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The migration lottery: Luck, law and lotteries

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Introduction

Lotteries, understandably, have a poor reputation. To speak of an unfair process might be to compare it to a lottery. There is something deeply discomfoting about the notion that luck should determine a person's outcomes. Yet, randomised social decision-making—through deliberately designed social lotteries—is also understood as a just way of allocating some burdens or benefits. Lotteries have been used throughout history, such as for military conscription and jury duty. More recently, New Zealand used a social lottery to allocate scarce places in its Covid-19 quarantine program (MIQ 2022), enrolment in which was necessary to enter the country. Michael Sandel (2020: 184–88) has also proposed a 'lottery of the qualified' for entry to elite universities in the United States. This chapter argues that lotteries are a useful policy tool for allocating scarce goods to individuals with equal or indeterminate claims. Lotteries can help create the migration 'pathways' discussed in Chapter 1 of this volume that the European Union and its member states are increasingly exploring as they navigate the 'borders-to-pathways' moment.¹ As a policy tool, a migration lottery can help ensure pathways remain fairer and more accessible than if alternative tools, such as 'first-come, first-served', are used in building or maintaining pathways for migration to Europe.

1 The 'borders-to-pathways' image is critically examined in Chapter 1 of this volume.

Lotteries have been used in migration policy in the United States since 1989, in New Zealand since at least 2002 and in Canada since 2017 (Mares 2023: 27). In 2023, Australia announced the introduction of a lottery-based Pacific Engagement Visa.² Scholars and policymakers have studied the flawed origin of the United States' lottery program (Legomsky 1993: 319; Law 2002: 3; Wasem 2002: 239) and several have proposed or considered migration lottery designs (Woodward 1992: 59, 61; Bhattacharya 2012: 4; OECD 2014: 213; Farer 2020). This chapter builds on these contributions to argue that a migration lottery offers a useful tool for responding to a long-term challenge facing migration policy: allocating numerically limited (that is, capped) permanent and temporary migration visas to ever larger numbers of eligible migrants. I suggest migration lotteries offer a fairer means of allocating visas than the current policy alternatives of 'first-come, first-served', which is the dominant approach, or ranking migrants through points-based programs. Realising the European Union's goal of creating a 'fair, efficient and sustainable' migration system, as emphasised in the *New Pact on Migration and Asylum*, demands innovative policies and approaches (EC 2020: 28).

This chapter takes as given limits on migration and the current objectives of most states' immigration policies, including most European states. As explored empirically later in this chapter, these objectives include the promotion of family, labour and skilled migration, along with a relatively small humanitarian program. The concern of the chapter is not with the levels or distribution of migration among the various migration streams. Rather, I examine how, in a context of the number of eligible immigrants far exceeding limited migration places, policymakers can allocate visas more equitably within each migration stream. In this context, the discussion takes 'equality of opportunity' as its key fairness objective: ensuring that people with equal or indeterminate claims to migrate under visa criteria do in fact have a degree of meaningful equality of opportunity. Lotteries can be adapted to the existing economic and social objectives of most states' migration policies while increasing equality of opportunity among those who are eligible for family, labour or humanitarian visas. This research will be relevant to policymakers in countries with caps on migration or which are looking to implement points-based migration programs. These countries include Australia, the United Kingdom, Canada, the US and an

2 Under the proposed s. 46C(2) of the *Migration Act 1958*, inserted by the Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Bill 2023 (Cth), 'participants' must be 'selected at random'.

increasing number of EU states.³ Following the introduction of a points-based migration stream in the UK, both Germany and Czechia are looking to introduce similar programs (OECD 2022: 72). The consideration of lotteries will also be relevant to other European states that are increasingly looking to migration quotas as a way to address voter concerns. This chapter suggests that quotas will be quickly exceeded if EU and member state attempts to regularise migration patterns succeed, while excessive competition for points-based visas could eventually become arbitrary and exclude valued occupations such as nursing and teaching.

