UACES 44th Annual Conference

Cork, 1-3 September 2014

www.uaces.org

Third Country National Students in the EU: Caught between Learning and Working

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(Work in progress)

Panel "**Vulnerabilities of Regular Labour Migration in the EU**"

UACES Annual Conference

Cork - Ireland

1 – 3 September 2014

Abstract

Third Country nationals coming to the EU for studies or research purposes are welcomed and nudged into staying in the EU after their studies: their potential as future highly skilled migrants is supposed to be large and needed. But students often also work during their studies and the legal position as workers is dealt with in the Students Directive 2004/114/EC and its currently negotiated recast. Third country national (TCN) students may need to work in order to pay for study loans or to support themselves. As yet unskilled workers they often end up in low skilled jobs. This paper deals with these often overlooked TCN students as migrant workers during their studies. Sometimes the work is more central to their activities than studying is, and they are relabelled as (illegally) working TCN. The same can happen to trainees, whose legal position is also dealt with in the aforementioned recast. As workers their social rights and right to equal treatment with national workers is codified in the recent Single Permit Directive 2011/98/EU. But as students or trainees they don't get the protection EU law offers illegally employed TCN: possibly in the ambiguity of the legal category they belong to, dangers of abuse lay waiting. In the paper I will draw on recent case-law on employer sanctions in the Netherlands to map the (re)labelling of students, trainees and workers by the authorities, the reasons for relabeling and the legal consequences of a student, trainee or worker.

Key words: EU migration law; students; trainees; precarious migrant workers; employer sanctions; case law

I Introduction

In spring 2014 I presented an earlier version of this paper in Antwerp to a diverse audience, including academics, and I asked whether they perceived themselves as students or as workers during the years

they busied themselves with PhD-research.[1] One PhD-reseacher responded saying he perceived himself as a student. I myself have conducted my PhD-research after ten years as a legal practitioner in a law firm and perceived myself as a worker. These different perceptions illustrate a vague boundary between work and study when doing PhD-research. A similar vagueness applies to the status of a 'trainee' as either a student or a worker, both of which I will give examples later. Defining to what category one 'belongs', has relevance in migration law. In its annual report on 2012, the European Commission states that EU migration law is to assist in making "the EU a more attractive destination for the most talented students and researchers and to stimulate research, development and innovative performance".[2] Students are welcomed to stimulate western economies as students, and as future highly skilled workers. During their studies they are allowed to work part-time in any labour market sector; if they overstep the right to work they can become undocumented migrant workers in the blink of an eye. Falling from the category of a student into the category of undocumented worker has great consequences on the rights of the migrant involved. To what category one belongs is indeed decisive for the rights one has, rights vis-à-vis the state as well as vis-à-vis ones employer. With these rights, or the lack thereof, comes an increased level of vulnerability and possible abuse. Categorizations in law may therefore, unintentionally, increase migrant vulnerability. With this research, as part of a recently started four year project financed by the Dutch *Instituut GAK*, Conny Rijken and I seek to unsurface these vulnerabilities created by law.

II Categorization and precarity / vulnerability

Are the Indonesian trainees in one of the case studies to be discussed below 'true' trainees or migrant workers? That is the main question the authorities ask when conducting inspections. But why is the question being asked? The street level labour inspectors will answer that question by explaining their competence to fine the employer for illegal employment if they conclude that these are not 'true' trainees. The immigration authorities will answer by referring to their competence to withdraw a visa or residence permit in that case. The host entity will argue that they are trainees, saving them from the legal obligation to pay a high fine or from allegations of smuggling or even trafficking of human beings. The migrants themselves might be ignorant of the relevance of relabeling their status at first, but will soon feel the consequences when obliged to return home or when stepping outside the 'legal' categorization and becoming irregular migrants.[3] The question of a true or false trainee or student is being asked because belonging to one or the other category has consequences for the rights, or the lack thereof.

As Anderson (2010) described for the UK, one doesn't need to be a highly skilled migrant or enter under labour migration schemes to participate legally on the UK labour market. In the UK, students may work

[1] Workshop "Travelling Policies. Convergence of Dutch and Flemish Integration Policies", Museum aan de Strom Antwerp, 13 June, 2014.
[2] COM(2013)422, p. 6-7.
[3] I use the term 'migrant' in general when referring to a third country national (non EU-national) without distinction between settled or temporary. I will elaborate on the rights a certain migrant status includes.

