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Visas and Non-discrimination

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Abstract

The article examines whether the EU visa policy discriminates on racial or religious grounds. That the EU's selection of countries whose nationals are subject to the visa obligation strongly correlates with global ethnic and religious demarcations fuels concerns about discrimination. The article juxtaposes the standards that have evolved in European non-discrimination law for justifying disparate racial and religious effects of immigration policies with the legislative history of the Visa list regulation. It argues that the progressive refinement of visa liberalisation dialogues by the European Commission including benchmarks on risks associated with visa travel provides no basis for allegations that current decision-making is based on ulterior motives. However, the placement of the large majority of countries on the 'black list' dates from the intergovernmental Schengen era and has never been properly justified. The article recommends to rectify this omission and to fundamentally rethink the balancing of the positive and negative criteria for the visa obligation.

Keywords

visa – discrimination – immigration – European Union – European Convention on Human Rights

1 Introduction

Recent case law from the United States demonstrates that, within the US legal order, travel bans are not outside the remit of constitutional review. Immigration restrictions for groups of aliens may be tested against human rights, including the prohibition of discrimination. Trump's travel ban for

persons from a range of predominantly Muslim countries was only found to be constitutional after it had been stripped of language that clearly entertained religious animosity. Contrary to the earlier variants, the third travel ban was considered to be ‘facially neutral toward religion’ and to have a ‘legitimate grounding in national security concerns’.¹ Even though the US Supreme Court only engaged in a marginal standard of review in view of the wide Presidential powers to control immigration—not testing and balancing the merits of the justifications²—it upheld its earlier case law that denials of a visa must respect the boundaries of the US Constitution.

It would be wrong to brand Trump’s travel bans as erratic manifestations of some outlandish president. In the European Union, the events of 2015, when more than a million migrants and refugees crossed its external borders, engendered all sorts of calls for stricter selection. European media reported extensively on what some labeled as refugee cherry-picking by a handful of eastern EU states, whose governments openly communicated that they only wanted Christians.³ And it were not only the immigration averse governments of ‘new Europe’ that engaged in religious preferentialism. Austria and Belgium launched special programmes for the resettlement of Syrian Christians in co-operation with the Syrian-Orthodox church, resulting in half and the vast majority, respectively, of resettled refugees in these two countries being Christian.⁴

Allegations that European immigration policies are discriminatory run deeper than revelations of overt instances of religious favoritism. Even though a dominant strand of literature on the history of immigration policies describes a development from ethnically selective to inclusive, non-discriminatory policies after the Second World War,⁵ some commentators maintain that race, together with class, continues to define European (and US) immigration policies to a formidable extent.⁶ They argue that EU migration law is a system of

1 US Supreme Court 26 June 2018, *Trump v Hawaii*, 583 U. S. ___ (2017), p. 29, 34.

2 *Ibid.*, p. 31–32.

3 *BBC* 19 August 2015, Migrant crisis: Slovakia ‘will only accept Christians’; *Financial Times* 21 August 2015, Poland favours Christian refugees from Syria; *Irish Times* 27 September 2016, Hungary to help Christians while rejecting Muslim migrants.

4 On Belgian practice, see: Federaal Migratiecentrum Myria, *Humanitaire Visa. Grenzen en grondrechten* (Brussels, Myria, 2017), p. 6, 27. On Austria, see e.g. *Die Presse* 7 September 2013, *Flüchtlings-Streit: ‘SPÖ redet Christenverfolgung klein’*.

5 E.g. G. Freeman, *Modes of Immigration Politics in Liberal Democratic States*, 29(4) *International Migration Review* 1995, p. 881–902; D. Cook-Martín & FitzGerald, *Liberalism and the Limits of Inclusion: Racialized Preferences in Immigration Laws of the Americas, 1850–2000*, 41 *Journal of Interdisciplinary History* 2010, p. 7–25.

6 L. Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14(1) *Columbia Journal of European Law* 2007, p. 123–30; K. Johnson, *Race Matters: Immigration*

institutionalized discrimination explicitly grounded in nationality and indirectly based on considerations of economic worth, cultural proximity or even race. In this special issue, Spijkerboer describes how the externalization of migration control, and especially the highly effective enforcement of the EU visa policy through carrier sanctions, has resulted in the discriminatory denial of access to the global mobility infrastructure, with nationalities in the Global North being able to circulate across the globe with minimal constraints, while the great majority of people in the Global South has minimal possibilities of free international travel.⁷ This discrimination, according to Spijkerboer, takes place along the lines not only of nationality but also of class, gender and race.⁸

Other legal commentators have also singled out the EU visa policy for being discriminatory—and serving at best to keep the poor out of Europe and at worst to sustain racial prejudice.⁹ One academic has coined the EU visa regime as ‘global apartheid politics’.¹⁰ The criticism inheres primarily from all African nationalities, as well as most nationalities in Asia, being subject to the visa obligation in the EU Visa list regulation (539/2001), while most of the countries whose nationals can travel into the EU without a visa are predominantly white or Christian (and often both). Concerns are amplified by the considerable leeway the EU (and previously: the Schengen states cooperating intergovernmentally) has in deciding on the issuing or lifting of a visa requirement. Although relevant criteria related to issues such as economic benefit and illegal migration are since 2004 laid down in Article -1 of the Visa list regulation (that was placed in front of all existing provisions), these criteria are not exhaustive and neither is it specified how they should be balanced. It is said that decision-making is often based on speculative arguments that cannot take away concerns that the policy is, in fact, discriminatory.¹¹

That the EU visa policy is an inherently discriminatory enterprise is a firm accusation. To stand as a matter of law, it must overcome the axiom that States, in the absence of specific treaty obligations to the contrary, are free in deciding

Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique, 2002(2) *University of Illinois Law Review* 2000, p. 525–557.

