

# Work-Based Pathways to Refugee Protection under EU Law: Pie in the Sky?

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## Abstract

This article focuses on the contested policy idea of utilising labour migration as a complementary pathway for refugees in the EU. Advocates view this as a “triple win” solution that empowers refugees, boosts economies, and supports post-conflict reconstruction. Yet, it re-mains unclear to what extent the EU labour migration *acquis* provides an adequate basis for such a novel approach. This paper provides a comprehensive assessment by combining an analysis of EU law with empirical data from interviews with international, EU and national stakeholders, such as public officials, employers and NGOs. It argues that such an approach requires amongst others, Member States’ readiness to make existing admission procedures more accessible for refugees, incentives for employers, and willingness of potential candidates for complementary pathways to accept initial limitations of some of the rights they would otherwise enjoy as refugees. The article concludes that despite the policy potential of work-based channels to create access to the EU for people in need of protection, at best a select group of highly-skilled refugees will be able to make use of the EU labour migration *acquis* in their ‘journey to a durable solution’.

## Keywords

complementary pathways for refugees – EU labour migration law – refugee protection – work-based complementary pathways for refugees – labour migration opportunities for persons in need of protection

## 1 Introduction

The growing externalisation of border controls<sup>1</sup> and the plethora of deterrence measures developed in the past decades<sup>2</sup> – such as visa requirements and carrier sanctions – have prevented refugees from using regular entry channels to seek asylum in the Global North. The surge in maritime arrivals and associated tragedies in the aftermath of the Arab Spring gave new impetus for the idea of creating legal pathways to protection, as part of the longstanding debates by the international community on global refugee responsibility sharing, alongside the lack of access to asylum.<sup>3</sup> These include traditional instruments for transferring refugees from first countries of asylum to host countries, such as resettlement. However, they also cover new instruments complementary to resettlement, which are based on labour migration, education and family reunification, as well as community sponsorship of refugees, supported by local communities in the host countries who serve as guarantors of the refugees' settlement.<sup>4</sup>

This article focuses on the contested policy idea of utilising labour migration as a complementary pathway for refugees. On one hand, its proponents see it as a “triple win” solution expected to empower refugees to take control of their lives in a dignified manner, boost the economies of host states in demographic decline by providing their labour markets with needed skills, and support post-conflict reconstruction in refugees' countries of origin.<sup>5</sup> Authors have documented that some of these pathways based on existing migration

1 See Violeta Moreno-Lax, *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017).

2 James C. Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 *Refugees* 40.

3 See for instance Gregor Noll, 'From “Protective Passports” to Protected Entry Procedures? The Legacy of Raoul Wallenberg in the Contemporary Asylum Debate' (2003), UNHCR Working Paper No. 99; Katy Long, 'From Refugee to Migrant? Labor Mobility's Protection Potential', Migration Policy Initiative (October 2016) 4–5. European Centre for the Development of Vocational Training (CEDEFOP), 'Creating Lawful Opportunities for Adult Refugee Labour Market Mobility' (2019) 17.

4 New York Declaration for Refugees and Migrants, A/RES/71/1, para. 79, and the annexed Comprehensive Refugee Response Framework (19 September 2016). United Nations, Report of the United Nations High Commissioner for Refugees, Part II: Global Compact on Refugees, General Assembly Official Records Seventy-third Session Supplement No. 12 (A/73/12 (Part II)), New York, 2018 (GCR), paras 94–96. See also UNHCR, 'Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations' (2019).

5 UNHCR (n 4). See also Elizabeth Collett, Paul Clewett and Susan Fratzke 'No Way Out?: Making Additional Migration Channels Work for Refugees', Migration Policy Institute Europe (2016); CEDEFOP (n 3).

avenues such as labour mobility, have already been used by refugees,<sup>6</sup> although often through informal channels due to legal, administrative and practical challenges.<sup>7</sup> Furthermore, when available legal channels are accessible, some refugees who are safe from conflict prefer not to seek asylum.<sup>8</sup> On the other hand, it has been argued that such an approach lacks ‘labour market realism’<sup>9</sup> and in order to be feasible, some of the refugees’ rights should be limited.<sup>10</sup>

Along with being promoted by the International Labour Organisation<sup>11</sup> and as part of the 2018 UN Global Compact on Refugees (GCR),<sup>12</sup> the idea to develop “work-related schemes” as complementary pathways to protection has also entered the EU policy debate.<sup>13</sup> Yet, due to the sensitivity of mixing labour migration and refugee matters, lack of formal EU action and political will of Member States to engage in such initiatives,<sup>14</sup> not much has happened since this notion was introduced. The proposal for a European Pact on Migration and Asylum,<sup>15</sup> the increasing number of studies on this topic<sup>16</sup> as well as the

6 Katy Long and Sarah Rosengaertner, ‘Protection through Mobility: Opening Labor and Study Migration Channels to Refugees’, Migration Policy Initiative (October 2016) 7.

7 OECD & UNHCR, ‘Safe pathways for Refugees. OECD-UNHCR Study on third country solutions for refugees: family reunification, study programmes and labour mobility’ (2018) 23.

8 Long and Rosengaertner (n 6) 7; Long (n 3) 3. See also, Alice Bloch, ‘Zimbabweans in Britain: Transnational Activities and Capabilities’ (2008) *Journal of Ethnic and Migration Studies*, 34 (2), 287–305.

9 Philip Martin and Martin Ruhs, ‘Labour Market Realism and the Global Compacts on Migration and Refugees’, (2019) *International Migration* 57 (6).

10 Martin Ruhs, ‘Can Labor Immigration Work for Refugees?’ (2019) *Current History. A Journal of Contemporary World Affairs*, 118 (804), 26.

11 ILO, Guiding principles on the access of refugees and other forcibly displaced persons to the labour market, (2016) para 31.

12 GCR (n 4) paras 94–96.

13 European Union Agency for Fundamental Rights, *Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox* (2015); European Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM (2016) 197; European Commission, *Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment*, COM (2016) 378 final, 14.

14 Interview with representative of international organisation, Belgium, April 2021; Interview with representative of international organisation, Austria, March 2021.

15 European Commission, *Communication on a New Pact on Migration and Asylum*, COM (2020) 609 final, 22–23.

16 CEDEFOP (n 3); See also the PATH project: <https://intermin.fi/en/-/the-study-surveys-what-types-of-work-and-study-based-pathways-for-legal-migration-are-available-in-different-countries-for-use-by-people-in-need-of-international-protection> accessed 2 May 2021.

technical assistance provided through EU funding to Member States,<sup>17</sup> could lead to the introduction of more initiatives in this regard.

EU labour migration *acquis* provides legal pathways for few categories of migrants only,<sup>18</sup> namely highly skilled Blue Card holders,<sup>19</sup> researchers,<sup>20</sup> intra-corporate transferees (ICTs)<sup>21</sup> and seasonal workers.<sup>22</sup> These are complemented by Member States' existing immigration channels thus covering the full spectrum of migrants based on national law or a combination of EU and national law, as some of the legal migration directives allow for parallel national schemes. An added value of using the EU labour migration *acquis* as a complementary pathway is the obligation for Member States to grant 'every facility to obtain requisite visas' to applicants who fulfilled the admission criteria and obtained a positive decision from the national authorities, which can facilitate access to the EU. Furthermore, most of the directives afford intra EU mobility, even if through somewhat cumbersome procedures. Therefore, the EU labour migration *acquis* has the potential to provide opportunity for legal secondary movements for refugees who currently cannot exercise free

17 See the AMIF Funding Call 2020: Complementary pathways for protection and integration available at <https://ec.europa.eu/migrant-integration/news/amif-funding-call-2020-complementary-pathways-for-protection-and-integration> accessed 2 November 2020.