20 hours in term time, but the students don't appear in the migration statistics as 'workers' (Anderson 2010, p. 308). Categorization of migrants is also central to the *transferal model* developed by Schrover & Moloney (2013) and using (some) of their tools I will discuss the legal categorization in EU and in Dutch migration law of students, trainees and workers. I will look at the characteristics of the migrant group, at the perceptions of gain and costs and at the migrants rights relevant to the specific category. Categorizations are, according to Schrover and Mooloney, shaped by ideas about gender, ethnicity, religion and class. At the current stage of my research the cases studied don't always reveal enough facts to analyse the relevance of these categories; linking data from different government authorities in the future may increase the depth of the analysis. I will discuss those characteristics of the migrant group that are available at the current stage of this research. I will show how in many cases the authorities relabeling increases the migrants' vulnerability, because relabeling has as a consequence the deprivation of rights. Schrover and Moloney argue that policy makers interpret categories narrow and exclude people who do not fit their definitions while support groups stretch categories. Legal categorization by the authorities (not just policymakers but the street level inspectors and decision makers as well) have a one dimensional approach: student or worker – with or without a right to stay on the long term. They may label a migrant as a student because the cost of that label for society on the long run would be lowest. From a human rights perspective a dimension is to be added: is the student the victim of 'false' categorization or not. Because a migrant who wasn't aware of the legal consequences of the false categorization is cheated out of the expected residency right, right to equal pay or the right to finish ones education. Here the perceptions of gains and costs of labelling and the (loss of) rights come together.

The methodology used for this paper is desk research, based on previous research of Dutch national archives, of media reports and of mainly Dutch case law on employer sanctions in cases of presumed illegal employment of migrants as well as some human trafficking cases. From these sources I have taken examples to illustrate where the legal categorization is decided or relabelled by the authorities with immediate consequences for the legal position of the migrant involved. I present a first selection of cases and of course it is not possible to say if the data is representative, for one because not all case law is published. The purpose of this paper is to generate new hypothesis that can be tested in the larger *Instituut GAK* study.

III Legal categories in EU migration law: students, trainees or workers?

There does not exist an exclusive right for a third country nationals (TCN) migrant to take up employment in an EU Member state nor probably elsewhere in the world. Roos and Zaun (2014) argue that in the absence of international legal norms EU negotiations on access to employment have been rather tough and resulted in little convergence between the EU member states.[4] They use the Blue Card Directive for highly skilled migrants as an example, and in that case they might indeed be right. But little time was needed to conclude Directives on the admission of TCN students (Directive 2004/114) and

[4]

researchers (Directive 2005/71) – a special kind of highly skilled just as sought after. These first Directives are to be combined in a recast Directive that will also include the admission of (un)remunerated trainees and au pairs.[5] Maybe in the political framing these categories are less threatening, not seen as 'real' workers (yet), and therefore political compromise can be reached more easily. What could also be agreed upon on the EU level was the admission of seasonal workers (Directive 2014/36, to be discussed by Conny Rijken) as well as a Directive on procedures and on equality of rights for migrant workers and working migrants, including students and researchers, family migrants and refugees alike (Directive 2011/98). Finally, the EU Member States also agreed on a Directive setting minimum standards for employer sanctions and facilitating complaints and claims from illegally resident and illegally employed TCN (Directive 2009/52). Although international legal norms do not create an obligation for employer sanctions, there is plenty of mutual interest in fighting unfair competition through the use of illegal labour.

There are international legal norms on the protection of migrant *workers* against unequal treatment and abuse. To some extent the directives mentioned deal with such rights. In addition, the human trafficking Directive (2011/36) provides for protection mechanism in case of criminal proceedings against traffickers. These norms in EU migration law address migrants depending on the legal category they fall into, and as a consequence, some don't fall under any protective regime. The categorization of the resident status may indeed hinder the TCN to claim the right to equal treatment or protection against abuse. Next the legal categories of students, trainees and (illegally employed) migrant workers are discussed with regard to the admission requirements, right to work, right to (permanent) residence and the right to equal treatment with nationals.

a. Students

In the earlier stages of student migration, at least this was the case for the Netherlands, students came to be enriched with the wealth of western European teachings. After finishing their studies they were obliged to go home. They had to sign a statement upon arrival that they would indeed leave again. They were to go home and enlighten their supposedly less developed country of origin with the western knowledge obtained. Allowing TCN students to study at our universities was in a way a form of development aid. Today, 2015, this is all to be seen in other ways. TCN students are lured into studying at our universities because they pay enormous fees: they have become cash cows. And when they're finished they're offered jobs, especially if they became techies, because few Dutch people are available for these jobs and technology is the engine of our economy. The TCN students are now an asset to the western worlds' development. The students are a potential future workforce.