Section one argues that managing the policy challenge of limited visas fairly and justly is critical because the ability to migrate can offer enormous benefits to individuals. I then present the migration policy challenge facing decision-makers today and into the future: the ability to migrate remains intentionally restricted, yet the number of people who would be granted a visa but for limits on places is sizeable and increasing across most advanced economies. Concluding this section, I consider existing approaches to the policy challenge. Section two introduces social lotteries as a policy tool, identifying their features and requirements. I then examine the potential benefits of a migration lottery, discussing the US Diversity Visa lottery as a case study, before addressing how the allocation of scarce visas is strongly suited to the use of a lottery. I will then examine the most common alternative to a lottery, the approach of ‘first-come, first-served’, and explain how the benefits of this policy tool break down when demand is too high and waiting times are too long. Section three examines two suggestions for how a lottery could work within existing migration policies, before considering how a migration lottery could be introduced in the EU.

The policy challenge

The question of how to allocate visas and the right to migrate matters because the ability to migrate is critical to individuals and their opportunities in life. This is particularly because of the unequal distribution of basic goods such as security, health, education and human rights across countries (Hasell et al. 2023). National borders and inherited citizenship mean that an individual’s position in this global distribution is largely fixed.⁴

³ As discussed later in this chapter, the following countries have introduced visas with caps or quotas: Austria, Czechia, Estonia, Italy, Greece, Hungary and Romania.

⁴ Except insofar as a person is able to be socially mobile within a state.

This results in ‘the birthright lottery’ (Shachar 2009: 3)—an arbitrary system of allocating the ‘feudal privilege’ of ‘[c]itizenship in Western liberal democracies’ (Carens 1987: 251, 252). Milanović (2016) has identified the ‘citizenship rent’ from which citizens of developed economies benefit. His analysis, comparing incomes in countries globally, has concluded that ‘we can “explain” ... more than two-thirds of the variability in incomes across country-percentiles by only one variable: the country where people live’. Milanović suggests that ‘[j]ust by being born in the United States rather than in Congo, a person would multiply her income by 93 times’ (2016: 133). Absent the abolition of political communities bounded by ostensibly impermeable borders, immigration is the only way to escape this birthright lottery and to gain access to the ‘location bonus’ or ‘citizenship rent’ of living in most Global North states (Bregman 2015: 217–21; Milanović 2016: 133).

Immigration also matters to individuals because of the social benefits it offers. This is obvious in the case of family migration, where parents, children or extended family can join a family member in another country. However, migration also matters to individuals in the context of ‘transnational social networks’, including in the diaspora (Van Hear et al. 2012: 11). Cultural differences or attractions across states may also make migration appealing, creating opportunities for human flourishing in different social contexts. These non-distributional motivations are obvious in the case of young people who migrate for study or work, even though the country from which they migrate may have a higher standard of living.⁵ The EU’s Erasmus+ mobility program, for example, has supported more than 12.5 million people to move for study, training or sport since 1987 (EC 2014; 2022: 17). The social motivations for migration are also found in the fact that many Bangladeshi women find in migration a way to escape marriages in a country that restricts divorce (Van Hear et al. 2012: 18). Apart from multiple economic gains, migration, therefore, brings significant social benefits that flow from shifting between different political communities that may be better suited or more attractive to particular individuals, regardless of whether these communities are better materially endowed.

The distributional inequalities persisting in the world today and the social opportunities afforded by migration require a migration policy that, to the maximum possible extent, ensures equality of opportunity among migrants

5 For discussion of the social benefits of migration for students, see EC (2014: 18).

with equal claims to a visa. I will return later to the ‘equal claims’ issue, but before doing so it is worth commenting on why formal equality of opportunity is a useful measure of fairness in migration policy. Formal equality of opportunity means ‘that positions and posts that confer superior advantages should be open to all applicants. Applications are assessed on their merits, and the applicant deemed most qualified according to appropriate criteria is offered the position’ (Arneson 2015).

In the context of migration policy, formal equality of opportunity means that all people eligible for a visa because they meet the criteria should have the meaningful opportunity to access that visa. For example, a person who meets the criteria for a parent visa in the UK should have the opportunity to receive that visa. I adopt a formal equality of opportunity approach because, while I consider equality of outcomes or substantive equality of opportunity are morally superior, they would require a revolutionary change in the principles and objectives of migration policy. This rethink has been proposed by many scholars (Carens 1987, 2013; Bregman 2015; Sager 2020) and rejected by others (Walzer 1983). Instead of joining this debate, I suggest that an immediately achievable fairer migration policy is one that distributes the opportunity to access the right to migrate as equally as possible among those with equal claims to a visa. The limits of ‘formal equality’ in this context are particularly acute. I make little comment in this chapter on the rules establishing who has a ‘claim’ to a visa—rules that may create a group of eligible persons that renders ‘formal equality’ entirely regressive and discriminatory. The aspirations of this chapter are relatively modest, seeking only to enhance the ability of the minority of people eligible for visas to access such visas.