18 The article's focus is on instruments granting a right to be admitted for employment. Therefore, 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 [2011] OJ L 343 (SPD) is only considered in section 6.3. See further Kees Groenendijk, 'Equal treatment of workers from third countries: the added value of the Single Permit Directive' (2015) ERA Forum 16, 549–550.

19 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17 (BCD).

20 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 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 [2016] OJ L 132 (SRD).

21 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 [2014] OJ L 157 (ICTD).

22 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94 (SWD).

movement rights until they obtain long-term residence or naturalise in a given Member State.<sup>23</sup>

This article examines whether the current EU labour migration *acquis* could provide an adequate basis for entry and stay in the EU for people in need of protection and could be utilised for the development of complementary pathways. It argues that despite the policy potential of work-based channels to create access to the EU for people in need of protection, only a limited group of highly-skilled refugees will be able to make use of the EU labour migration directives in their 'journey to a durable solution'. The article commences with a discussion of the definitions and target groups and international and EU standards applicable to work-based complementary pathways. Then, it focuses on the policy conditions for facilitating such pathways under the EU labour migration directives. Finally, it discusses the rights of beneficiaries of such pathways. In so doing, it examines the existing differences in rights between refugees, subsidiary protection status holders<sup>24</sup> and asylum seekers<sup>25</sup> on one hand, and labour migrants on the other. In order to come full circle, it combines analysis of EU law and policy with empirical data from interviews with international, national and EU stakeholders.<sup>26</sup>

## 2 Work-Based Complementary Pathways to Refugee Protection: Definitions and Target Groups

Before analysing the potential of the EU labour migration *acquis* to serve as a complementary pathway into the EU, this article clarifies the concept's exact meaning, its potential beneficiaries, and provides a working definition. The

23 Examining intra-EU mobility rights for third country nations under the EU labor migration *acquis* is out of the scope of this article. For a concise account, see Tesseltje de Lange and Kees Groenendijk, 'The EU's legal migration *acquis*: Patching up the patchwork', European Policy Centre Issue Paper (2021) 20–23.

24 Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337 (QD).

25 Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180 (RD).

26 More than 40 semi-structured interviews have been conducted with EU and national public officials, representatives of international organisations and NGOs, experts, trade unions and employers' organizations in the period October 2020–June 2021 as part of the project 'Refugees as Migrant Workers. Labour Migration as Alternative for Refugee Protection in the EU Context?.'

GCR recommends that, along with resettlement, countries should offer ‘labour mobility opportunities for refugees, including through the identification of refugees with skills that are needed in third countries.’<sup>27</sup> UNHCR’s Strategy on Resettlement and Complementary Pathways defines complementary pathways as safe and regulated avenues for refugees that supplement resettlement by providing lawful stay in a third country where their international protection needs are met. In addition, work-based complementary pathways are ‘safe and regulated avenues for entry or stay in another country for the purpose of employment, with the right to either permanent or temporary residence.’<sup>28</sup>

As the European Commission’s recommendation suggests, such pathways may be part of existing immigration systems which could be adapted to facilitate refugees’ access to labour migration options<sup>29</sup> or create incentives for employers.<sup>30</sup> Another approach is to develop temporary and permanent skilled entry arrangements specifically aimed at supporting refugees.<sup>31</sup> Interested states could consider, for instance, a new type of visa or a permit based on a hybrid status.<sup>32</sup> Additional possibility is to use existing humanitarian channels, such as humanitarian visas, humanitarian admission programmes and private or community-based sponsorship programmes, to provide a secure status to refugees and then facilitate access to employment.<sup>33</sup>

The second issue to be addressed concerns the target groups of work-based complementary pathways. As Wood underlines, UNHCR’s definition differs at times and, along with refugees includes others ‘in need of international protection’, encompassing those yet without a formal refugee status recognition but facing risks in case they return to their countries of origin.<sup>34</sup> Such a broad definition reflects the realities on the ground related to practical

27 GCR (n 4) para 95.

28 UNHCR (n 4) 10.

29 European Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, C (2020) 6467 final, Brussels (2020) 10. See also UNHCR (n 4) 10.

30 Ruhs (n 10) 24. On the Canadian policy example, see UNHCR & Government of Canada, ‘The Economic Mobility Pathways Project – Policy Principles and Lessons Learned: A Canadian Perspective on Complementary Pathways for Admission’ (2019).

31 Ruhs (n 10) 24. UNHCR (n 4).

32 See for instance the Displaced Talent Visa idea in the UK proposed by Talent Beyond Boundaries, <https://www.talentbeyondboundaries.org/blog/house-of-lords-debate-displaced-talent-visa-in-the-uk> accessed 5 November 2020.

33 CEDEFOP (n 3) 40.

34 Tamara Wood, ‘The role of ‘complementary pathways’ in refugee protection’, Kaldor Centre for International Refugee Law, UNSW Sydney (2020) 25–26. Interview with UNHCR official, April 2021.

challenges in status determination due to lack of sufficient resources and delays in large-scale displacement situations.<sup>35</sup> It is also applied by some of the existing work-based complementary pathways and relies on the use of presumptions that, for instance, Syrians in Jordan or Lebanon are in need of international protection.<sup>36</sup> In addition, the new Pact<sup>37</sup> and an interview with a European Commission officials indicate that the EU approach will similarly cover ‘people in need of protection’.<sup>38</sup> This means that in reality not only individuals with a refugee status in first countries of asylum but also *de facto* refugees could be covered.<sup>39</sup>

This article examines work-based complementary pathways understood as legal channels for entry and stay in a Member State based on its existing immigration system for the purpose of employment, targeting people in need of protection in first countries of asylum: those with a refugee status in a third country as well as those without a formal refugee status recognition but facing risks in case they return to their countries of origin.<sup>40</sup> For clarity, the individuals falling under this definition, will be referred to in the text as beneficiaries of complementary pathways.

### 3 Protection Safeguards Based on International, Regional and EU Standards

The starting point of this article is that complementary pathways could provide ‘a journey to a durable solution’.<sup>41</sup> This entails that the skills and experience gained through temporary labour migration can with time, support

35 Wood (n 34) 25–26.

36 For instance, UNHCR Lebanon is open to supporting and facilitating labour mobility programs without requiring UNHCR registration or refugee status determination for people in refugee-like circumstances, or people in need of international protection. See Marina Brizar, Report on 2018 Churchill Fellowship to Explore Labour Mobility as a Complementary Pathway to Humanitarian Resettlement (2019). The Canadian model, however, requires proof of UNHCR registration in order to allow candidates to participate. See UNHCR & Government of Canada, ‘The Economic Mobility Pathways Project – Policy Principles and Lessons Learned: A Canadian Perspective on Complementary Pathways for Admission’ (2019).