According to the EC today: "immigration from outside the EU is one source of highly skilled people, and third-country national students and researchers in particular are groups which are increasingly sought after."[6] The recast proposes "to give students more opportunities to seek work during and after their

[5] COM(2013) 151 final (2013/0081 (COD)) of 25 march 2013.
[6] COM(2013) 151 final (2013/0081 (COD)) of 25 march 2013.

studies. It also aims to provide better protection and to address certain rights of equal treatment with nationals." Their future role as highly skilled workers in the EU is stressed from a labour market needs perspective. Their role as part-time workers during their studies however, is not framed from this labour market perspective but as a means for them to support themselves during their studies. For the purpose of this paper the articles of the proposed recast that needs to be paid attention to is article 23[7] on the right to work during the studies.[8] Member states will have to allow TCN students to work at least 15 hours a week. In the Netherlands this is currently 10 hours, with the requirement of a work permit that will be granted without a labour market test being performed.

As was mentioned in the introduction, the legal position as *workers* of TCN students is dealt with by the Single Permit Directive 2011/98/EU. The Chapter in this Directive on the right to equal treatment applies to them as it applies to other TCN migrants working. However, Member States may decide to exempt TCN students from family benefits. With regard to the procedural rules set in this Directive, Member States may decide that the single application procedure does not apply to TCN students. If member states do apply this procedure it means a separate work permit is no longer required; the residence permit of the TCN student will also mention the (limited) right to access the labour market. If a Member State chooses not to implement the single application procedure for students their employers will require a work permit before they can employ the TCN student legally. In the recast of the Students Directive reference is also made to Directive 2011/98/EU to stipulate the right of equal treatment of students when working.

The Single Permit & Equal Rights Directive presents us the student as a worker, but also as a migrant. Although the student should be treated equally as a worker, as a migrant the student does not have to benefit from the Directive, this depends on the implementation of the Directive in the Member State of his studies.

b. Trainees

The recast also deals with conditions for entry of remunerated and unremunerated trainees. The member states are left a wide margin of discretion: according to article 12 of the proposal a trainee needs to have a signed training agreement, approved if need be by the relevant authority in the

[7] **Economic activities by students**
1. Outside their study time and subject to the rules and conditions applicable to the relevant activity in the host Member State, students shall be entitled to be employed and may be entitled to exercise self-employed economic activity. The situation of the labour market in the host Member State may be taken into account.
2. Where necessary, Member States shall grant students and/or employers prior authorisation in accordance with national legislation.
3. Each Member State shall determine the maximum number of hours per week or days or months per year allowed for such an activity, which shall not be less than 20 hours per week, or the equivalent in days or months per year.
4. Member States may require students to report, in advance or otherwise, to an authority designated by the Member State concerned, that they are engaging in an economic activity. Their employers may also be subject to a reporting obligation, in advance or otherwise.
[8] See: http://www.nuffic.nl/bibliotheek/working-while-studying-overseas.pdf

receiving Member State in accordance with national law or practice. The agreement needs to include a description of the training program, the duration, working hours and conditions under which the trainee is supervised. The legal relationship with the host entity needs to be mentioned as well as where and how much the trainee is remunerated. These requirements have relevance with regard to intra-corporate trainees – often remunerated in their countries of origin. The trainee is to be placed with a public- or private-sector enterprise or vocational training establishment recognized by the Member State, again in accordance with its national legislation or administrative practice. If required by the Member state the trainee needs to prove having relevant education, qualifications or work experience to benefit from the work experience. This is a clause that's open for multiple interpretations and as a consequence can enhance vulnerability: when is training beneficial? Will it be up to the national admission officers or (labour) inspectors to make that judgment? Furthermore, the trainee can be required, again depending on the national requirements, to receive basic language training.