The challenge of allocating visas

The policy challenge can be simply stated: the number of people wanting to permanently migrate far exceeds the number of available places. Gallup polling suggests about 750 million people would migrate if they could (Esipova et al. 2018). The US Diversity Visa Program, which simply requires a person to have a high school degree or two years of skilled experience, received 23,182,554 registrations in the 2020 financial year and 11,830,707 in the 2021 financial year (US State Department 2021b), with just 50,000 visas available under the program. Nuance can be added to this policy challenge: the number of people who would be granted a visa but

for limits on visa places is significant. This second group is smaller than the total number of people who want to migrate because of states' restrictive visa requirements, such as for family and skill visas, but it remains large.

The available data support the proposition that the number of persons eligible for family, labour and humanitarian visas exceeds the number of visas available. The waiting list for family visas is particularly startling. A person making a new application for an Australian Contributory Parent visa will wait 12 years before they have their application processed (Department of Home Affairs 2022a). New successful applicants for Parent and Aged Parent visas can expect to wait 29 years, with the wait for eligible Remaining Relative and Aged Dependent Relative visa applications about 24 years (Department of Home Affairs 2022a, 2022b). In the US, family and employment visas are also substantially oversubscribed. The waiting list for the 226,000 family-preference visas (which exclude 'immediate relatives', an uncapped category) was 3,969,573—a 5.5 per cent increase on the previous year (US State Department 2021a: 2). This belies the true waiting times for people from oversubscribed countries, because the US imposes a cap per country for most visa classes. The 2022 financial year country cap was 15,820 (US State Department 2021a: 5), which means people on the list of 1,209,633 Mexican applicants will wait decades and someone making a new application faces a wait of more than 70 years.⁶ This reality is acknowledged by the US consular service, which frequently culls 'visa cases to remove from the count those unlikely to see further action' (US State Department 2021a: 4). For humanitarian visas, the number of eligible refugees far exceeds the number of humanitarian visa places in advanced economies, with more than 20 million people registering as refugees between 2010 and 2019 (UNHCR 2020: 4). The number of UNHCR resettlement refugees a country accepts is capped at whatever discretionary figure that country applies in a given year (OECD 2006: 111).

The allocation of scarce visas to ever larger numbers of applicants will become increasingly important among member states of the European Union. Several countries, including Austria, Czechia, Estonia, Italy, Greece, Hungary and Romania, have numerical limits on their temporary and permanent migration programs (Chaloff and Lemaitre 2009: 43; OECD 2017: 200, 236, 238, 268; 2018: 222; 2019: 224, 228). Many EU countries also have small humanitarian programs (see Table 5.1), which have become

⁶ Assuming the country cap is not substantially increased.

largely meaningless in the context of large-scale irregular migration, as observed in Greece and Italy. However, this is changing as the EU and its member states seek to strengthen common borders and regularise migration—both central objectives of the European Commission’s *New Pact on Migration and Asylum* (2020: 2–3). If these attempts succeed, regular migration pathways will face greater demand, perhaps comparable to that seen in Australia and the United States. For example, Romania reached its annual permanent migration quota for the first time in November 2017 and, but for rises in the quota over both years, it would have exceeded it in 2018 and 2019 (OECD 2018: 276; 2019: 268). Estonia reached its cap on residence permits in 2018 (OECD 2019: 228). The increase in regular migration comes as many countries are promising stronger controls on migration more generally. The French Government, promising to ‘take back control of our migration policy’ (BBC News 2019), is looking to introduce migration quotas for the first time (Chrisafis 2019), while Austria did so in 2017 for humanitarian visas (ECRE 2017; Rettman 2016).

