working in Tandem," 105.

18 Rochel, "Working in Tandem," 105.

19 Rochel, "Working in Tandem," referring to the decision of CJEU in the case no. C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, 1991 E.C.R. 1991 05469.

20 Stating that (1) "Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by clearly indicating the relevant facts and the legal basis of the decision"; (2) "The official shall avoid making decisions which are based on brief or vague grounds, or which do not contain an individual reasoning"; (3) "If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore sent, the official shall subsequently provide the citizen who expressly requests it with an individual reasoning." In: European Ombudsman, *European Code of Good Administrative Behaviour* (European Union, European Ombudsman, 2015), https://doi.org/10.2869/61059. Accessible via: https://www.ombudsman.europa.eu/pdf/en/3510.

21 Rochel, "Working in Tandem," 106.

The implementation of quota systems inevitably precipitates fundamental inquiries into their substantive motivations. Potential justifications may encompass diverse considerations, ranging from contemporary unemployment metrics to broader strategic imperatives of migratory flow regulation.[22]

In the absence of explicit decisional reasoning,[23] the only other possible source of information remains the explanatory memorandum to the relevant legislation. In this respect, as the Regional Court in Brno points out in the above-quoted decision, the justification for the introduction of the quota system states that the capacities of the embassies are limited and that in the main source countries of labour migration, the interest of foreigners in working in the Czech Republic far exceeds the capacity of the embassies to accept applications.[24]

However, do the reasons for the inadmissibility of the application set out in the explanatory memorandum withstand rigorous scrutiny against the fundamental requirements for a proper and individualized statement of reasons? We contend that they do not, and this assessment extends beyond the procedural observation that applicants bear no obligation to consult an explanatory memorandum that lacks the normative status of legislative enactment.[25]

Critically, it becomes imperative to interrogate the extent to which the information articulated in the explanatory memorandum corresponds to empirical realities. A particularly revealing analytical vector emerges through comparative quota allocation: Why are 10,550 permits allocated to Philippine nationals, while merely 200 are granted to Vietnamese nationals? This stark differential demands sophisticated interrogation. What distinctive characteris-

22 Then, according to Rochel, the foreigner could raise questions such as why does the public authority consider it problematic or how does it fit into the delivered decision? In: Rochel, "Working in Tandem," 106.

23 Moreover, in the case of the Czech Republic, we cannot even say that it is *an application*.

24 See the decision of the Regional Court in Brno no. 55 A 38/2022—155 of 21 February 2024 and the explanatory memorandum to Act No. 176/2019 Coll., which introduced quotas in the Czech Republic pursuant to Article 79(5) TFEU.

25 Unlike with the laws, where the principle *ignorantia iuris non excusat* would apply.

tics render Philippine workers ostensibly more desirable? Can one genuinely assert an objective basis for such dramatically disparate allocation?[26]

As previously discussed, by precluding foreign nationals from even applying for the relevant residence permit, we eliminate any opportunity to critically assess the rationale behind the specific setting of quotas in individual cases. In doing so, we circumvent the application of the principle of proportionality, which, as Rochel suggests, could serve as a vital mechanism for balancing the considerable discretionary authority of Member States with the applicant's right to a well-reasoned decision. Without access to information beyond the explanatory memorandum accompanying the legislation, we are left with an inherently static framework—one that, by its nature, can only reflect the circumstances prevailing at the time the legislation was enacted.

For the sake of completeness, we would like to reference the reasoning presented in the decision of the Regional Court in České Budějovice.[27] The court asserts that the justification for the admissibility of the quota system reflects the absence of a legal entitlement to a residence permit under Directive 2011/98/EU, thereby granting the state the discretion to determine which foreign nationals may enter its territory. According to the court, this discretion is rooted in "various national or international political reasons."

In our view, this reasoning is problematic, primarily due to the conflation of two distinct issues: (i) whether there exists a legal entitlement to the issuance of a single permit under Directive 2011/98/EU (as we have discussed above), and (ii) whether the application of legislation adopted under Article 79(5) TFEU can

26 It should be added that according to the report of the Ministry of the Interior of the Czech Republic on migration for the first quarter of 2024, a total of 68,181 persons of Vietnamese nationality and 7,416 persons from the Philippines resided in the territory—it is therefore impossible to argue that the Philippines is a country whose nationals traditionally reside in the Czech Republic and have a significant presence here compared to other foreigners. See Ministerstvo vnitra České republiky, *Statistická příloha ke čtvrtletní zprávě o migraci I. 2024*, 7. Accessible via: https://www.mvcr.cz/soubor/zpravy-o-migraci-ctvrtletni-zprava-o-migraci-i-2024-priloha.aspx.

27 Judgement of the Regional Court in České Budějovice, Case No. 61 A 21/2023—42, dated 31 October 2023.

effectively circumvent the need to adjudicate on an individual's entitlement to a residence permit. Nevertheless, the concerns expressed earlier remain pertinent in relation to the reasoning in this decision. Specifically, the foreign national is not required to familiarize themselves with national case-law or explanatory memorandums, and, more critically, the reasoning offered in the decision fails to provide concrete, verifiable justifications for the introduction of the restriction in question.