Finally, the member states may require the host entity to declare that the third country national is not filling a job. This requirement explicitly deals with our subject: if the host declares the trainee is not performing a job but the authorities find otherwise, the trainee becomes - at least in the Netherlands – illegally *employed*. The host entity is likely to receive an administrative fine and may be excluded from future traineeship residence permits as a sanction on providing a false statement on the nature of the traineeship. But what is the consequence for the trainee if this is the case? Does it make the trainee a victim of human trafficking and will he or she be treated as such? The recast leaves this up to the Member states. If authorities qualify the training as employment, that will be ground for non-renewal of the residence permit and, more importantly, for withdrawal as the purpose for which the TCN was authorized to stay wasn't employment. The host entity surely wouldn't have complied with social security and tax laws regarding employees, thinking the trainee was just that and not an employee. [9]

The duration of the permit for trainees is one year and can be extended only for another year if this is necessary in order for the trainee to acquire a vocational qualification.[10] During the traineeship only remunerated trainees can stay in another member states for a period exceeding three months, but not exceeding six months. Of course, the second member state needs to consent and needs to be provided with relevant documents.[11]

c. (undocumented) Workers

EU migration law does not include a general Directive on the conditions for entry and residence of workers. The recent single permit and equal rights Directive does deal with the efficiency of available procedures and with the equal treatment of migrant workers and working migrants with nationals. Three other Directives, other than the Researchers Directive, deal with entry conditions for labour migration (Blue Card, Seasonal Workers and still under negotiation Intra-corporate transfers) and one

[9] Article 19(1) a + d Commission Proposal.
[10] Article 16(4) Commission Proposal.
[11] Article 26 Commission Proposal.

Directive deals with employer sanctions and protection of migrant workers in case of illegal employment of *illegally staying* third country nationals. In case of a TCN student working full time or a trainee not being trained, but in fact filling a job vacancy, these TCN are legally staying but illegally employed. Although Directive 2009/52/EU deals with the protection of illegally employed TCN no EU law covers the protection of TCN students or trainees when they are found to be (illegal) workers instead. The recast just qualifies this as a breach of the conditions of their residency status and allows for withdrawal of their status. If they are not (recognized as) victims of trafficking there is a gap in their legal protection offered by EU law. They might not be trafficking victims but indeed they may have been abused to a lesser extent and still need protection.

IV Case-law on relabeling students and trainees as (illegally employed) migrant workers

a. Students or workers?

In my research on the regulation of labour migration to the Netherlands from 1945 through 2007 I came across a prominent example of legal categorization with far reaching consequences. In 1986 the University of Delft entered into an agreement with the University of Beijing on having 20 Chinese PhD's come to Delft for conducting research. After this agreement was entered into the University wondered about the immigration status of the 'students'. The university asked the authorities if these PhDs were to qualify as workers and if there for work permits were required. They qualificed as students came the answer. At the time qualification of University employees as workers would have meant that they were exempted from the work permit regime as civil servants. It would indeed have meant that they would (soon) receive free access to the Dutch labour market. Surely, the authorities figured, these Chinese PhD's would leave their research as soon as possible, leaving the University with 20 vacancies to be filled by another 20 Chinese. Better to qualify them as students: after finishing their 'studies' they would at the time be obliged to leave the Netherlands in order to have China profit from their brain gain. Brain gain for countries of origin was indeed at the time the reason for allowing TCN students to come and study in the Netherlands. The labelling is a clearly based on presumed costs and benefits for society, not taking into account the migrants' rights consequences and possible increased precariousness in the position of a student.

After the turn of the century the number of TCN students (not just PhD's) in the EU and in the Netherlands rose. The Dutch authorities feared abuse of students would rise and increased the level of inspections. From the annual reports of the Labour Inspection we learn that the inspection selects employers for inspection based on data made available through several governmental organizations. TCN students are a focus group of their inspections.[12] The labour inspection reported 95 cases of employment of TCN students to the Immigration authorities because illegal employment can be a reason for loss of legal residence. In case of employment of students the labour inspection came across a relatively high percentage of infringements (69% of the inspected employers) which the inspection explains by pointing at the detailed information they have on TCN students. This means that inspections

[12] Annual Report Dutch Labour Inspection 2012.