37 European Commission (n 15) 22–23.

38 Interview with European Commission officials, April 2021.

39 For more details, see Wood (n 34) 25–26.

40 This naturally excludes people fleeing directly from persecution in their countries of origin.

41 Wood (n 34) 27. See also UNHCR (n 4).



refugees in finding further employment opportunities and accessing long-term residence. However, such an approach also requires the consideration of ‘protection safeguards’<sup>42</sup> based on human rights standards and rights guaranteed by international and EU law that ensure that the rights of its beneficiaries are respected and that these pathways ‘yield a net benefit to refugees in their search for a solution to their plight.’<sup>43</sup> Furthermore, such safeguards need to be part of complimentary pathways because without the declaratory act of being granted international protection by the host Member State, refugees would have only rights limited to their legal status as a worker.<sup>44</sup> Dual status under EU law is currently achievable only if a person is admitted as a refugee, for instance through resettlement, or applies for international protection in the EU, and then gains additional rights as a worker under national or EU law, or as a long-term resident.<sup>45</sup>

These standards include the right to seek asylum<sup>46</sup> and protection against *refoulement*, contained in several human rights treaties and EU law<sup>47</sup> and considered as a customary international law and *jus cogens* rule.<sup>48</sup> Beneficiaries

42 GCR (n 4) para 94.

43 Wood (n 34) 27.

44 CEDEFOP (n 3) 49. See further James C. Hathaway and Michelle Foster. *The Law of Refugee Status* (Cambridge University Press 2014) 25–33.

45 Based on Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2003] OJ L 132. On the double status, see further Kees Groenendijk, ‘Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court’s Approach’ (2014) *European Journal of Migration and Law* 16 (3), 330.

46 See Article 14 (1) of the Universal Declaration of Human Rights (UDHR), UNGA Res. 217 A (III), 10 December 1948. See further James C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press 2005) 301–302; María-Teresa Gil-Bazo, ‘Asylum as a General Principle of International Law’ (2015) *International Journal of Refugee Law* 27 (1) 3.

47 Article 33 on prohibition of expulsion or return (“refoulement”) of the Convention Relating to the Status of Refugees (Refugee Convention), 28 July 1951, 189 UNTS 137. Articles 6 and 7 of the International Covenant on Civil and Political Rights and Article 3 (1) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also contain protection against refoulement. On EU law, see Articles 18 and 19 of the EU Charter of Fundamental Rights (EUCFR). For more, see Maarten den Heijer, ‘Article 18 – Right to Asylum’, 562–585 and Elspeth Guild, ‘Article 19 – Protection in the Event of Removal, Expulsion or Extradition’, 586–605 in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Eds.) *The EU Charter of Fundamental Rights: A Commentary* (Nomos, Baden-Baden 2014). See also Article 78 TFEU and Case C-175/08 – Salahadin Abdulla and Others, ECLI:EU:C:2010:105, paras. 52–54.

48 For discussion, see Cathryn Costello and Michelle Foster, ‘Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test.’ In: Maarten den Heijer and Harmen



of work-based complementary pathways benefit also from the right to work reflected in international<sup>49</sup> and regional human rights instruments,<sup>50</sup> as well as the EU Charter.<sup>51</sup> Other standards applicable to all workers pertain to equality of treatment and non-discrimination in areas such as conditions of work and remuneration, forming and joining trade unions and social security rights.<sup>52</sup> Finally, access to family reunion,<sup>53</sup> and a clear path to permanent residence, such as through renewable permits or permits with long validity, as provided under EU law,<sup>54</sup> are additional safeguards that need to be considered when developing complementary pathways.

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van der Wilt (Eds.) *Netherlands Yearbook of International Law* (2015), vol 46. T.M.C. Asser Press, The Hague.

- 49 Article 23 UDHR; Article 6 of the International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200 A (XXI), 16 December 1966. See also UN Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (Article 6), 6 February 2006, E/C.12/GC/18, para. 23; Recognized refugees benefit also from Articles 17–19 of the Refugee Convention.
- 50 See Article 1 of the European Social Charter (Revised), ETS No163, 3 May 1996. For discussion and the case law of the European Court of Human Rights, see Cathryn Costello and Colm O'Cinnéide, 'The Right to Work' in Cathryn Costello, Michelle Foster and Jane McAdam (Eds.), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).
- 51 Article 15 (1) EUCFR. See further Diamond Ashiagbor, 'Article 15 – Freedom to Choose an Occupation and the Right to Engage in Work' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Eds.) *The EU Charter of Fundamental Rights: A Commentary* (Nomos, Baden-Baden 2014) 423–435.
- 52 See Article 6 (1) of Convention concerning Migration for Employment (Revised 1949), C097, 1 July 1949, and Article 10 of Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, C143, 24 June 1975. On international standards, see further Shauna Olney and Ryszard Cholewinski, 'Migrant Workers and the Right to Non-discrimination and Equality' in Cathryn Costello and Mark Freedland (Eds.) *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014). On EU law, see Article 15 (3) EUCFR and Ashiagbor (n 51) 423–435.
- 53 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251 provides the general rule in this respect. On the international standards, see Hélène Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe' in Vincent Chetail and Céline Bauloz (Eds.) *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014). For a detailed account of the European standards, see Sergio Carrera and Zvezda Vankova, 'Human Rights Aspects of Immigrant and Refugee Integration Policies. A comparative assessment in selected Council of Europe member states at the request of the Special Representative of the Secretary General on Migration and Refugees of the Council of Europe' (Strasbourg 2019).
- 54 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16 provides the general rule in this respect.

#### 4 Facilitating Work-Based Complementary Pathways into the EU: Why (Not)?

Work-based complementary pathways can provide access to the EU for people in need of protection through the facilitation of existing work-based channels, and thus reduce the need for refugees to undertake irregular journeys by offering an orderly alternative, albeit limited in numbers. This would also have an effect on the smuggling networks that the EU aims to curb.<sup>55</sup> As the new Pact demonstrates, however, the European Commission does not envisage the development of work-based complementary pathways at EU level and intends to solely support interested Member States to explore such initiatives alongside resettlement pledges and other legal channels.<sup>56</sup> The secondary role of the EU in this regard is also evident from the pending Proposal for Recast of the BCD, which due to political and legal reasons will not cover refugees residing in first countries of asylum<sup>57</sup> as its personal scope will be extended to apply exclusively to refugees under the Qualification Directive.<sup>58</sup> Apart from being a missed opportunity to create a legal pathway into the EU for highly skilled individuals needing international protection, this means that initiation of work-based complementary pathways will depend entirely on the willingness of interested Member States,<sup>59</sup> active engagement of employers and other key stakeholders, and informed decision of the people in need of protection. Therefore, this section of the article focuses on these pertinent issues.

In order for Member States to be willing to give refugees access to existing immigration programmes and build political support for such initiatives, they need to experience labour market shortages and employers' demand for new workers.<sup>60</sup> This means that, especially after the Covid 19 pandemic, mainly Member States with low unemployment rates and persisting labour market needs would be willing to initiate such work-based pathways.