## Discrimination Against Foreigners from Third Countries?

With the exception of Directive 2014/66/EU, all of the aforementioned directives addressing labour migration contain provisions mandating their implementation without discrimination. However, the criterion of distinction based on nationality is always absent from the list of discriminatory grounds, referring to the wording of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which similarly state in their preambles and Articles 3(2) that: "This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned." It is also essential to reference Article 21(2) of the Charter of Fundamental Rights of the European Union (hereinafter: the Charter), which enshrines the prohibition of discrimination on the grounds of nationality within the scope of the TFEU and the Treaty on European Union (hereinafter: the Treaties). However, the provision in question also specifies that certain provisions of the Treaties may exclude this discriminatory criterion. It is precisely Article 79(5) TFEU, along with the related directives (as discussed above), that constitutes such an exception.

In the context of Czech national law, the Supreme Administrative Court addressed this issue regarding the application of the quota system in one decision.[28] The Court noted that while Article 21(2) of the Charter generally prohibits discrimination based on nationality, it specifically refers to discrimination among Union citizens based on the nationality of a Member State. In contrast, within the realm of migration and access to the labour market for third-country nationals, the criterion of nationality is not considered, thus permitting differential treatment. This view is also acknowledged in the Handbook on European Non-Discrimination Law, published by the European Union Agency for Fundamental Rights.[29]

Nevertheless, does this imply that Member States are entirely exempt from considering the principles derived from EU law when regulating the volume of entry and residence of foreigners? We believe not.

In our view, the restriction of fundamental rights in the context of regulating the volume of entry of workers based on their nationality presents another critical dimension—unequal treatment in the exercise of the fundamental right to a reasoned decision. The argument put forward by Johan Rochel now aligns closely with our own.

We refer to the Opinion of Advocate General Gerhard Hogan of 2 March 2021 in case C-94/20, *Land Oberösterreich v. KV*. In his opinion, Advocate General Hogan asserts that when a Member State invokes an exception under one of the Treaties relating to fundamental freedoms or an overriding reason of general interest to justify legislation that interferes with the exercise of fundamental freedoms,[30] this justification, which is governed by EU law, must be

28 Decision of the Supreme Administrative Court of the Czech Republic no. 4 Azs 14/2022—34 of 14 June 2022.

29 European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law* (Publications Office of the European Union, 2020), 27, https://doi.org/10.2811/0294. Accessible via: https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition.
Rochel, "Working in Tandem," 106.

30 E.g. free movement of services.

interpreted in accordance with the general principles of EU law, particularly the fundamental rights enshrined in the Charter.[31] Thus, such exceptions can only be applied to the legislation in question if they comply with fundamental rights, which the CJEU ensures are respected. In this regard, he also refers to the CJEU's (then ECJ) judgment in C-540/03, *Parliament v. Council* (27 June 2006), where the Court considered whether certain exceptions in Directive 2003/86 on the right to family reunification were consistent with fundamental rights. The Court held that the exceptions in the directive did not entitle Member States, either expressly or by implication, to adopt implementing provisions that contravened fundamental rights, even though they retained a margin of discretion—one that was sufficiently broad to allow them to apply their rules while still respecting the requirements of fundamental rights protection.[32]

One of the fundamental rights that can be derived from the right to a fair trial is the right to a statement of reasons, as Johan Rochel rightly emphasizes.

At this point, it is worth quoting the CJEU's reasoning in the previously mentioned case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, where it was held that respect for the rights guaranteed by the Community legal order in administrative procedures is of fundamental importance. These guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all relevant aspects of the individual case, and the right of the person concerned to express their views and to receive an adequately reasoned decision. The right to a proper statement of reasons is intrinsically linked to the principle of sound administration.[33]

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31 Judgment in the case C-390/12 *Pfleger and Others* of 30 April 2014, paragraphs 34 to 36.

32 Opinion of Advocate General Gerhard Hogan of 2 March 2021 in case C-94/20 *Land Oberösterreich v. KV*, paragraph 69 and CJEU judgment in case C-540/03 *Parliament v. Council* of 27 June 2006.

33 See, for example, the decision of the General Court (formerly the Court of First Instance) in Case T-410/03 *Hoechst GmbH v. Commission of the European Communities* of 18 December 2003: "… among the guarantees conferred by the Community judicial order in administrative procedures is, in particular, the principle of sound administration, which entails the obligation for the competent institution to examine carefully and impartially all the relevant elements of the case," sub-section 129.

Thus, in our view, when directives grant discretion to Member States—in this case, regarding how to manage labour migration of third-country nationals—that discretion must always be exercised in a manner that aligns with the fundamental rights of the individuals concerned. In the domain of the right to a reasoned decision and the state's duty of sound administration, no distinction can be made based on nationality.[34] Therefore, while the mere existence of a restriction on labour migration is not inherently discriminatory, its implementation by a Member State that interferes with qualitatively different rights—such as the right to enter and remain in the territory or the legal entitlement to a residence permit—may be.