are likely to take place at employers who do have a work permit but that they break the law by not sticking to the maximum of ten hours a week. In 2012, 129 inspections took place resulting in 89 employer sanction fines regarding in total 195 TCN students. As the total number of TCN migrant workers illegally employed was 773 (out of a total including EU nationals during transition of 2.555, the students make up a high percentage of TCN illegally employed and possibly underpaid migrant workers. In 2013 the Dutch Labour Inspection conducted 120 inspections, focusing on illegal employment of TCN legally staying students. They handed down 50 fines, 42% regarding 88 TCN students. In total 37 reports on TCN students were send to the Immigration authorities. As the data available by the labour inspection and the immigration authorities can't be matched it's not (yet) clear what the result of these reports was for the TCN students.

Case law shows that in many cases where a work permit is required for students to work the maximum of 10 hours they are allowed to work in the Netherlands, the work permit is absent, but the 10 hours are not exceeded.[13] In those cases limited employer sanctions are enforced for the administrative omission.[14] The ruling regarding two Chinese migrants working in massage parlours without work permits does mention that taxes and social security premiums had been paid and that nothing indicated bad faith or abuse. Another case regards Chinese students handing out leaflets; they did work more than ten hours, the Court found no ground for limiting the sanctions (€8.000 per student). Whether the students received proper pay, whether taxes and social security premiums were paid or whether the students were abused or possibly even victims of trafficking did not enter into the Courts considerations.[15] In a case regarding two students cleaning more than ten hours a week, the employer argued that it wasn't a case of abuse and all financial obligations had been fulfilled, but again, this didn't enter into the Courts considerations other than the fact that the employer was trying to run an honest business didn't take away the infraction. If indeed the authorities expect a case of abuse or trafficking, the case is moved to the public prosecutor's desk and becomes a criminal case, not an administrative one. Nevertheless, it has been argued by Dutch legal scholars that not taking into account the level of abuse, or the absence thereof, violates the proportionality of the sanctions imposed (Krop 2014).

b. Not even students

[13] A hospital refusing a Surinamese student because of the work permit requirement was found to act discriminatory, College voor de Rechten van de Mens 23 april 2013, case 2013-49, *NJCM* (2014) nr. 3, p. 313.

[14] http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2013:BZ9068, regarding Chinese students employed in a beauty ~~parlor~~parlour. http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNNE:2014:874 regarding three TCN students employed by a cleaning company without work permits, but who did not exceed the ten hours work a week. The case does not mention abuse (which does not mean there was none). As reasons for a lower sanction, the authorities mention:

[15] Court of the Council of State 19 March 2014 http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2014:1001 and similarly: Court of the Council of State 12 March 2014 http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2014:889.

As was discussed above, if the facts indicate to the Dutch authorities a possible case of trafficking, it becomes a criminal investigation. This was at hand in the case of nine Pakistani students who were admitted to the European University of Professional Education (EUPE) in The Hague. The college fee of € 10.000 was paid by each of them and visa were obtained. The Dutch public prosecutor tried the directors of this University for trafficking after the police found that these nine students, who all lived at the same address, enrolled at this university through an agency. The agency had received a fee for its help in enrolling them. The students were satisfied with the education received, but the police doubted that due to the – according to the police investigating the case –limited knowledge of the English language of these Indian students they would never be able to graduate.[16] At the time the Education Inspection reprimanded the University for its lack of quality.[17] Spring 2014 the court held however that the enrolment of these students wasn't a case of trafficking: they had received valid entry clearance visa based on government approved registration procedures. The trafficking case seems another legal instrument to convince the directors to close down the University, which apparently they eventually did. What the consequence was for the migrant students, whether they were able to graduate, the story doesn't reveal. In a way they were abused by the authorities in the governments' fights against this University. The abuse in this case is not in the labour to be performed during the studies, but the fee paid for the studies in relation to the possibility of success.