Furthermore, any discussion involving labour migration as a complementary pathway has to also take into account the central role of employers and their labour needs,<sup>61</sup> since 'humanitarian considerations typically play little role in the labour immigration policies of high-income countries'.<sup>62</sup> Therefore, another central issue is how employers would be informed about potential

55 See Conclusions from the European Council Meeting, para 5, EUCO 9/18 (June 2018).

56 European Commission (n 15) 22.

57 Interview with European Commission officials, April 2021.

58 See Draft Article 3 of the Proposal.

59 Long and Rosengaertner (n 6) 27.

60 Ibid.

61 See further GCR (n 4), paras 70 and 95.

62 Martin and Ruhs (n 9) 82.

beneficiaries of complementary pathways based in first countries of asylum and what would encourage them to recruit them. As Ruhs stresses, employers will only do so if the refugees are the most suitable candidates for the job with necessary skills and work experience, and if associated recruitment and training costs are reasonable.<sup>63</sup> Additionally, they will be more likely to hire potential beneficiaries of complementary pathways if the process is not too difficult or cumbersome.<sup>64</sup> Therefore, the engagement of the state through its public agencies can facilitate the process of recruitment and incentivise employers to employ such workers.

The outcomes of the policies to date, although not extensive, indicate that potential applicants also face challenges accessing information about available vacancies and labour migration channels in general.<sup>65</sup> This is even more complex in the EU context, as migrants gain access to one Member State, even though the EU labour market currently consists of twenty-seven different national markets, and the common rules apply to twenty-four.<sup>66</sup> UNHCR underlines that access between employers and potential beneficiaries of work-based complementary pathways could be facilitated through videoconferences, specific websites or recruitment specialists.<sup>67</sup> In line with that, the Commission encourages Member States to use the EU Skills Profile Tool for Third Country Nationals<sup>68</sup> to support skill profiling of potential candidates<sup>69</sup> and envisages the creation of a Talent Pool to facilitate matching of migrants interested to work in the EU and employers in the Member States.<sup>70</sup>

However, this cannot be achieved without the active engagement of relevant stakeholders from Member States and countries of first asylum. National coalitions in Member States consisting of responsible state bodies, employers' organisations, trade unions and NGOs can ensure that there is sufficient

63 Ruhs (n 10) 24.

64 Long and Rosengaertner (n 6) 31.

65 UNHCR & Government of Canada (n 30); Long (n 3) 17.

66 Elspeth Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration', in Cathryn Costello and Mark Freedland (eds.) *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press, 2014) 117.

67 UNHCR, Written Contribution to the Public Consultation on the European Union's legislation on the legal migration of non-EU citizens (Fitness Check on EU legal migration legislation), 8 [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/201712\\_unhcr\\_legal\\_migration\\_consultation.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/201712_unhcr_legal_migration_consultation.pdf) accessed 3 April 2020.

68 European Commission (n 29) 6.

69 Available at <https://ec.europa.eu/migrantskills/#/> accessed 2 May 2021.

70 See [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum/skills-and-talent\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum/skills-and-talent_en) accessed 2 May 2021.

support to make such pathways available in a more organised and sustainable way.<sup>71</sup> Some of these key stakeholders have also a role to play in matching labour market needs to potential job applicants, as well as supporting candidates through the application process, and ensuring that they make an informed decision when pursuing entry as labour migrants.<sup>72</sup> Furthermore, policy research has highlighted the centrality of a ‘migratory anchor’ in the first country of asylum that can provide access to potential beneficiaries for the purpose of selection by employers or by intermediaries<sup>73</sup> and admission to the receiving country.<sup>74</sup>

## 5 Equitable Access for People in Need of Protection under the EU Labour Migration Directives: Mission (Im)possible?

A common feature of all EU labour migration directives is that their admission conditions are fairly restrictive, even for highly-skilled migrants. In order for complimentary pathways to be a feasible legal channel, their admission conditions must be accessible for people in need of protection. Therefore, this section examines the legal and practical barriers under the existing EU labour migration directives.

Firstly, in order to avail themselves of labour migration channels into the EU, refugees based in first countries of asylum need to secure a work contract or a binding job offer<sup>75</sup> before they are admitted as workers under the legal migration directive matching their qualifications profile and skills. Furthermore, in the case of Blue Card holders, the job offer or work contract should reflect a specific salary threshold,<sup>76</sup> which has proven difficult to fulfil in some Member States.<sup>77</sup>

71 GCR (n 4), para 94.

72 For more, see UNHCR & Government of Canada (n 30).

73 Due to lack of space this issue is not discussed here even though it is relevant to the topic of the article. See generally, Kendra Strauss and Judy Fudge (Eds.) *Temporary Work, Agencies and Unfree Labour Insecurity in the New World of Work* (New York: Routledge 2013).

74 CEDEFOP (n 3) 35–38.

75 See Article 8 (1) SRD; Articles 5 and 6 (1) (a) SWD; Article 5 (1) (a) BCD; Article 5 (1) (c) ICTD.

76 Article 5 (3) BCD.

77 See for instance, European Commission, *Impact assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC*, SWD (2016) 193 final, Part 4/6, Strasbourg, 28.

Secondly, before employers can start the procedure for hiring a third country national, they may need to overcome possible labour migrant recruitment restrictions<sup>78</sup> derived from Member States' competence under Article 79 (5) of the TFEU to determine the volumes of admission of third-country nationals to their territories for employment. This can include labour market tests, requiring employers to advertise their vacancies for a certain period of time before they are allowed to recruit a migrant worker, or specific labour migration quotas.

Thirdly, even when employers are willing to recruit refugees from first countries of asylum and have provided applicants for complementary pathways with a binding job offer or a work contract, in line with the directives Member States impose further conditions for first admission, which could be lengthy and difficult for refugees to fulfil because of legal, administrative or financial obstacles.<sup>79</sup> Among some of the obligatory requirements contained in the directives are a valid travel document and (an application for a) visa, if necessary;<sup>80</sup> proof of sufficient resources;<sup>81</sup> health insurance;<sup>82</sup> and documents attesting the recognition of (un)regulated professional qualifications.<sup>83</sup>

The valid travel document and (application for a) visa criterion, along with other Schengen admission criteria, stems from the Visa Code and the Schengen Border Code and concerns all third-country nationals' prior entry into the EU, refugees included.<sup>84</sup> These entry conditions are integral to the EU's "embodied border phenomenon", resulting from the widening and deepening of the integrated border management paradigm.<sup>85</sup> The CJEU determined in *X and X* that asylum seekers cannot rely on EU law rules on entry or admission for

78 See for instance Article 8 (2) BCD.

79 Long and Rosengaertner (n 6) 7; OECD & UNHCR (n 7) 23.

80 Article 7 (1) (a) SRD; Article 6 (7) SWD; Article 5 (1) (d) BCD; Article 5 (1) f ICTD.

81 Article 7 (1) (e) SRD; Article 6 (3) SWD; Article 5 (5) ICTD (facultative).

82 Article 7 (1) (c) SRD; Articles 5 and 6 (1) (b) SWD; Article 5 (1) (e) BCD; Article 5 (1) (g) ICTD.

83 Article 5 (1) (b) and (c) BCD; Article 5 (1) (e) ICTD; and as an optional condition in Articles 5 (4) and 6 (6) SWD. Another requirement that can be problematic but it is outside the scope of this article, is that applicants should not be considered to pose a threat to public policy, public security or public health: Article 7 (6) SRD; Article 6 (4) SWD; Article 5 (1) (f) BCD; Article 5 (8) ICTD.