## Conclusions

The foregoing analytical exploration of Member States' capacities to modulate foreign entry through Article 79(5) TFEU, illustrated by the Czech Republic's context, reveals a nuanced and complex regulatory landscape. While the selection of eligible foreign nationals based on nationality does not inherently transgress non-discrimination principles and aligns with the Charter's provisions, such a juridical determination proves insufficient to categorically preclude the broader substantive rights of prospective residents seeking employment-related permits.

Consequently, two critical jurisprudential inquiries emerge: (i) the procedural guarantees afforded to foreign nationals in articulating their intent to pursue residency, and (ii) the potential institutional responses to entry limitation mechanisms. The fundamental principle of administrative transparency necessitates that applicants be afforded a minimally substantive opportunity to

34 In fact, the principle of sound administration is often included in the provisions of national legislation on administrative procedures. In the case of the Czech Republic, it is Sections 2 to 8 of act no. 500/2004 Coll., the Administrative Code, which enshrine the basic principles of the activities of administrative authorities, while Section 8(2) of this act explicitly mentions the concept of "sound administration".

present their case. Specifically, individuals should retain the right to submit applications and receive a concise, reasoned decision elucidating the grounds for inadmissibility. Such an approach not only preserves fundamental rights but also mitigates concerns regarding potential arbitrary administrative discretion.

Moreover, the implementation of labour migration quota systems—whereby specific national contingents are strategically delineated for residency permit allocation—inherently generates systemic vulnerabilities. These mechanisms invariably incentivize circumventive strategies, potentially compelling applicants to exploit alternative residency pathways. Paradigmatic illustrations include residence permits predicated on academic research, educational exchanges, or cultural programs, as stipulated in Directive 2016/801 of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (hereinafter: Directive 2016/801). While beyond the immediate analytical scope, it is noteworthy that Member States encounter comparatively diminished discretionary latitude in rejecting study-related permits versus employment-oriented applications, not least because Member States cannot make use of a similar right to that conferred by Article 79(5) TFEU.

Using the Czech Republic as a paradigmatic case study, we can elucidate a critical systemic vulnerability wherein the quantitative restrictions on employment-related residence permits under Directive 2011/98/EU have resulted in a strategic circumvention mechanism. Specifically, foreign nationals have increasingly leveraged the ostensibly unrestricted avenue of study-purpose applications to facilitate an almost immediate transition to employment status. The judicial landscape surrounding this practice remains notably fragmented, with administrative courts presenting divergent interpretative approaches.

Some judicial bodies have contended that such procedural manoeuvres do not contravene extant national or European Union legal frameworks.[35]

35 See the judgments of the Supreme Administrative Court of the Czech Republic in cases nos. 1 Azs 158/2024 and 5 Azs 149/2024.

Conversely, other judicial perspectives align more closely with the European Court of Justice's jurisprudence, particularly the recent C-14/23 *Perle* decision, which explicitly affirms the applicability of the fundamental EU legal principle prohibiting systematic abuse.[36] The latter perspective compellingly argues that unrestricted permission of such procedural tactics would effectively render Article 79(5) TFEU meaningless, fundamentally undermining Member States' discretionary capacity to regulate economic migration through quota mechanisms.

The potential normalization of such procedural strategies resurrects a fundamental legal interrogation: Do the normative conditions articulated in relevant directives—and specifically in Directive 2011/98/EU's national implementations—genuinely confer a substantive legal entitlement to residence permit issuance? If interpreted affirmatively, such a hermeneutic approach would provide a relatively straightforward mechanism for circumventing Member States' carefully constructed migratory barriers.

Resolving this complex regulatory challenge defies simplistic solutions. However, a potentially pivotal interventionary strategy emerges, namely, mandating that Member States provide comprehensive, substantive rationales when declining and non-processing residence permit applications. This approach, previously advocated by scholarly voices such as Johan Rochel, represents a nuanced mechanism for introducing procedural transparency. While inevitably failing to eliminate all circumventive strategies, such a framework would substantially mitigate concerns regarding administrative arbitrariness and unwarranted discretionary practices.

Despite the current jurisprudential framework that permits nationality-based differentiation in migration policies (and does not consider them as discrimination), the critical examination undertaken in this study ultimately points towards a more profound aspiration: the progressive refinement of legal mechanisms

36 Judgment of the CJEU in case C-14/23 *Perle* of 29 July 2024, paragraph 42. See also the judgment of the Regional Court in Brno no. 41 A 23/2024—28 of 19 September 2024.

to ensure substantive equality. While non-EU foreigners may not successfully claim direct discriminatory treatment based on nationality, the analytical trajectory of our research suggests that the ongoing dialogue between legal principles, administrative practices, and fundamental rights can incrementally enhance the normative framework governing third-country nationals' mobility. The ultimate telos of such scholarly and legislative endeavours should transcend mere procedural technicalities, instead focusing on cultivating a more nuanced, transparent, and equitable approach to migration governance that genuinely respects individual dignity while maintaining the sovereign prerogatives of Member States.

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