7 See the contribution of Spijkerboer in this volume.

8 *Ibid.*

9 E. Guild, *Moving the Borders of Europe*, inaugural lecture, 30 May 2001 (Nijmegen: KU Universiteit Nijmegen, 2001), p. 38; R. Cholewinski, *Borders and Discrimination in the European Union* (London: ILPA/Migration Policy Group, 2002). Also see Spijkerboer in this volume.

10 H. van Houtum, Human Blacklisting: The Global Apartheid of the EU's External Border Regime, 28 *Environment and Planning D: Society and Space* 2010, p. 957–976.

11 Guild, note 9, p. 38; Cholewinski, note 9, p. 22; V. Moreno-Lax, *Accessing Asylum in Europe* (Oxford: Oxford University Press, 2018), p. 90–94.

which immigrants may enter its territory and that, consequently, distinctions on the ground of nationality are not considered to be discriminatory.¹² Yet, the legal climate in Europe seems to be riper than when visa policies were harmonized in the 1990s to bring allegations of discrimination—and the EU legal order may even be more receptive to claims that immigration law is racially or religiously discriminatory than the US Supreme Court. This is so because in European non-discrimination law, the establishment of (indirect) discrimination does not depend on discriminatory intent and because the scope of judicial review is not necessarily curtailed in immigration cases.¹³ Further, the European Court of Human Rights (ECtHR) has, in more recent case law, shown itself to be more willing than before to look into racial aspects of immigration rules.¹⁴

The article asks the question, therefore, whether on the basis of standards developed in European non-discrimination law, the EU visa policy discriminates on the grounds of race or religion. It first establishes how the prohibition of discrimination governs distinctions made in immigration law. Even though visa obligations normally affect persons who have not yet set foot on EU soil, I am interested not so much in issues of standing (most notably, the requirement that affected persons are ‘within the jurisdiction of a State Party’¹⁵), but in the legal evolution of the notion of indirect discrimination and how it applies to nationality-based immigration distinctions that may sort prejudicial effects on other grounds such as race or religion. Most attention goes to the case law of the European Court of Human Rights (section 2), but as the EU is bound directly to concepts of non-discrimination laid down in primary and secondary EU law, the analysis also includes EU non-discrimination law (section 3). Next, the article examines whether the EU visa regime meets the standards for being branded indirectly discriminatory (section 4). This is done primarily by examining what justifications play a role in the legislative history of amendments of the Visa list regulation and in publications of the European Commission on visa liberalisation dialogues. In so doing, the article aims to

12 For an extensive historical discussion, see R. Plender, *International Immigration Law*, 2nd ed. (Dordrecht: Martinus Nijhoff, 1988), p. 1–6. See in more detail section 2 below.

13 Whether the ECtHR leaves a wide or narrow margin of appreciation to States depends on a variety of circumstances and considerations. For an extensive discussion, see G. Letsas, Two Concepts of the Margin of Appreciation, 26(4) *Oxford Journal of Legal Studies* 2006, p. 705–732. If the differential treatment is based on race, the margin is as a rule narrow. See also section 2 below.

14 ECtHR 24 May 2016, no. 38590/10 (*Biao v Denmark*). Cf. M. Möschel, The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain, 80(1) *The Modern Law Review* 2017, p. 110–132 at p. 131.

15 See the contribution of Pijnenburg in this volume.

yield a better understanding of the considerations that define the nature and often guide the development of bilateral relationships of the EU with third countries in the context of migration cooperation.

The argument developed in this article is that the EU's current rules and decision-making on issuing or lifting a visa obligation for a particular group of nationals displays neither direct nor indirect signs of discrimination. However, as the EU's visa regime is the legacy of individual Member States' visa policies that were harmonized in the Schengen era, the bulk of the countries whose nationals are subject to a visa obligation, including all countries in Africa, have never been subjected to review against the objective criteria for issuing or lifting a visa obligation that the European Commission has incrementally developed since the adoption of the Visa list regulation in 2001. Therefore, the EU continues to lie open to the charge that its visa regime may be discriminatory on the grounds of race as well as religion.

2 Migration and Non-discrimination in the ECHR

In the case law of the ECtHR, nationality is normally considered to be a suspect basis for different treatment that requires a stricter test of necessity and proportionality.¹⁶ But nationality-based distinctions in the context of immigration policy are treated by the ECtHR with less skepticism. It not only pays deference to the generally accepted right of States in international law to control the entry of aliens, but also considers distinctions made in the EU legal order between EU citizens and third-country nationals to find objective and reasonable justification in the special nature of that order.¹⁷ Moreover it finds that preferential treatment granted to nationals of a foreign state in the sphere of migration pursuant a bilateral agreement with that state does not imply that the same benefits must be granted to nationals of other states.¹⁸

Understandably, therefore, arguments that migration policy amounts to discrimination tend to invoke the logic that nationality is merely a veil for distinctions on other grounds such as race, class or religion. But the precise concepts

16 See extensively K. de Vries, *Integration at the Border: The Dutch Act on Integration* (Oxford: Hart Publishing, 2013), Ch. 8.