84 See Articles 3 (b), 4, 6 (1) and 14 (1) of Regulation (EU) on a Union Code on the rules governing the movement of persons across borders, [2016] OJ L 77/1; Article 21 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas [2009] OJ L 243/1. See also Moreno-Lax (n 1) 47–80.

85 Ibid.

the purpose of seeking protection in the EU.<sup>86</sup> Moreover, the Covid-19 pandemic has further exacerbated problems surrounding access to asylum in the Global North.<sup>87</sup>

Entering the EU as labour migrants, however, could also pose challenges for beneficiaries of complementary pathways in obtaining travel documents and visas.<sup>88</sup> UNHCR stresses that in order to have equal opportunities as migrant workers, they need to be supported through measures including the issuance of Convention Travel Documents (or other accepted travel documents) and be facilitated in their access to embassies and consulates.<sup>89</sup> An added value of using the EU labour migration *acquis* as a complementary pathway is the provision that applicants who fulfilled the admission criteria and obtained a positive decision from the national authorities should be granted 'every facility to obtain requisite visas'.<sup>90</sup> Thus, Member States are obliged to facilitate the issue of long-stay visas with a validity period of more than three months pursuant to the EU labour migration *acquis*.<sup>91</sup> The pandemic has created numerous challenges for migrant workers, but also opportunities facilitating the entry and processing of visa applications for workers in fields key to the pandemic response, long-term recovery and development, including healthcare provision, agricultural production, domestic care and construction.<sup>92</sup>

Other admission requirements concern health insurance and demonstrating sufficient resources to cover subsistence costs, which could create financial challenges for refugees with limited funds.<sup>93</sup> For instance, the responsibility for covering health insurance costs varies depending on the national context of the host country and could be covered by employers and/or state budget or

86 Case 638–16/ PPU – X and X, ECLI:EU:C:2017:173.

87 Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' EUI Working Papers RSCAS 2020/55, Migration Policy Centre (2020).

88 See Federica Infantino, *Outsourcing Border Control: Politics and Practice of Contracted Visa Policy in Morocco*. (Palgrave Macmillan US 2016).

89 UNHCR (n 67) 9. See Long (n 3) 17.

90 See Article 7 (1) BCD; Article 12 (7) SWD; Article 5 (3) SRD; Article 13 (7) ICTD.

91 Steve Peers, *EU Justice and Home Affairs Law: Volume 1: EU Immigration and Asylum Law* (Oxford University Press 2016) 436. For the special rules under the SWD, see Article 12 (2).

92 Lorenzo Guadagno, 'Migrants and the COVID-19 Pandemic: An Initial Analysis'. Migration research Series, No.60, International Organisation for Migration (2020) 13.

93 This is illustrated by the Canadian situation: see UNHCR & Government of Canada (n 30).

taxes.<sup>94</sup> In some Member States, however, applicants need to rely on a private health insurance initially<sup>95</sup> or for a longer period of time.<sup>96</sup>

When it comes to sufficient resources, according to CJEU case law the concept of “resources” ‘must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union.’<sup>97</sup> The Court has also noted that “sufficient” must be interpreted to mean that Member States may indicate a certain sum as a reference amount, but not that they may impose a minimum income level irrespective of an examination of the situation of each applicant.<sup>98</sup> Thus, in line with the CJEU’s judgment in the case *X v Belgische Staat*, it is not the source of the resources, but their sufficiency and sustainability, in view of the situation of the person concerned, that is decisive.<sup>99</sup>

A requirement on how to evaluate the resources adequacy is contained in Article 9 (3)(b) of the Blue Card Directive (BCD) and the text of the Students’ and Researchers’ Directive (SRD), stating in Article 7 (1) (e) that when assessing the applicants’ availability of sufficient resources, Member States’ administrations need to adopt a case-by-case approach taking into account job offers, work contracts or any other income. Unlike these two instruments, the Seasonal Workers’ and Intra-corporate Transferees’ Directives’ (ICTD) sufficient resources provisions do not pertain to sustainability and do not specify how their assessment must be done. Despite the differing objectives of these directives, the sufficient resource requirement needs to be interpreted in a similar and cohesive manner in light of the principle of proportionality,<sup>100</sup> allowing for various sources of income to be considered. Notwithstanding the discretion of national authorities when assessing the sufficient resource requirement,<sup>101</sup> applicants for complementary pathways should be able to use their work contract or binding job offer, as well as income of relatives and

94 For an overview, see Jean-Michel Lafleur and Daniela Vintila (Eds.) *Migration and Social Protection in Europe and Beyond* (Volume 1) (Cham: Springer 2020).

95 See for instance the Swedish case in Petra Herzfeld Olsson (ed.), *National Effects of the Implementation of EU Directives on Labour Migration from Third Countries*, 91 *Bulletin of Comparative Labour Relations* (Alphen aan den Rijn: Wolters Kluwer 2016) 98.

96 See for instance the Bulgarian case, Zvezda Vankova and Dragomir Draganov, ‘Migrants’ Access to Social Protection in Bulgaria’ in Lafleur and Vintila (n 94).

97 See Case C 306/16 – Maio Marques da Rosa, EU:C:2017:844, para. 38; Case C-302/18 – *X v Belgische Staat*, ECLI:EU:C:2019:830, para. 26.

98 See case C 578/08 – Chakroun, EU:C:2010:117, para. 48.

99 Para. 40.

100 See Marco Gerbaudo, ‘The X Case: The Influence of the Resource Requirement on Long Term Residents’ Integration and National Authorities’ Discretionary Powers’ (2019) *European Papers* (3) 806.

101 Case C-302/18 – *X v Belgische Staat*, ECLI:EU:C:2019:830, paras 42–42.



family members residing in the Member States in question, when applying for admission under the EU legal migration directives.

One of the most problematic admission requirements is the recognition of qualifications, particularly in regulated professions.<sup>102</sup> This is even more complicated for refugees, who in many cases lack diplomas and certificates due to the circumstances of their displacement.<sup>103</sup> Further, the recognition procedure (or parts of it) may need to commence from afar while applicants are in their countries of first asylum.<sup>104</sup> This would necessitate the development of specific new flexible mechanisms. For instance, the current recognition procedures for doctors require diploma recognition, passing of exams, host country medical internships, and proficiency in the host country language. In addition, the recognition process also entails fees and costs for translation that can pose additional financial challenge to refugees.<sup>105</sup> Alternatively, beneficiaries of complementary pathways would need to work initially in professions not matching their qualifications, while they undergo the recognition process in the host Member State after their arrival.

Finally, specific requirements under the legal migration directives may render some of these instruments unsuitable as a basis for complementary pathways. For instance, the specific focus of the ICTD's Article 5 (1)(b) requires applicants to provide evidence of employment within the same undertaking or group of undertakings, from at least three up to six or twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of trainee employees, managers or specialists. It is unlikely that potential beneficiaries of complementary pathways could meet such a requirement. Another example lies in the SRD: if a researcher overstays in the Member State concerned, under Article 8 (2) of the Directive, Member States may require reimbursement from the hosting research organisations relating to the stay and return incurred by public funds, which might disincentivise research organisations to participate in such initiatives.