Reference must be made to another case of a TCN student facing government 'protection', this is the case of Mohamed Ali Ben Alaya, brought before the European Court of Justice by the German *Verwaltungsgericht* of Berlin.[18]Alaya, of Tunisian nationality, was born in Germany but received his education in Tunisa. He studied information technology in Tunisadn wanted to complete his education with degree in Math at the Technical University in Dortmund. The German authorities refused to grant him a student visa because they doubted his intentions because in school he only received bad grades for those subjects relevant for this course; his knowledge of the German language wouldn't be sufficient either. His chances of success were too slim according to the authorities, reason for them to refuse the application for a residence permit. The authorities feared abuse of the student visa for migration for other purposes (like labour). The Advocate General advised the Court, on the bases of the Students Directive 2004/114, that the Directive does not allow for the national authorities to refuse the residence permit for these reasons. Only if the applicant doesn't fulfil the requirements or when there are clear indications of abuse can the permit be denied. Such indications of abuse weren't there. Without going into the legal details any further, the practical consequence, if the ECJ follows the AG, would be that Alaya must be admitted and will then receive intensified attention of inspections in order to see if indeed he is studying. As the recast will allow the member states to withdraw the residence permit in case of little study progress, Alaya has a strong incentive not to flunk his exams. Again here the abuse is not so much of the TCN but of the legal instruments at hand by the authorities when they think the

[16] District Court The Hague, 30 April 2014 http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:5338.
[17] http://www.onderwijsinspectie.nl/actueel/publicaties/European+University+of+Professional+Education.html, visited on July 8, 2014.
[18] Case C-491/13 *Mohamed Ali Ben Alaya vs. Germany*, conclusion AG Mengozzi of 12 June 2014.

available legal categorization doesn't fit their interpretation of the facts. Since 2011 this 'abuse' has deprived Alaya of a right to entry to Germany for the purpose of studies.

c. Trainees or workers?

As was discussed above, the EU draft Directive sets out to regulate the position of (remunerated) trainees. The Netherlands, like most member states, has had an admission policy for trainees since the 1960ties and often the question was raised whether the trainee policy wasn't abused as a means to get cheap migrant workers. A work permit is required for a trainee, but can be granted without a labour market test, while for workers the test isn't waived and, especially for low or unskilled work, is hardly ever granted. Work and residence permits are required for trainees who do their training in the Netherlands but follow an educational program in their country of origin.

Some trainees are exempted from the work permit requirement. This regards TCN students with a residence permit as students[19] and TCN – even without legal residence – who enrolled in professional education (*Beroepsonderwijs*) before they turned eighteen and who are required to receive practical training – which may mean gaining unremunerated work experience– as part of the curriculum.[20] The latter category was added to the regulations after a Courts decision ruling on the governments' obligation to allow these irregular migrants to finish their education, including a traineeship, based on the right to education as protected under the ECHR. [21] In May 2014 MP's questioned the Minister of Social Affairs why this exemption only applied to certain practical schools and not to all middle and higher education programs. More practical education programs will be included in the exemption, but higher education will not as these illegally staying students are able to pick a track without a traineeship. Not being able to obtain the diploma is their own fault, they should have picked a track without a training.[22] According to the Minister it's a choice between the right to education – which he is not questioning, it's just a matter of what education one picks – and the Dutch governments' right to enforce a restrictive migration policy. On a side note, using trainees as a substitute for a regular worker is a rather common practice on the Dutch labour market and can be seen as part of the flexibilization of the labour market in general. Even if an educational program doesn't require a traineeship, many employers offer 'trainees' work experience and (Dutch) students increase their labour market potential through these trainings.

Let's return to the problem at hand: the relabeling of trainees into workers. The previous elaboration introduced you into the detailed and somewhat arbitrary Dutch regulation on traineeships. The EU Directive might make the Dutch government redesign this regulation, but that's in the future. I'll present cases of (attempted) relabeling of trainees as workers that show what the consequences of labelling are for the migrants' rights.

[19] These trainings were previously qualified as work and required a work permit, ABRvS 4 April 2012, 201106847/1/V6 JV 2012/226 nt M.A.G. Reurs [LJN: BW0790]
[20] Paragraph 1f *Besluit Uitvoering Wav*.
[21] Rb 's-Gravenhage (civiel), 2 May 2012, 403618/HA ZA 11-2443, JV 2012/270 [LJN: BW4736]. Article 2 of the first protocol
[22] Parliamentary questions no. 2014Z08396 of 12 May 2104; answers of 12 June 2014 TK 2013-2014 Aanhangselnummer 2162.