17 ECtHR 18 Feb. 1991, no. 12313/86 (*Moustaquim v Belgium*), par. 49; ECtHR 7 Aug. 1996, no. 21794/93 (*C. v Belgium*), par. 38; but see on the provision of state benefits ECtHR 8 April 2014, no. 17120/09 (*Dhaibi v Italy*), par. 53.

18 ECtHR 16 March 2010, no. 42184/05 (*Carson a.o. v United Kingdom*), par. 88. The case concerned the reciprocity of welfare benefits.

and rules for the legal framing of such arguments, i.e. as indirect discrimination, have long been in flux and subject to controversy.

Abdulaziz is often referred to as the case establishing that the aim of restricting migration will normally justify distinctions based on nationality and that, moreover, any resulting racial effects do not in themselves amount to racial discrimination.¹⁹ The Court's conclusions on the issue of racial discrimination were not self-evident, however, and, as I will explain in this section, based on an at the time ill-developed concept of indirect discrimination. A minority of the European Commission had in earlier stages of the proceedings considered the changes in UK immigration rules to be indirectly racially discriminatory, as their main effect was to prevent immigration from the New Commonwealth and Pakistan and because, even though the text of the rules was not racist, the legislative history showed 'clearly that in fact it was aimed at distinguishing [on the basis of] colour and national origin'.²⁰ The European Court sided, however, with Commission's majority. It concluded that there was no discrimination because the text of the immigration rules was silent on race or origin and because their essential purpose was to curtail immigration in order to protect the labour market at a time of high unemployment.²¹ That the immigration rules affected mostly persons from the decolonized countries and therefore fewer white people than others was no reason to conclude differently: 'it is an effect which derives not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others.'²² This is, by today's standards, an insufficient justification, as its underlying logic implies, by analogy, that prohibiting headgear cannot be discriminatory because it's a fact that more Muslim women and Sikhs were headgear than other persons.

On reflection, the judgments in *Abdulaziz* and *Trump v Hawaii* display a similar level of rather superficial scrutiny. In both cases, decisive for not considering the entry restrictions discriminatory was that the text was neutral and that there was *prima facie* evidence that the entry restrictions were grounded in other than discriminatory reasons. In the words of the US Supreme Court: 'when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and *bona fide* reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against

19 ECtHR 28 May 1985, nos. 9214/80, 9473/81 and 9474/81 (*Abdulaziz, Cabales and Balkandali v United Kingdom*).

20 European Commission of Human Rights, Report of 12 May 1983, nos. 9214/80, 9473/81 and 9474/81 (*Abdulaziz, Cabales and Balkandali v United Kingdom*), p. 38.

21 *Abdulaziz*, note 19, par. 85.

22 *Ibid.*

the asserted constitutional interests of U.S. citizens.²³ Likewise, in *Abdulaziz*, the European judges readily accepted the justification of protection of the labour market and did not look into what had been said about ‘colour’ and ‘race’ in the UK parliamentary debate.²⁴ Moreover, the fact that the allegations had to do with race and religion, respectively, occasioned neither court to entertain a stricter measure of review.

Although the dissenting minority of the European Commission on Human Rights had framed the facts in *Abdulaziz* as indirect discrimination, the Court refused at the time to look into the concept. The ECtHR’s historical reluctance to entertain the idea of indirect discrimination has been explained as stemming from a doctrinal opposition to making a sharp distinction between the two manifestations of discrimination.²⁵ The ECtHR fully accepted the concept only some 20 years later (probably in order to bring its case law in line with developments in EU law) in a series of cases involving the segregation of Roma children—*D.H. v Czech Republic* being the leading one.²⁶ Significantly, the ECtHR not only recognised the relevance of indirect discrimination for Article 14 ECHR, but also adopted an understanding of that notion as was (and is) prevalent in EU law. This means that the focus is on disparate impact rather than discriminatory intent: ‘a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC [...], such a situation may amount to ‘indirect discrimination’, which does not necessarily require a discriminatory intent.’²⁷ This approach differs from the evolution of indirect discrimination in the case law of the US Supreme Court, which requires proof of deliberate discrimination.²⁸ It is also different from some

23 *Trump v Hawaii*, note 1, p. 30–31.

24 Quoting *Kleindienst v Mandel*, the US Supreme Court held that ‘when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification’ against the asserted constitutional interests of U.S. citizens, *Trump v Hawaii*, note 1, p. 30.

25 R. Etinski, Indirect Discrimination in the Case-Law of the European Court of Human Rights, 47(1) *Proceedings of Novi Sad Faculty of Law* 2013, p. 57–72 at 65.

26 ECtHR 13 November 2007, no. 57325/00 (*D.H. v Czech Republic*).

27 *D.H.*, note 26, par. 184. That the ECtHR was inspired by the conceptualisation of indirect discrimination in EU law is clear from its extensive references to relevant EU law and case law of the ECJ in par. 81–91.