In order to serve as a basis for complementary pathways, Member States need to make the labour migration instruments accessible to refugees, for example by adapting the procedures available in national law for recognition of qualifications, by allowing various incomes to be considered as sufficient

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102 See for instance Zvezda Vankova, *Circular Migration and the Rights of Migrant Workers in Central and Eastern Europe: The EU Promise of a Triple Win Solution* (Cham: Springer 2020) 223–236.

103 UNHCR & Government of Canada (n 30).

104 See CEDEFOP (n 3) 62; UNHCR (n 67) 9.

105 Interview with a state official, Sweden, April 2021.

resources, and by implementing the required visa issue facilitation, in order to turn them into an advantageous option for refugees.

## 6 Beneficiaries of Complementary Pathways under the EU Labour Migration *Acquis*: What about Their Rights?

Alongside with the potential opportunities and barriers related to entry conditions under the EU labour migration *acquis*, the article aims to assess to what extent these directives provide an adequate basis for beneficiaries of complementary pathways to stay in the EU. In so doing, it examines the existing differences in the rights of refugees, subsidiary protection status holders and asylum seekers on one hand, and labour migrants on the other, as provided under EU law. The subsections focus on residence rights, access to family reunification, labour rights and equal treatment, which are assessed against the applicable protection safeguards mentioned above.

### 6.1 *Residence Rights*

The labour migration directives are no exception to the global trend of high-income countries increasingly moving towards temporary migration policies concerning foreign labour recruitment.<sup>106</sup> This means that none of the directives discussed here provide for immediate access to permanent residence; migrants generally depend on employers for renewal of their work and residence permits. Some of these instruments, such as the SRD and BCD, allow for renewable permits with a validity respectively between one and four years<sup>107</sup> and long-term residence status eligibility after five years,<sup>108</sup> while others – the SWD and the ICTD – aim to keep migrants in a temporary position.<sup>109</sup> Seasonal workers can either engage in circular migration for at most nine of any 12 months if allowed to return to their country of first asylum,<sup>110</sup> or use opportunities created by Member States on the basis of national law and switch to another national or EU permit.<sup>111</sup> As in the case of the SWD, upon

106 Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times', *The Modern Law Review* (2004) 67 (4) 588; Martin and Ruhs (n 9) 80.

107 Article 7 (2) BCD and Article 18 SRD. For a discussion on the implicit provision of Blue Cards' renewal, see Peers (n 91) 378.

108 See Article 16 BCD, which applies with favorable derogations from Directive 2003/109/EC. On the SRD, see Vankova (n 102) 85.

109 Vankova (n 102) 85.

110 On the basis of Article 16 SWD.

111 See Article 14 (1) SWD. For instance, seasonal workers in Poland can access permits issued for other purposes, including student permits. See Article 116 (4) of the Polish Act on Foreigners of 2013.

expiry of their permits after maximum of three years, ICT permit holders are obliged to leave the Member State or transfer to a residence permit on other grounds to facilitate permanent residence in accordance with EU or national law.<sup>112</sup>

By comparison, under EU asylum law asylum seekers are provided with a document certifying only that they are allowed to stay in the given Member State while their application is pending or being examined.<sup>113</sup> Subsidiary protection status holders under EU law are entitled to a renewable residence permit which must be valid for at least one year and refugees' permits – for at least three years and renewable.<sup>114</sup> The implementation report of the Qualification Directive shows that almost half of the Member States grant residence permits to refugees with validity longer than required, some of them providing permanent residence permits directly or permits with more than five years validity.<sup>115</sup> In the case of subsidiary protection status holders, according to the report, several Member States went beyond the requirements of the Directive but very few offer access to permanent residence after five years.<sup>116</sup> Both categories are eligible for a long-term residence status as long as their residence is considered legal, e.g. their international or subsidiary protection was not revoked.<sup>117</sup> In addition, at least half of their residence period as an asylum seeker shall be counted in when calculating the five year eligibility period for this LTR status.<sup>118</sup>

Finally, another issue pertinent to the initial temporary permits that labour migrants obtain under EU law, is that beneficiaries of work-based complementary pathways who cannot prolong their stay, cannot be returned to their countries of origin – unlike labour migrants – as the right to seek asylum and protection against *non-refoulement* is guaranteed under EU law. Return to the countries of first asylum is also impossible often due to the “no-return” policies of countries including Jordan and Lebanon, which is another challenge that needs to be considered in this context.<sup>119</sup>

112 Article 12 (1) ICTD. See for instance Article 5 (1) of the Swedish Aliens Act (2005/716), according to which ICT permit holder must have resided in Sweden for four of the last seven years in order to become eligible for a permanent residence permit.

113 Article 6 (1) RD.

114 Article 24 QD.

115 European Commission, Evaluation of the application of the recast Qualification Directive (2011/95/EU), (2019) 182.

116 Ibid.

117 See Daniel Thym, ‘Long Term Residents Directive 2003/109/EC’, in Kay Hailbronner and Daniel Thym (Eds.) *EU Immigration and Asylum Law: A Commentary* (C.H.Beck/Hart/Nomos 2016) 442.

118 See Article 4 (2) third sub-paragraph LTRD.

119 CEDEFOP (n 3) 49.

Work-based complementary pathways leading to temporary permits can be considered advantageous when compared to the asylum seekers' status which is characterised by an initial period of insecurity. Subsidiary protection status holders, who do not have direct access to permanent residence in most Member States, would also be better off with a Blue Card permit instead. However, there is a clear disadvantage in residency rights when comparing the temporary residence permits under the labour migration directives with the secure permits that refugees obtain. Therefore, some authors argue that in practice most of the beneficiaries of complementary pathways will be inclined to apply for asylum on the territory of the host Member State after admission and therefore this right should be limited.<sup>120</sup> However, such ideas are in clear violation of international and EU law. Furthermore, previous experience with labour migration of people in need of protection,<sup>121</sup> as well as the empirical data collected for this study,<sup>122</sup> demonstrate that the uncertain outcome of asylum claims, the repercussions for their right to work and professional opportunities due to "lane switching"<sup>123</sup> or in some cases the 'stigma' associated with a refugee status, makes this option unattractive. Rather, such workers would be prone to seek asylum mainly as a safety net upon expiry of their work permits or in case, they lose their jobs prematurely with no options to seek alternative employment, as with some temporary and seasonal workers' schemes.

## 6.2 *Family Reunification*

The Family Reunification Directive (FRD) determines the conditions for third-country nationals residing in Member States' to exercise the right to family reunification,<sup>124</sup> which is 'a significant legal innovation'<sup>125</sup> compared to existing international and regional standards. It stipulates that in order to reunite

<sup>120</sup> Also stressed by Martin and Ruhs (n 9) 86. Ruhs (n 10) 27.

<sup>121</sup> On the history of refugee migration, see Katy Long, 'When refugees stopped being migrants: Movement, labour and humanitarian protection', (2013) *Migration Studies* 1 (1) 4–26. On more recent examples, involving refugees from Afghanistan and Somalia who became temporary workers in the Middle East, see Katy Long, 'Extending protection? Labour migration and durable solutions for refugees' UNHCR Research paper No. 176 (October 2009). See also Vankova (n 102) 139.

<sup>122</sup> Interview with a lawyer, Germany, November 2020. Interview with representative of an international NGO, UK, December 2020.

<sup>123</sup> Applying for asylum in the host Member State could affect the right to work for a particular period of time depending on the national legislation in line with Article 15 (1) and (2) RD.