It is in this context—of a move to both regularise migration and introduce quotas on immigration that are being exceeded or likely to be exceeded—that the fundamental question of *how* to allocate the ability to migrate becomes crucial to policymakers. In other words, how can the ‘borders-to-pathways’ aspiration be meaningfully realised in Europe and how should new or increasingly busy pathways to migration be (re)designed?

Current approaches to the policy challenge

Three core long-term migration streams have developed that focus on different migrant characteristics: labour, family and humanitarian. Table 5.1 shows the prevalence of these streams in permanent or long-term migration programs across selected Organisation for Economic Co-operation and Development (OECD) states. European states have introduced a suite of new policies to encourage temporary and permanent skilled labour migration, often seeking to move away from migration programs dominated by family or low-skilled migrants. In Germany, for example, the *Skilled Workers Immigration Act* has simplified the processes for skilled migrants to obtain visas (OECD 2022: 236). Countries such as Lithuania, Slovakia and Poland have taken similar steps (OECD 2022: 254, 255, 272).

Table 5.1 Permanent or long-term migration streams in selected countries (per cent)

Country	Labour	Family	Humanitarian	Total migration in three streams
Slovenia	57.00	42.00	n.a.	98.30
Canada	32.50	51.80	13.80	98.10
United States	11.00	72.00	11.00	93.90
New Zealand	22.00	65.00	6.00	93.20
Australia	26.60	58.20	8.00	92.80
Lithuania	88.00	4.00	n.a.	92.00
Estonia	41.50	43.50	n.a.	85.00
Czechia	57.10	24.70	n.a.	81.80
Portugal	41.00	35.00	0.00	75.90
Poland	60.00	15.00	n.a.	75.20
United Kingdom	18.00	41.00	14.00	73.50
Finland	23.60	35.90	12.20	71.70
France	18.00	35.00	12.00	65.00
Italy	6.00	47.00	9.00	62.30
Spain	10.00	33.00	15.00	57.70
Greece	8.00	42.00	n.a.	50.20
Belgium	3.70	28.10	6.40	38.20
Netherlands	12.00	21.00	4.00	38.00
Denmark	18.40	17.90	1.50	37.80
Germany	10.00	14.00	12.00	35.80
Austria	7.40	11.40	10.90	29.70

n.a. = not applicable

Source: Data from OECD country reports published in the *International Migration Outlook* (2022).

Policymakers can rely on a mix of policy tools to limit migration within the framework of either formal or informal numerical limits (OECD 2006: 111). The two key policy tools are restrictions on eligibility criteria (for example, the types of relatives able to apply for a family visa or requirements for certain educational standards for skilled migrants) and ranking potential migrants based on their characteristics, with only applicants of a certain rank or score able to apply to migrate (Elster 1992: 58–59). For example, Australia's migration scheme for skilled migrants assigns points based on age, language, skilled work in Australia and overseas, educational qualifications

and several other criteria (Sumption 2019: 3). In 2019, applicants who did not have a job offer needed at least 65 out of 100 points to be eligible under the criteria. However, due to Australia's capping of visa numbers and reliance on ranking migrants, successful applicants really needed at least 85 points to succeed in June 2019—up from 70 in December 2018 (Sumption 2019: 3). The scope for this kind of ranking or for restricting applicant criteria is limited in relation to humanitarian migrants applying for resettlement. Instead, humanitarian visas are allocated on a waiting list basis administered by the UNHCR or through a natural lottery of who is physically able to get to a country that may accept them (asylum seekers) (UNHCR 2020: 4). Many advanced economies, even when using policy tools to limit the pool of eligible migrants, will still see more eligible applicants than available places, as the beginning of this section demonstrated.

Wherever the number of eligible applicants exceeds the supply of available migration places, policymakers have several options. First, as the Australian example demonstrates, eligible migrants can simply be ranked and excluded if they do not meet the shifting cut-off score, which is the point at which the number of ranked applicants meets the maximum number of places. However, this does not apply to family and humanitarian streams. As Table 5.1 shows, family migrants make up a significant proportion of migrants to most EU countries, as well as to the US, Australia and Canada (Ferrie and Hatton 2015: 53, 78). Despite their use in Australia, points-based systems that comparatively rank applicants, whether for labour or family visas, are used by few other countries. Instead, minimum standards are generally used, such as minimum educational qualifications, skills or a job offer. In this case, the primary policy tool for allocating visas is 'first-come, first-served'—an approach that is often used in conjunction with a *waiting list* or *queue* (Elster 1989: 70). Where there is no formal waiting list, an informal but unordered one effectively operates for people who are eligible but were unable to access a visa due to a cap on places and the operation of 'first-come, first-served'. It is also worth noting that the challenge of allocating scarce permanent or long-term labour visas can be avoided by relying on short-term migrant schemes. These are often uncapped, but they leave individuals in precarious situations, needing to frequently reapply for their visas and having limited economic and social rights. In 2016, OECD countries received 4.2 million temporary labour migrants—an increase of 11 per cent on 2015 and dwarfing the 500,000 permanent labour migrants moving to an OECD country (OECD 2018: 26).