Defining trainees as such and not as workers resulted them not receiving permanent residence: the traineeship residence permit is by law of a temporary nature of not more than one year. Like with the Chinese in the 1980ties, at the turn of the century a group of Indonesian nurses got residence permits as 'trainees', but for two instead of one year. After these two years the nurses wanted to stay. They realized they had worked but had a status as trainees: their employers and the authorities had cheated them out of their rights in order to prevent the idea that the government was lenient on 'labour migration' and providing the employers with a flexible work force to be discarded after two years. However, some hospitals wanted to keep the nurses and they asked the courts to relabelled the status as work and allow the nurses to obtain a more permanent residence status, which claim was awarded by the courts. [23] Since then it has become more difficult to obtain permanent residence as a worker, reducing the difference in rights acquired as worker or as trainee.

The facts of next case coincide to some extent with the previous case, and again a large group of Indonesian trainees was involved. This time it's trainees in the hospitality sector, coming to different hotels in the Netherlands to enjoy one year of training. The year started in April 2008. The year was cut short, as in August 2008 the authorities raided several of the hotels and prosecuted the intermediary organization in charge of placing the trainees for smuggling in human beings. Based on the information retrieved during these raids the organization was fined in august 2010 (ten days before the right to fine them would laps) for illegally employing 93 migrant workers because the workers did not, as was agreed in the terms of the traineeship, rotate after two months from housekeeping to administration, to restaurant services etc. There is nothing in the case reports that would suggest the trainees were exploited, abused or otherwise maltreated. The smuggling case never went to court as the organization made a plea bargain with the public prosecutor.[24] The employer sanctions for illegal employment of the trainees as workers amounted to € 754.000 (at the time € 8.000 per person) and was fought by the organization in court. The District court upheld the fines in March 2013 but in appeal the fines were overturned by the Council of State. The Council of State argued that the public authority granting the permits for the Indonesians as trainees had agreed to a change of the training plan – allowing the trainees to stay at least three months at the same department instead of switching every two months – and had found it appropriate to grant the permits. Also, permits had been granted since 2000 on an annual basis and regular contact had existed between the organization and the permit granting authority, something the labour inspection had ignored. The Council of State concluded that there were no grounds for relabeling the trainees as illegal workers. A big win for the organization, but a useless decision for the migrant trainees: the decision came on 15 January 2014, five and a half year after they were forced to quite their training.[25] At the time human trafficking outside the sex industry wasn't receiving much government attention yet as it is today; today the case might be framed as a case of trafficking and not of smuggling or (just) illegal employment. The relevance of this legal labelling of the

[23] T. de Lange (forthcoming). Public-private regulation of labour migration: a challenge to administrative law accountability mechanisms. In M. Panizzon, G. Zurcher & E. Fornale (Eds.), The Palgrave Handbook of International Labour Migration - Law and Policy Perspectives. Palgrave MacMillian.
[24] Rb Leeuwarden 21 maart 2013, paragraph 4.1, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNNE:2013:BZ4686.
[25] Council of State, 15 January 2014, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2014:53.

case relates to the legal position of the migrant trainees after the raid. Were the residence permits withdraw? Were they deported or given a few weeks for voluntary return? Did they have their own passports and tickets, or did the organization keep those for them? Indeed, did they have the means to return home or did they choose to remain in illegality? Case law doesn't provide us answers to these questions. They are not known either to the Indonesian Migrant Workers Union in the Netherlands, who suggested that these trainees did return home.[26]

Another case started early June 2014 when the Dutch labour inspection reported a possible abuse (of the migration rules, not of migrants) seven Chinese migrants. They have a trainee residence permit, obtained it through an agency like the Indonesians did, but possibly they used the permit to work as cheap workers: harvesting vegetables and working on a goat farm without attention being paid to the training objectives. The Chinese migrants have been reported to the immigration authorities who will investigate the possibility of withdrawing their residence permit, says the government news report.[27] Although the news report does, in general terms, stress that the abuse of migration law should be prevented in order to stop possible *abuse of migrants* involved it does not mention whether the authorities will investigate if these migrants where victims of abuse, indeed, it just mentions the option to withdraw their status, suggesting they are perpetrators, not victims. [28]