<sup>124</sup> Article 1 FRD.

<sup>125</sup> Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) 139–141.

with family members, a sponsor needs to hold ‘a residence permit issued by a Member State for a period of validity of one year’ and have ‘reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status’.<sup>126</sup> It also allows Member States to subject family reunification to further requirements, such as waiting periods and other integration measures, like requirements for participation in language and integration courses,<sup>127</sup> however by observing their human rights obligations.<sup>128</sup>

On the basis of derogations to the FRD, all highly skilled categories of migrants – Blue Card holders, ICTS, and researchers – enjoy facilitated access to family reunification.<sup>129</sup> They are not required to have reasonable prospects of obtaining permanent residence and are exempt from other conditions such as waiting periods. This means that they can enter and stay on temporary permits and still have the right to reunite with their family members.<sup>130</sup> Finally, seasonal workers who stay temporarily are excluded from FRD’s scope and the right to family reunion, along with other temporary permit holders under national law.<sup>131</sup>

By way of comparison to EU asylum law, refugees are entitled to family reunification under FRD’s preferential rules based on series of derogations.<sup>132</sup> For instance, the above-mentioned integration measures under the directive may be applied only once the refugee has been granted family reunification and is on territory of the Member State concerned.<sup>133</sup> Additionally, waiting periods and requirements concerning accommodation, sickness insurance and sufficient resources are waived, unless an application for family reunification was submitted more than three months after the granting of refugee status.<sup>134</sup> While in the case *K and B* the CJEU confirmed that this three-month time limit is the general rule, it stressed that it cannot be applicable ‘to situations in which particular circumstances render the late submission of the initial application objectively excusable’.<sup>135</sup>

126 Article 3 FRD.

127 See Article 7(2) FRD. See Kees Groenendijk, ‘Legal Concepts of Integration in EU Migration Law’, (2004) *European Journal of Migration and Law* 6 (2).

128 See for instance Case C-578/08 Chakroun, ECLI:EU:C:2010:117; Case C-153/14, K and A, ECLI:EU:C:2015:453.

129 Article 15 BCD; Article 26 SRD; Article 19 ICTD.

130 Vankova (n 102).

131 Ibid.

132 See Articles 10 and 11 and Article 12(2) FRD.

133 Carrera and Vankova (n 53) 18.

134 Article 12 (1) third paragraph.

135 Case C-380/17- K and B, ECLI:EU:C:2018:877, para 66.

By contrast, though subsidiary protection status holders are not mentioned within the personal scope of the FRD, some authors argue that they are covered by the Directive as they are not explicitly excluded.<sup>136</sup> In practice, however, only half of the Member States allow beneficiaries of subsidiary protection to apply for family reunification under the same conditions as refugees.<sup>137</sup> Notable examples of countries restricting this right include Germany and Sweden, which are prominent refugee-hosting states.<sup>138</sup> Finally, asylum seekers are also explicitly excluded from this right.<sup>139</sup>

This section of the article highlighted the privileged access to family reunification of refugee status holders when compared with the preferential rules applicable to Blue Card holders and other highly-skilled categories of migrant workers. Refugees embarking on work-based complementary pathways could still experience challenges when it comes to their right to family life. However, for individuals granted a subsidiary protection status, access to family reunification is limited as it depends on the particular Member State. As in other areas discussed, coming through complementary pathways instead of applying for asylum in the EU could be advantageous for asylum seekers due to the possibility for family reunification through EU labour migration channels, unless they embark on a seasonal workers status.

### 6.3 *Labour Rights and Equal Treatment*

Beneficiaries of work-based complementary pathways under the directives discussed have the right to work in a specific job and sector related to their admission grounds, with limited or no opportunity to change employer.<sup>140</sup> The adoption of the Recast BCD will improve the Blue Card holders labour market access, even though Member States will still have the possibility to subject change of employer to a labour market test in the first 12 months of

136 Cathryn Costello, Kees Groenendijk and Louise Halleskov Storgaard, *Realising the Right to Family Reunification of Refugees in Europe* (Council of Europe: Commissioner for Human Rights, June 2017) 28; European Commission, *Communication on guidance for application of Directive 2003/86/EC on the right to family reunification* (COM/2014/0210) 24.

137 European Commission, *Report on the implementation of Directive 2003/86/EC on the right to family reunification* (COM (2019) 162 final) 3.

138 Costello, Groenendijk and Storgaard (n 136) 34. European Commission (n 137) 4.

139 Article 3 (2) (a) FRD.

140 Article 15 (3) SWD and Article 12 (2) BCD explicitly provide for change of employer; Article 21 (5) SRD, only implicitly, and the ICTD does not envisage such right (see Article 17). For more details see Vankova (n 102) 80–81.

employment.<sup>141</sup> By comparison, beneficiaries of international protection may engage in any employment ‘immediately after protection has been granted’ subject only to rules applicable to the profession or public service.<sup>142</sup> In contrast, asylum seekers have access to the labour market no later than nine months from the date of application for international protection if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant, even in cases where a transfer decision has been taken in their regard under Dublin III Regulation.<sup>143</sup> Their access is regulated under national law, based on decision on the individual case and might be subject to a labour market test.<sup>144</sup>

The EU’s sectoral approach to labour migration has institutionalised differential treatment between categories of migrants, and between third country nationals and nationals.<sup>145</sup> Despite the directives’ equal treatment clauses, Member States can derogate from the principle of non-discrimination and subject equal treatment rights to a set of differentiated restrictions or conditions linked to the particular categories of migrant workers.<sup>146</sup> This further exacerbates the precarious position of migrant workers who, in contrast to national workers, are more dependent on their employers and have limited opportunity to seek alternative employment due to restrictions on changing employer.<sup>147</sup>

Except for the ICTD, all the legal instruments discussed here provide for equal treatment with nationals concerning working conditions and health and safety

141 Unlike European Commission’s Proposal which provided for a full access to highly qualified employment from the outset (Draft Article 13). See Draft Article 15 (2) of the Final Compromise Text, 2016/0176(COD).

142 Article 26 (1) QD. Unless otherwise indicated, the term beneficiaries of international protection cover both persons with refugee and subsidiary protection status.

143 Article 15 (1) RD. See Joined Cases C-322/19 and C-385/19 – KS and Others v The International Protection Appeals Tribunal and Others, ECLI:EU:C:2021:11.

144 Article 15 (2) RD. For more details, see Markus Peek and Lilian Tsourdi, ‘Asylum Receptions Conditions Directive 2013/32/EU’, in Kay Hailbronner and Daniel Thym (Eds.) *EU Immigration and Asylum Law: A Commentary* (C.H.Beck/Hart/Nomos 2016) 1438.

145 Sergio Carrera et al., *The Cost of Non-Europe in the Area of Legal Migration*, Study requested by the Parliamentary Research Services, European Parliament (2019) 34. See also Bjarney Friðriksdóttir, *What Happened to Equality? – The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (Brill/Nijhoff 2017).