28 In the US Supreme Court the logic of disparate impact has been accepted in several federal acts, but the US Supreme Court has refused to extend it to its interpretation of the

earlier approaches in Strasbourg case law that had focused on what the ‘sole’ or ‘primary’ purpose of a measure had been.²⁹

More precisely, the indirect discrimination test as laid down in *D.H.* and later cases is that, in the first step, it must be demonstrated, normally on the basis of reliable and significant statistics, that there is factual—as opposed to intentional—unequal treatment. This gives rise to a presumption of indirect discrimination and shifts the burden of proof to the enacting State. That shift is necessary, according to the Court, as it would otherwise be extremely difficult for applicants to prove indirect discrimination.³⁰ In the next step, the state must demonstrate the existence of an objective and reasonable justification, and if the difference is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.³¹ One important element of the necessity and proportionality test is whether the measure is implemented in accordance with its stated non-discriminatory aims. The violation in *D.H.* was in part based on the finding that irrespective of learning problems, the vast majority of Roma children were placed in the special schools that were ostensibly created for the mentally retarded. In *Orsus v Croatia*, no indirect racial discrimination was found, because Croatia had demonstrated that the Roma children who had obtained adequate Croatian language skills were transferred to regular classes.³²

The ECtHR transposed this logic to the immigration context in *Biao v Denmark*.³³ In that case, the Court considered the more favorable regime for family reunification in Denmark for persons possessing Danish nationality for at least 28 years to amount to indirect discrimination on the ground of race or ethnic origin. Because in practice the rule excluded mostly persons who were not of ethnic Danish origin, the Court considered that the difference in treatment was not only based on nationality but sorted a clear racial effect. It next considered Denmark not to have demonstrated ‘very weighty reasons’ for justifying this different treatment based on race. The aim advanced, namely better integration of foreign spouses, was found to be based on ‘speculative

US Constitution. See, for comparative US-European observations: Möschel, note 14, p. 130; and T. Khaitain, Indirect discrimination in US and UK Law, *OUPblog* July 2015.

29 See esp. the Chamber judgment: ECtHR 7 Feb. 2006, no. 57325/00 (*D.H. v Czech Republic*), par. 48; and the dissent in the European Commission of Human Rights report in *Abdulaziz*, note 20, p. 38.

30 *D.H.*, note 26, par. 189.

31 *Ibid.*, par. 196.

32 ECtHR 17 July 2008, no. 15766/03 (*Orsus v Croatia*), par. 65.

33 *Biao*, note 14.

arguments' and 'general biased assumptions or prevailing social prejudice'.³⁴ Denmark had not shown to have based the different treatment on objective factors unrelated to ethnic origin.

To summarise, the ECtHR's case law has since *Abdulaziz* opened up to discrimination claims in the immigration context. First, its acceptance of indirect discrimination allows for probing into possible disproportionate prejudicial effects of immigration rules beyond the status of nationality. Second, if such prejudicial effect is present, the State must demonstrate that it is genuinely pursuing a legitimate aim that is not discriminatory. The intensity of judicial review ('margin of appreciation') will differ according to the discriminatory ground at issue,³⁵ with race necessitating an in depth examination of whether the difference in treatment can be reasonably and objectively justified by other reasons.

3 Migration and Non-discrimination in EU Law

EU law has traditionally been reluctant to bring third country nationals within the ambit of EU non-discrimination law. In *Vatsouras*, the Court of Justice of the European Union (CJEU) confirmed that the prohibition of nationality discrimination laid down in Article 18 TFEU only applies to differences in treatment between nationals of Member States.³⁶ Moreover, issues of entry and residence fall outside the scope of EU non-discrimination directives and some of these directives specify that they do not cover treatments arising from the legal status of third-country nationals.³⁷

To the extent that their legal position is within the scope of Union law, third-country nationals may, however, rely on the prohibition of discrimination on other grounds than nationality. Art. 21(1) of the EU Charter of Fundamental Rights, laying down the prohibition of discrimination, must be presumed to apply to all fields of EU law, including asylum and immigration.³⁸ Even though Article 21(2) of the Charter may, in view of its close linkage with Art. 18 TFEU, be read as not covering discrimination against third-country nationals, there is no bar for that category of persons to claim, for example, to be directly or

34 *Biao*, note 14, par. 125–126.

35 Extensively De Vries, note 16, p. 299–301.

36 CJEU 4 June 2009, Joined Cases C-22/08 and C-23/08 (*Vatsouras and Koupatantze*).

37 See Racial Equality Directive, 2000/43/EC, Art. 3(2) and the Employment Equality Directive, 2000/78/EC, Art. 3(2).

38 C. Kilpatrick, Article 21, in: S. Peers, T. Hervey, J. Kenner & A. Ward, *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing, 2014), p. 588–589.

indirectly discriminated for reasons of religion or race. Rather than there being legal obstacles for such claims, it appears that allegations about possible discriminatory effects of EU rules on entry and residence of third-country nationals have simply never been brought before the CJEU.³⁹

The recent judgment in *Jyske Finans* would nonetheless seem to have raised the bar for accepting claims made by third country nationals of discrimination on the ground of race or ethnicity.⁴⁰ The CJEU found that stricter conditions for obtaining a loan imposed on persons born outside the EU amounted to neither direct nor indirect discrimination in the meaning of the Racial Equality Directive because there is no 'inextricable link' between a place of birth and a person's ethnicity, and because it could not be said that the practice had the effect of putting persons of a 'particular ethnic origin' at a disadvantage compared to ethnic Danes.⁴¹ The CJEU in effect required that a specific ethnicity (which can be defined by criteria such as common nationality, faith, language, cultural and traditional origins and backgrounds⁴²) is put at disadvantage. This narrow conceptualisation of race and ethnicity has been criticized for leaving open the door to more general distinctions based on, for example, skin colour.⁴³ Under the CJEU's understanding of the Racial Equality Directive, it would seem to be acceptable to treat white people better than black people, because black people are in fact of multiple racial or ethnic origins.