Finally, in a French case presented to the Court de Cassation in 2002, the Court held that a hotel manager in Saint-Tropez had infringed the law regarding three trainees (not migrants) who were forced to work behind the reception desk, without supervision, about 55-63 hours a week, including nights from 23.00-07:00 o'clock; they fulfilled their duties like it was a regular job and got paid a small fee, not in any way relating to French minimum wage. The Court held that this was a case of dependence that constitutes trafficking due to the traineeship being part of their school curriculum and a requirement for obtaining their qualifications. The manager of the hotel was sentence to four months of imprisonment and fines.[29] Dependence is a marker for trafficking of human beings. The facts as presented in case law and media reports on the Dutch cases of Indonesian and Chinese trainees give too little details to conclude that such a dependence was present; but the cases do suggest that maybe this wasn't even investigated and the migrants weren't even given a chance (to consider) to file a complaint and be eligible for the residence permit as a victim of trafficking or of abusive. There could be a coincidence of

[26] Personal correspondence 8 July 2014.
[27] http://www.inspectieszw.nl/actueel/nieuwsberichten/chinese_stagiaires_ingezet_als_goedkope_arbeidskrachten.aspx, visited on July 8, 2014.
[28] District Court Roermond 11 May 2010 (on three trainees from Taiwan, Indonesia and China), www.rechtspraak.nl, ljn BM4307: The lack of a trainee agreement (at the time not required by law) was not a justifiable ground to relabel these trainees as workers.
[29] Court de Cassation 3 December 2002, no. 02-81453; discussed in F.H. van Dijk & R.N. Ungureanu, 'Labour exploitation in Europe', 2010, p. 104.

interest between government to fight the shadow economy and those determined to fight trafficking (government and ngo's protecting human rights) as Anderson (2010) notes for the UK but in these cases is seems this coincidence of interest has not been found. The Dutch governments' focus is (still) very much on fighting illegal employment as a form of abuse of migration rules and as a means of illegitimate competition on labour costs.

V First conclusions / points for discussion

I have mapped the EU (draft) legal regimes on the entry and residence and employment of students, PhDs and trainees in relation to regular 'workers'. Based on case law I have shown where these categorizations blur in practice and how the relabeling allows for different kinds of abuse. Looking at the migrants involved in these cases further research is required to do a gender analysis, but the countries of origin that stand out are Indonesia and China. Possibly the inspections more often target migrants (students or trainees included) from these countries, as was the case with the research into the Chinese beauty parlours. Analysing the class structure or these cases gives the impression that lower skilled trainees run a higher risk of relabeling; interestingly, if we take language skills as an indicator of class, in two cases the authorities called into doubt the language (English) proficiency of the migrants who wanted to study although they passed the required language tests. Possibly again nationality played a role, as it regarded Indian and a Tunisian student.

The students and trainees discussed in this paper were all working in what would be typical low wage jobs (although I have come across students performing jobs at the university as research assistant as well). Students and possibly to a lesser extent trainees as well, can be considered a hyper flexible supply of workforce. The increase of the number of hours they must be allowed to work in EU law adds to this. With Anderson I conclude that immigration control shapes the position of migrants on the labour market. In almost all cases relabeling had as a consequence a lesser right to remain in the Netherlands, a feared long term costs of their migration possibly reduced. The Chinese students in the 1980ties got temporary residence, the Indonesian trainees at the turn of the century got temporary residence and since then relabeling is a ground for withdrawal of a legal residency status (in the case of students and trainees qualified as illegally employed migrant workers), hinders the migrant from starting (in the case of Alaya) or finishing ones studies (in all cases regarding students and trainees relabelled as workers as well as in the case of the presumed victims of trafficking (and undocumented students under age – not discussed)). Interestingly, the qualification as illegally employed migrant worker (though *not* illegally staying) leads to a stronger legal position vis-à-vis the employer when claiming equal pay according to Dutch law.

In the Netherlands, placing a migrant in the category of a labour migrant doesn't result in a more permanent residence status since 2014. Due to the political climate the opening up the channels for labour migration instead of (ab)using trainees and students as alternatives to provide for a flexible work force hides the possible need for TCN migrant workers or hides other labour market imbalances.

Without a *legal* labour migration policy for skilled workers abuse of these other categories will probably continue at the cost of the migrants. Indeed, the EU needs to fill the gap in legislation on protection of TCN who entered under the wrong category, allowing them to receive assistance (in claiming outstanding remunerations etc.) like illegally staying TCN.

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