In summary, policymakers who do not use points-based systems generally attempt, at least in relation to labour and family migration, to restrict the number of persons eligible for visas, such as through minimum skills, educational qualifications or familial connections. Where this fails to reduce the number of eligible persons below a numerical limit, the policymaker can simply declare that the country will not accept migrants above the cap and implement a ‘first-come, first-served’ policy. In this circumstance, which also applies to humanitarian migrants, all eligible persons have equal claims to a visa. Policymakers then use time and the order in which people applied as the tiebreaker between equal claims to the visa (through a waiting list).

Proposals for a migration lottery

This section first considers what randomised social decision-making in the form of a lottery looks like, how lotteries have been used historically, how they can be flexibly designed and their ethics and efficacy. It then examines the US Diversity Visa lottery, before considering why European and other policymakers may want to use a migration lottery, particularly in place of ‘first-come, first-served’ approaches, to allocate scarce visas.

What is a lottery?

Kornhauser and Sager (1988: 483, 485) define a social lottery as a scheme that

allocates a benefit (sometimes called a ‘prize’) among a designated group of potential beneficiaries (‘candidates’ who comprise a ‘pool’) according to a stipulated procedure (the ‘pay-off condition’). The payoff condition is stipulated by some person or persons with the authority to effectuate the allocation (the ‘allocating agency’).

A social lottery can be contrasted with a natural lottery, such as a person’s genetic inheritance or birthplace, both of which have no human ‘allocating agency’ (Goodwin 1992: 62–64; Shachar 2009: 3–4, 11). A social lottery is therefore manufactured by an authority able to impose it as a decision-making process for allocating a particular benefit or burden. Social lotteries are most famously used in the allocation of jury duty and military service through draft lotteries (Elster 1989: 95; Fienberg 1971: 255). They have also been used ‘to settle sporting matters, to determine which citizens should be subject to tax inspections, to recruit employees, to determine

which immigration applications should be successful [referring to the US Diversity Visa Program], [and] to assign judges' (Duxbury 1999: 43–44). The use of social lotteries has therefore been significant.

For a process to be a lottery, the 'stipulated procedure (the "payoff condition")' must be random (Kornhauser and Sager 1988: 485). What this means in practice is much debated and is dependent on the design of the 'stipulated procedure'. For the purposes of this chapter, I take this randomness requirement to be satisfied so long as the entries in a pool are selected in an 'equiprobable' way (Kornhauser and Sager 1988: 485). This means that if there are 100 slips of paper in a hat, each has the same chance of being selected. This does not mean that each person has an equal chance of being selected, because a person may have been entered multiple times under a 'weighted lottery' approach. However, each entry to the lottery is as likely to be picked.

The members of the pool for the lottery can be selected on almost any basis. This makes social lotteries amoral: the morality of any lottery depends on how the pool is selected and what the lottery is being used to allocate. For example, the candidates for a military conscription lottery may be persons aged 18–40, while the pool for a kidney transplant may be those likely to die within one year absent a transplant. An immoral lottery may be one that allocates a burden, such as military service, among a pool solely comprising a minority ethnic community. An immoral lottery may only permit white people to access a benefit such as a dialysis machine. Structural factors may also—deliberately or not—affect access to lotteries and therefore their fairness. Such structural factors can include language, location, knowledge and other social capital. For example, and as discussed further below, the Irish diaspora significantly helped Irish migrants 'win' the US Diversity Visa lottery during its early years. Social lotteries are deliberate human creations generated to address allocative challenges and they are inherently neither moral nor immoral. Ultimately, lotteries offer almost endless flexibility in selecting entrants to the pool of potential 'winners' and in weighing each applicant within the pool (whether equally or through some formula).