It must be added however, that the judgment was based on a textual interpretation of the terms of the Racial Equality Directive, and in particular the words 'particular disadvantage'. It is at least uncertain whether a similar interpretation guides the application of Art. 21 of the Charter, which does not contain a specific reference to indirect discrimination. Moreover, as the case law of the ECtHR on non-discrimination continues to inform the scope of Art. 21 of the Charter (by virtue of Article 52(3) of the Charter), it must also be recalled that the *Biao* judgment entertained a much looser conceptualization of race or ethnicity. The ECtHR had simply accepted the dichotomy between ethnic Danes and all others to constitute racial differentiation. It must therefore be presumed that indirect discrimination, including on racial grounds, is constructed similarly in the ECHR and the Charter and that neither regime

39 In *Kamberaj*, the CJEU did accept there be to discriminatory treatment in the context of the Long-term residence directive, but that treatment concerned housing benefits and not the right of entry or residence: CJEU 24 April 2012, C-571/10 (*Kamberaj*).

40 CJEU 6 April 2017, Case C-668/15 (*Jyske Finans*).

41 *Ibid.*, par. 20 and 27.

42 *Ibid.*, par. 17.

43 E.g. S. Atrey, Race discrimination in EU law after *Jyske Finans*, 55(2) *CMLRev* 2018, p. 625–642 at p. 632–641.

precludes claims that concern global ethnographic distinctions of the type that seem to be at play in the EU visa policy.

4 Differential Treatment in the EU Visa Regime

The Visa List Regulation (Reg. 539/2001) lists the countries whose nationals must have a visa when crossing the external borders (Annex I, also known as the 'black list') as well as the countries whose nationals are exempt from that requirement (Annex II, the 'white list'). Until 2004, the criteria for determining whether a country is subject to or exempt from the visa requirement were not laid down in the Regulation's enacting provisions but only in the preamble, highlighting the discretion the Member States had previously enjoyed (especially during the formative intergovernmental Schengen negotiations) in deciding on what grounds a country should be placed on one list or the other.⁴⁴ Apart from moving the criteria to the actual legal text, the 2004 amendments added economic benefit and human rights to the list of criteria. In its current form, the relevant provision sets forth that placement on either list requires:

[A] case-by-case assessment of a variety of criteria relating, inter alia, to illegal immigration, public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the Union's external relations with the relevant third countries, including, in particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.⁴⁵

As is clear from the words 'inter alia' and the wide variety of mentioned criteria, the Union legislator still has ample leeway in black- or whitelisting a particular country. Race, religion and class are not explicitly mentioned as relevant criteria. Yet, as has been observed by multiple authors, the visa regime sorts a variety of discriminatory effects.⁴⁶ First, the allocation of countries to either list closely follows racial lines, as all African countries are listed in Annex I as

44 The lack of transparency of Schengen cooperation is widely critiqued: see e.g. M. den Boer & L. Corrado, For the record or off the record: Comments about the incorporation of Schengen into the EU, 1(4) *European Journal of Migration and Law* 1999, p. 397–418; S.K. Karanja, The Schengen Co-Operation: Consequences for the Rights of EU Citizens, 18(3) *Mennesker og Rettigheter* 2000, p. 215–222.

45 Article 1 of Reg. 539/2001.

46 See esp. Guild, note 9, p. 37–39; Cholewinski, note 9, p. 21; and Moreno-Lax, note 11, p. 90–94.

well as all Asian countries with the exception of Japan, South Korea, Malaysia, Brunei, Singapore, Taiwan, Timor-Leste, the United Arab Emirates and Israel. Second, with the exception of Singapore, Malaysia, Brunei and the United Arab Emirates, nationals from all Muslim-majority countries are subject to the visa requirement. The same is true for nationals from all countries where the majority is Hindu or Buddhist. And third, there also is a strong correlation—probably even stronger than with race or religion—between GDP per capita and the visa requirement, potentially giving rise to concerns about discrimination on the basis of class.

As set out in the previous sections, legally decisive for not considering such effects to be discriminatory is whether the EU can demonstrate that its visa policy is based on other, objective grounds. Such an assessment is not easy to make as the EU visa regime is by and large the cumulative legacy of the pre-existent individual visa policies of its Member States. When the States participating in Schengen discussed the harmonisation of visa policies in the late 1980s and early 1990s, it was first agreed to place on the negative list all third countries whose nationals were subject to a visa requirement in all Member States.⁴⁷ That list comprised 73 States as of June 1993.⁴⁸ Third countries whose nationals did not need a visa for all Member States (19 at the time) would not be placed on the black list. Of the 92 third countries in the grey area whose nationals needed a visa for at least one but not all Member States, the majority ended up on the black list, with exceptions being made for some countries with former colonial links to a Member State (especially the UK).⁴⁹ However, due to the eventual harmonised approach not being reasoned and the confidential nature of discussions in the Schengen era, it is not possible to establish the motivations for the placement of countries on the black list.