146 Carrera et al (n 145) 37.

147 Cathryn Costello, ‘EU Migration and Asylum Law: A Labour Law Perspective’, in Alan Bogg, Cathryn Costello, ACL Davies (Eds.) *Research Handbook on EU Labour Law* (Edward Elgar Publishing 2016) 314.



requirements.<sup>148</sup> ICTs are entitled to equal treatment with posted workers,<sup>149</sup> except regarding remuneration, where equal treatment with nationals is one of the admission criteria.<sup>150</sup> Migrant workers covered by the aforementioned directives are also entitled to equal treatment with nationals regarding the main labour rights without the possibility of derogations.<sup>151</sup>

However, all these directives allow Member States to restrict equal treatment regarding family benefits to some extent, except for the BCD.<sup>152</sup> Entitlements to unemployment benefits also vary – they are excluded for seasonal workers and limited to three months for Blue Card holders.<sup>153</sup> Additionally, Member States have discretion to restrict equal treatment in the field of education and vocational training for all migrants covered by directives, including Blue Card holders, and permitted derogations vary regarding access to goods and services.<sup>154</sup>

Asylum seekers do not benefit from any equal treatment provisions under EU asylum law. Beneficiaries of international protection under the Qualification Directive derive remuneration rights and access to social security systems regarding employed activities alongside conditions of employment from national law.<sup>155</sup> The implementation report on the Qualification Directive demonstrates that they have equal treatment with nationals concerning these rights in all Member States.<sup>156</sup> Regarding education, beneficiaries of complementary pathways would have more rights, particularly if they obtain Blue Cards, as they would enjoy equal treatment to nationals despite any applicable derogations. By contrast, beneficiaries of international protection under the Qualification Directive are entitled to access to the general education system and further training or retraining, under the same conditions as legally resident third country nationals.<sup>157</sup> The same applies in the field of housing.<sup>158</sup> Under the current *acquis* adult asylum seekers cannot benefit from any of these rights.

When it comes to labour rights and equal treatment, beneficiaries of international protection have clear advantage over labour migrants in important

148 Article 14 (1) (a) BCD; Article 22 (1) SRD; Article 23 (1) (a) SWD; Article 12 (1) (a) SPD.

149 Article 18 (1) ICTD. See further Friðriksdóttir (n145) 320.

150 Article 5 (4) (b) ICTD.

151 Article 14 (1) (b) BCD; Article 23 (1) (b) SWD; Article 18 (2) (a) ICTD; Article 12 (1) (b) SPD.

152 Article 18 (3) ICTD; Article 22 (2) (b) and (c) SRD; Article 23 (2) (i) SWD; Article 12 (2) (b) second paragraph SPD; Carrera et al, (145) 38.

153 Friðriksdóttir (n 145) 319.

154 Ibid. 317.

155 Article 26 (4) QD.

156 European Commission (n 115) 204.

157 Article 27 (2) QD.

158 See Article 32 QD and Article 14 (1) (g) BCD.

areas such as unrestricted access to all occupations, apart from public sector professions, and are not tied to an employer for a particular period of time. These are two important premises to avoid labour exploitation and abuse and some of the reasons why the SWD and ICTD raise labour rights concerns.<sup>159</sup> Beneficiaries of international protection also benefit from equal treatment with nationals, except for the fields of education and housing. Compared to labour migration statuses, the asylum seeker status is beset with uncertainty, as labour market access is mainly determined at national level. Therefore, beneficiaries of work-based complementary pathways could initially have advantageous standing compared to asylum seekers.

## 7 Conclusion

This article examined whether the current EU labour migration *acquis* could provide an adequate basis for entry and stay in the EU for people in need of protection and serve as a basis for the development of complementary pathways. To this end, it discussed the legal and policy conditions for facilitating such pathways under the EU labour migration directives, and the rights that beneficiaries of such work-based complementary pathways would have under these instruments.

The analysis demonstrated the potential of work-based complementary pathways to facilitate legal access to the EU for people in need of protection under the EU labour migration *acquis*. This, however, depends entirely on the willingness of interested Member States, supported by the European Commission through exchange of information and funding, rather than targeted EU legal action. It will also require Member States to address possible challenges arising from the directives' admission conditions, which could be difficult for applicants to fulfil and decrease the motivation of employers to hire them. Examples include exempting applicants from labour market tests, facilitating available procedures for recognition of qualifications, explicitly allowing various incomes to be considered as sufficient resources, and implementing the required visa facilitation under the directives. Further policy conditions include using national employment agencies or other 'migratory anchors' to incentivise employers and facilitate recruitment, and providing

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159 Cathryn Costello and Mark Freedland 'Seasonal Workers and Intra-Corporate Transferees in EU Law: Capital's Handmaidens?' in Joanna Howe and Rosemary Owens (Eds.), *Temporary Labour Migration in a globalised World: The Regulatory Challenges* (Hart Publishing 2016). See also Carrera et al (n 145) 65–66.

possibilities for refugees to take an informed decision when embarking on a labour migration path.

Nevertheless, as others have concluded in different contexts,<sup>160</sup> this article shows that utilising the potential of work-based complementary pathways would require a certain trade-off when it comes to the rights of potential beneficiaries under EU law, as none of the legal migration directives provide a status as secure as the one that a refugee status holder enjoys. The main differences concern the possibility for immediate access to permanent residence and family reunion, as well as limitations to the right to change employer and access to all occupations. On the other hand, when the rights of labour migrants under these EU instruments are compared to those of subsidiary protection and asylum seeker statuses in areas like family reunification and access to long-term residence, one can see clear added value of considering such complementary approach. Furthermore, the analysed data suggests that refugees generally are willing to accept limitations to these rights, and would rely on the asylum system as a safety net only.

Different challenges exist when it comes to specific instruments of the EU legal migration acquis. Offering the highest protection safeguards among the instruments discussed here, the BCD holds the potential to serve as a work-based complimentary pathway by resolving certain perceived threats to Member States' sovereignty: refugee law obligations, preventing irregular migration and the recruitment of highly skilled labour.<sup>161</sup> It offers a path to a long-term residence status and facilitated access to family reunification, and its recast Proposal will improve the labour market access for Blue Card holders by limiting the optional labour market tests to the first year of employment. However, the recast Proposal also represents a missed opportunity to create a legal pathway into the EU for highly skilled individuals needing international protection and to remedy challenges arising from the stringent admission conditions.

The SRD could also serve as a complementary pathway, though beneficiaries would again need to wait five years to access long-term residence, unless they could avail themselves of more favourable national permanent residence conditions, and might face challenges with changing employers. By contrast, both the ICTD and the SWD do not contain sufficient protection safeguards for potential beneficiaries of complementary pathways such as a path to long-term residence, unless national law allows for such possibility, and also raise labour rights concerns, which could lead to exploitation of an already

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160 Martin and Ruhs (n 9).

161 Drawing on the work of Dauvergne (n 106) 596.

vulnerable group of individuals. Furthermore, seasonal workers are excluded from access to family reunification and the ICTD has overly specific admission requirements, rendering it practically very difficult to use for such purpose.

In conclusion, the EU labour migration directives can provide an adequate basis for entry and stay in the EU to a very small proportion of persons in need of international protection, namely highly-skilled refugees, in a limited number of Member States that will be interested to support refugees' 'journey to a durable solution'. This also means that complementary pathways are more likely to be developed on the basis of national law, where Member State are free to adjust national admission requirements concerning sufficient resources, insurance and others that can create obstacles to the initial application, as well as address issues related to access to family reunification, clear path to permanent residence, and limitations to the right to change employer and access to all occupations.

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