The US Diversity Visa lottery

The history of the US Diversity Visa begins with the US Congress's concern that family migrants in the 1980s were coming from a limited number of countries, largely in Asia and South and Central America (Legomsky 1993: 328). This was the result of the *Immigration and Nationality Act of 1965* and

its removal of many explicitly discriminatory features of US immigration policy, such as a ban on Asian immigration (Law 2002: 4). After a transition period that ended on 30 June 1968, discriminatory national quotas were eliminated and s. 202(a) of the *Immigration and Nationality Act* introduced a limit of 20,000 migrants per country, covering all visa streams.⁷ Section 203 of the Act provided for a new system of preferences, which assigned visas to people based on labour and family connection requirements (Law 2002: 6–12). The legislation immediately reduced migration from European states, which had benefited from the discriminatory rules in the earlier legislation. In 1965, the total quota for migrants from European states was 149,697, or 94 per cent of the total quota in that year. Migrants from Asia and Africa had a total quota of less than 8,000, and only 4,624 people were actually allowed to migrate from those regions in 1965 (US Immigration and Naturalization Service 1965: 34). By 1970, European migrants accounted for 57 per cent of Eastern Hemisphere migrants admitted through the new system—a figure that dropped to 37 per cent in 1975 (US Immigration and Naturalization Service 1970: 47; 1975: 42).

Beginning in 1986, Congress began experimenting with policy tools to allocate permanent residency visas to migrants from countries that had been ‘adversely affected’ by the 1965 *Immigration and Nationality Act* (Legomsky 1993: 328). As Law (2002) demonstrates, the Diversity Visa lottery was classic ‘pork-barrel politics’ aimed at benefiting Americans of European, particularly Irish, heritage.⁸ European migrants had been impacted by the new preferences system, under which it appears many were ineligible or uncompetitive relative to migrants from other regions. This meant that, by the 1980s, many European states had relatively low migration flows to the United States and used little of their quota of 20,000 visas. The 1986 NP-5 program created a total of 10,000 visas that were granted ‘first-come, first-served’ to nationals of ‘adversely affected countries’. This meant any ‘country that did not use more than 25 percent of its 20,000 annual allotment of visas’—a definition that generally captured European states (Law 2002: 15). This program ran for four years and, though not strictly a lottery, functioned with a significant degree of luck. A total of 1.4 million applications were received in the seven-day registration period for 1986,

7 There were exceptions to this rule, so that some migrants could enter without counting towards the numerical limits. Most importantly, ss. 201(a)–(b) of the *Immigration and Nationality Act* provided that exempt migrants included ‘immediate relatives’—defined to mean children, spouses and parents of a citizen of the United States.

8 This view was echoed by Miller (2017); and Alvarez (2017).

with applications approved as they arrived in the mail (Dunn 1991; Law 2002: 15). Applicants easily manipulated the program. Irish applicants arranged charter flights for their applications and held parties where attendees filled in visa applications, which were unlimited, for potential Irish migrants (Gaiba 2016; Law 2002: 15). Applications received in 1986 were used to award a further 10,000 visas annually in 1987, 1988 and 1989, resulting in Irish migrants receiving more than 40 per cent of visas. The scheme had a strong racial aspect to it, as European migrants tended to be white (Gaiba 2016; Law 2002: 15).

Following this first period, the NP-5 program was replaced with an actual randomised lottery with one entry per person. In 1990, an initial program (OP-1) offered 10,000 visas to nationals of ‘underrepresented countries’. OP-1 used the same criteria as the 1986 NP-5 program but genuinely randomised the process. This resulted in a vastly different cohort from the NP-5’s Irish-dominated stream, with the top 10 countries in 1990 being Bangladesh, Pakistan, Egypt, Peru, Trinidad and Tobago, Fiji, Poland, Iran, Malaysia and Indonesia (Dunn 1991). The lottery was made permanent as part of the *Immigration Act 1990*. From 1992 to 1994, a transitional lottery was operated (visa program AA-1), with 40,000 visas granted annually, subject to national limits and an Irish preference that guaranteed at least 40 per cent of visas to Irish nationals (Wasem 2002: 241). Since 1995, the modern Diversity Visa has provided 50,000 visas (down from 55,000 in its first two years of operation) to nationals from countries ‘from which immigrant admissions were lower than a total of 50,000 over the preceding five years’ (Wilson 2019: 4). Numerical limits are applied to applicants from certain regions, each country is capped at 7 per cent of the total number of available visas and there is no cost to enter the lottery (US State Department 2020: 1). Along with being from an eligible country, an applicant must have a ‘high school education or its equivalent’ or ‘two years of work experience within the past five years in an occupation that requires at least two years of training or experience to perform’ (US State Department 2020: 2).