Due to the better availability of EU legislative documents, it is possible to scrutinize the white- or blacklisting of countries since the adoption of the Visa list regulation in 2001 in greater detail. The regulation was amended 16 times up to September 2018. Nine of these amendments involved changes of the country lists and almost all these changes concerned the transfer of countries from the black list to the white list.⁵⁰ It appears from information published by the European Commission that such decisions take place in two phases.

47 COM(93) 684 final; discussed in some detail in K. Hailbronner *Visa Regulations and Third-Country Nationals in EC Law*, 31(5) *CMLRev* 1994, p. 969–995 at p. 980.

48 *Ibid.*

49 S. Peers, *The Visa Regulation: free movement blocked indefinitely*, 21(2) *European Law Review* 1996, p. 150–155 at p. 152.

50 Reg. 453/2003 of 6 March 2003; Reg. 1932/2006 of 21 December 2006; Reg. 1244/2009 of 30 November 2009; Reg. 1091/2010 of 24 November 2010; Reg. 1211/2010 of 15 December 2010;



FIGURE 1 Visa requirements for third-country nationals (dark grey: visa required, grey: no visa required)

The first and least transparent phase is that of deciding to reassess the visa status of a particular country. This is done on the basis of a periodic questionnaire in which Member States are asked by the European Commission to indicate whether the annexes to the Regulation as they stand still correspond to the criteria determined by the Regulation.⁵¹ On the basis of an analysis of the responses (and especially, it seems, when the position of a country on one of the lists is questioned by multiple Member States), the Commission decides to launch a full-fledged assessment of that country against the criteria of Article -1 of Reg. 539/2001 that was cited above. Throughout the years, these assessments have been progressively formalised and involve four blocks of 'benchmarks': document security, border management and asylum, public order and security, and external relations and fundamental rights. In the case of a potential visa exemption, the process involves both negotiations with the third country (the visa liberalisation dialogue), which starts with the European Commission presenting an action plan on visa liberalisation ('VLAP') to the third country as well as a roadmap describing the measures the third country must undertake to qualify for lifting the visa requirement. The Commission periodically measures the progress that is made under the various benchmarks ('progress reports'). As to how the successive amendments of the lists relate to the criteria in the Visa list regulation, the following categorisation becomes apparent.

The first category are visa exemptions granted for geopolitical reasons. This includes the visa waiver for Balkan countries (FYROM, Montenegro, Serbia, Albania, Bosnia and Herzegovina)—some of which became EU candidate countries—and for countries that were pulled from the Russian to the Western sphere of influence (Moldova, Georgia, Ukraine).⁵² The series of progress reports adopted by the Commission that paved the way for the visa waiver measured progress according to the benchmarks cited above: (i) document security, including biometrics; (ii) irregular migration, including readmission; (iii) public order and security; and (iv) external relations and fundamental rights.⁵³ On a concrete level, the assessments took into account such matters as whether the third country issues machine-readable biometric passports, what the refusal rates are of short-stay visas, and how many nationals of the country are

Reg. 259/2014 of 3 April 2014; Reg. 509/20145 of 15 May 2014; Reg. 2017/372 of 1 March 2017; Reg. 2017/850 of 17 May 2017.

51 The procedure is set out in *inter alia* COM(2010)358 final.

52 Visa liberalisation with Moldova, Georgia and Ukraine formed part of the EU's Eastern Partnership Strategy and was seen as a means to politically align those countries to the EU and hence ensure the EU's security at its eastern border, see Joint Declaration of the Eastern Partnership Summit, Warsaw, 29–30 September 2011.

53 SEC(2011) 1075 final; SEC(2011) 1076 final; COM(2013) 808 final.

identified as illegally staying in the EU. It is obvious from the EU documents that the visa waiver for this category was foremost based on the positive indicator of the importance of close external relations and subsequently checked against the negative indicators of illegal immigration, public policy and security and respect for fundamental rights.

The second category are visa waivers granted for primarily economic reasons, most notably for Taiwanese nationals and nationals of the United Arab Emirates (UAE).⁵⁴ Reasons cited for transferring the United Arab Emirates to Annex II were the trade volume between the EU and the UAE, the huge number of direct flights to and from the EU, the large number of European nationals living in the UAE and 1.6 million Europeans visiting the UAE each year.⁵⁵ It was also observed that the UAE was making progress in the field of human rights and that, on the basis of indicators including a low refusal rate of visas and the issuing of biometric passports by the UAE, it did not present a risk of clandestine immigration.⁵⁶ For Taiwan, the decision to grant visa free travel was justified by Taiwan being a major trading partner of the EU, the positive economic impact the visa exemption would have on EU-Taiwanese relations, reinforcing regional coherence in view of the existing visa waivers for similar countries such as Hong Kong, Macao, Japan, South Korea and Singapore; and the risk of illegal immigration from Taiwan being very low (as demonstrated by low refusal rates of Taiwanese visa applications as well as of Taiwanese nationals at the EU border).⁵⁷

The third category are a whole range of island States in various parts of the world which were whitelisted in 2006 and 2014: Antigua and Barbuda, the Bahamas, Barbados, Dominica, Grenada, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Trinidad and Tobago (all in the Caribbean), Mauritius, the Seychelles (Indian Ocean), Kiribati, the Marshall Islands, Micronesia, Nauru, Palau, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu (Pacific). The visa exception was primarily justified on the ground that those countries did not present any risk of illegal immigration or a threat to public policy and security.⁵⁸ But also important was that these islands are popular holiday destinations for Europeans (it was expected that the visa exemption would be reciprocated through visa waiver agreements) and the

54 Reg. 509/2014 (United Arab Emirates) and Reg. 1211/2010 (Taiwan).

55 EP Recommendation on the draft Council decision on the conclusion of the Agreement between the European Union and the United Arab Emirates on the short-stay visa waiver, 16 November 2015, no. A8-0324/2015.

56 *Ibid.*

57 COM(2010) 358 final.

58 See recital 4 of Reg. 509/2014.

practical difficulty that in some of these islands, none of the Member States offered consular services.⁵⁹

The fourth and last category are a number of South American countries that were transferred from Annex II to I (Ecuador and Bolivia) and vice versa (Peru and Colombia). Most South American countries enjoy visa free travel to the EU, which is explained by the close cultural and economic ties most of these countries still have with their former colonial masters (especially Spain).⁶⁰ In the EU visa policy, these bilateral ties are however balanced with risks of illegal immigration. Ecuador and Bolivia were transferred to the first Annex on the basis of figures and statistics provided by Member States on refusals at the border, returns of illegally staying persons, convictions for criminal offences and nationals of other Latin American countries subject to the visa requirement fraudulently acquiring Bolivian and Ecuadorian passports.⁶¹ Peru and Colombia were transferred to Annex II by inverse reasoning: both countries had experienced considerable economic growth, there had been an increase in visa applications, and statistics showed Peruvians and Colombians to be generally bona fide travelers (low visa refusal rates, high return ratio of illegally staying persons, low number of (unfounded) asylum applications). Moreover, the excellent cooperation on return by both the Peruvian and Colombian authorities was cited.⁶²

The amendments of the Visa list regulation that were undertaken since 2011 provide no evidence that the EU visa regime is based, directly or indirectly, on racial or religious preferentialism. On the contrary, the very decisions to whitelist Taiwan and the United Arab Emirates seem to demonstrate that the visa regime is not the product of fear of Islam or people of different skin colour.

Yet, several commentators uphold that the justifications advanced by the EU for imposing a visa requirement fall short of the standards developed by European courts on proportionality and necessity. Guild and Cholewinski, writing respectively shortly before and after the adoption of the Regulation in 2001, argued that reliable statistics on illegal immigration are notoriously difficult to arrive at and that justifications relying on such statistics are therefore inherently flawed.⁶³ More fundamentally, they advance that risk assessments should always be made on an individual basis instead of being grounded in

59 European Commission Press Release 7 November 2012, *A smarter visa policy to facilitate tourism to the EU*, COM(2006) 84 final.

60 Cholewinski, note 9, p. 26.

61 COM(2002) 679 final; COM(2006) 84 final.

62 COM(2014) 665 final; COM(2014) 663 final.

63 Cholewinski, note 9, p. 22 et seq; Guild, note 9, p. 34–35.

national profiling.⁶⁴ Further, they make the point that while amendments of the visa lists must be based on the (non-discriminatory) criteria laid down by the EU legislator, the harmonisation of the lists by the Schengen States was not explicitly governed by these criteria and that there has never been an explanation for the placement of each and every country on the black list. Some of these criticisms have recently been echoed by Moreno-Lax.⁶⁵

On the basis of the procedures and benchmarks that have since been developed by the European Commission, I find only some of these arguments persuasive. As was explained in the previous sections, it is indeed the case that immigration policy that sorts a clear racial or religious discriminatory effect requires very weighty justifications. That does not mean, however, that immigration policy may not be organised on the basis of nationality, which clearly follows from Strasbourg case law.⁶⁶ Further, as Cholewinski admits, a distinction must be made between the visa requirement and the decision to grant or refuse a visa to an individual.⁶⁷ The latter decision is based on an individual risk assessment, which implies that the actual entry decision is not based on national profiling but on individual circumstances. Moreover, although the reliability of some data on illegal immigration may well be questioned, it is rather sweeping to argue that such data is inherently problematic. That seems to be tantamount to saying that risks of illegal immigration can never play a role in immigration policy. Especially in the more recent visa liberalisation dialogues, the European Commission works with detailed and concrete benchmarks relating to illegal migration, and takes stock of progress by measuring changes to law and policy of the third country as well as statistics and data provided by Member States on visa overstaying, visa refusal, illegal border crossings, return ratios, etcetera. It may be that refusal rates of, say, Taiwanese visa applications are not procured by the Member States on the basis of uniform criteria, but it does not follow that such rates may not form part of an objective assessment, together with other criteria, of the risk a particular group of nationals poses in terms of illegal immigration.

I do not think, accordingly, that the legislative history on amending the visa list regulation displays discriminatory intent, nor that it fails to provide sufficient objective economic and other legitimate justifications for visa restrictions that sort discriminatory effects. Although visa liberalisation processes

64 *Ibid.*

65 Moreno-Lax, note 11, p. 90–92.

66 E.g. *Abdulaziz*, note 19, par. 84: ‘Whilst a Contracting State could not implement “policies of a purely racist nature”, to give preferential treatment to its nationals or to persons from countries with which it had the closest links did not constitute ‘racial discrimination’.

67 Cholewinski, note 9, p. 22.

indeed raise quite fundamental questions on how certain trade-offs are being made (such as the weight attached to the human rights component and the emphasis on readmission⁶⁸) as well as on the influence the EU wields over domestic policies of third States,⁶⁹ there is no evidence that the European Commission's assessments are guided by ulterior motives.

Importantly, however, this conclusion does not touch upon the bulk of countries whose placement in Annex I is unchanged since the harmonization of visa policies by the Schengen States. As was observed above, the best that can be said about that harmonisation process is that the minimum common denominator served as first organisational principle and that in the ensuing negotiations on the fate of the 'grey countries', special attention was given to countries whose nationals were subject to a visa obligation in some Member States but had specific historical bonds with another one. But only the outcome has been made public. When the European Commission consolidated the common Schengen policy in its proposal for the current Visa list regulation, it simply adopted the common lists that had been agreed and only gave specific reasons for why it proposed to transfer Bulgaria and Romania to Annex II.⁷⁰

This is problematic because, under the logic of Strasbourg case law, the burden rests, in view of the racial and religious effects of the make-up of the visa lists, on the EU to demonstrate that the placement of countries in Annex I is grounded in objective and reasonable non-discriminatory justifications. It may well be that there are sound economic reasons or concerns relating to illegal immigration that justify a visa obligation for all African nationalities, but the EU needs to be forthcoming with that justification. The lack of such a justification stems not only from the Schengen negotiations being clouded in secrecy, but also from how the lists are being reviewed. As explained above, this is done on the basis of periodically compiled Member State suggestions for changing the visa status of a particular nationality instead of an integral review of all countries on the lists. In view of the clear discriminatory effects and the evidentiary burden on the EU to refute allegations of discrimination, the argument to change this practice is rather potent.

68 S. Dedja, Human Rights in the EU Return Policy: The Case of the EU-Albania Relations, 14(1) *European Journal of Migration and Law* 2012, p. 95–114.

69 F. Trauner & E. Manigrassi, When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose: The EU Visa Free Dialogues after the EU's Experience with the Western Balkans, 16(1) *European Journal of Migration and Law* 2014, p. 125–145.

70 COM(2007) 27 final.

5 Conclusion

It has long been thought that imposing visa obligations belongs to the executive discretion of States.⁷¹ This followed the traditional legal understanding that distinctions based on nationality are part and parcel of any immigration policy. The US case law on President Trump's successive travel bans has showed that this discretion is not unfettered—that judges may pierce through the veil of nationality in search for other, illegitimate policy rationales. This lesson should take root in the European legal order as well. The concept of indirect discrimination is now sufficiently developed in European case law to test the legality of distinctions that are formally grounded in nationality but also sort disproportionate distortions on prohibited grounds such as race and religion.

Part of that test, as established in the case law of the ECtHR and CJEU, is that authorities must demonstrate that any such distortions are justified by other legitimate reasons and that the discriminatory effects are necessary and proportionate. This has serious ramifications for the EU visa regime, in view of its disparate racial and religious impact. A review of the EU's implementation of the Visa list regulation, in particular the visa liberalisation dialogues that have been undertaken since the adoption of the regulation in 2001, shows that amendments of the lists are primarily guided by geopolitical and economic self-interest, whereby illegal immigration and public order function as contra-indicators. Even though it can be argued that some amendments have been scarcely motivated or that the balancing of the different criteria is not always clear,⁷² the EU has developed—in general—a system of review that is based on non-discriminatory benchmarks and objective data and statistics. The legislative history, including progress reports and explanatory memoranda, does not display the sort of prejudice or speculative arguments that resulted in a finding of racial discrimination in the *Biao* case.

The onus lies on the EU to demonstrate that these justifications also apply to the vast majority of countries whose place on the lists has never changed since the initial harmonization of visa policies and, accordingly, has never been tested against the current legal criteria, in accordance with the Commission's mechanisms. One wonders what would happen if, similar to the recent court actions in the US, legal challenges are brought before courts in Europe against the placement of a particular country on the EU's black list. What if, for example, a person of Gambian nationality, legally resident in Belgium, whose mother, residing in Gambia, was refused a visa to visit him for family reasons, would

71 Plender, note 12, p. 5.

72 Cholewinski, note 9, p. 22 et seq; Moreno-Lax, note 11, p. 89–90.

argue before a Belgian court that the visa obligation for Gambian nationals is racially discriminatory? In such a case, the Belgian immigration authorities are likely to be asked why the EU requires Gambians to have a visa, but the EU has never felt the need to be forthcoming with that justification.

Also in the absence of litigation, it is important that the EU takes away concerns about discrimination by submitting the visa lists to an integral review. A matter that lies open and that should be debated in the context of such an exercise is how the criteria in favour of a visa waiver (economy, geopolitical reasons, bilateral relations) should be balanced against the negative indicators (public order, illegal migration). Presumably, the positive indicators and the negative ones are communicating vessels, which balance out economic and other advantages with the risks of visa free travel. In the current system, the balance tilts highly in favour of the positive indicators. African countries are simply never nominated by Member States for the visa exception because there are no strong economic or geopolitical imperatives to do so. But why is it that countries whose nationals may in theory pose no risk of public order or illegal immigration whatsoever are subject to a visa obligation? The current visa regime perpetuates global economic inequalities because only countries that have become (economically) interesting enough for the EU qualify for a visa waiver. Changing this default position would not only help breaking global economic injustices, but could also put incentives in place for countries that are currently blacklisted to meet the EU's benchmarks on public order and illegal immigration so that visa free travel can become a possibility.