The US Diversity Visa illustrates the potential flexibility of lotteries in increasing equality of opportunity while still achieving the longstanding objectives of migration policy. As Figures 5.1 and 5.2 show, the Diversity Visa produces a notably different cohort of migrants than other migration streams. The figures show the visa provides far more visas to African migrants (43 per cent) than other streams (11 per cent). It also results in a substantially younger migrant cohort, with 85 per cent of visa recipients under the age of 30 (compared with 46 per cent in other migration streams).

The Diversity Visa delivers on the ‘diversity’ objective while using skill requirements to achieve a migrant cohort that reflects the labour objectives of US migration policy. The evolution of the program over its first decade from 1986 demonstrates how the criteria used to select the ‘pool’ of potential ‘winners’ can be flexibly altered as the objectives of migration policy shift. It is notable that the shift from a ‘first-come, first-served’ approach in the 1986 NP-5 program, which rewarded informed and mobilised migrants such as the Irish, to a lottery approach significantly improved the equality of opportunity, as reflected in the far more diverse cohort since the 1995 lottery. It should be noted that if a ‘first-come, first-served’ approach had been retained, the waiting time for migrants at the end of the waiting list for the Diversity Visa would be measured in hundreds of years.

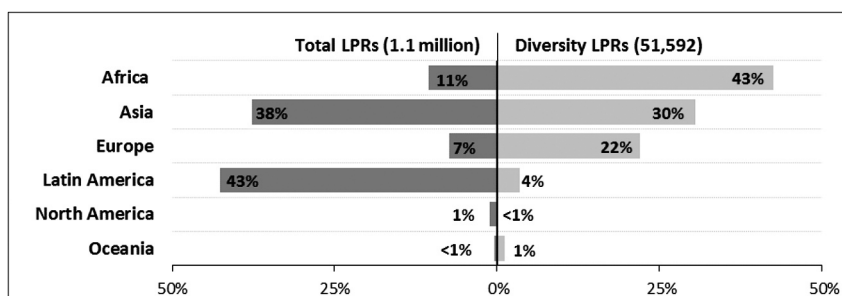


Figure 5.1 Regional composition of US Diversity Visas and general immigration stream

Note: LPR refers to legal permanent resident.

Source: Wilson (2019: 7).

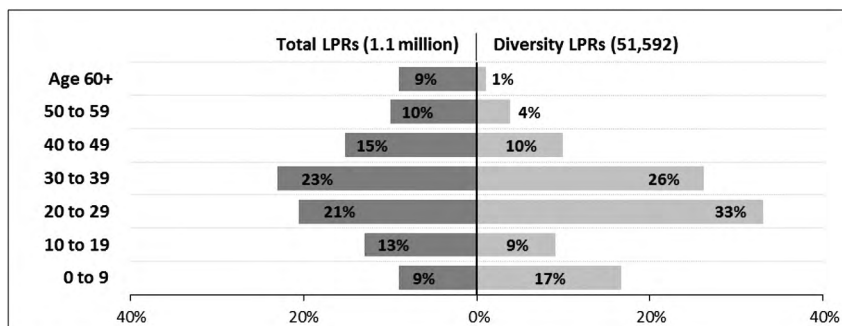


Figure 5.2 Age composition of US Diversity Visas and general immigration stream

Source: Wilson (2019: 8).

Why use a migration lottery for allocating visas?

Scholars who have previously considered the use of a migration lottery have assumed that it would need to draw from the entire population of people wishing to migrate (Bhattacharya 2012; Woodward 1992: 61). This may be true from a purely moral standpoint of ensuring complete equality of opportunity. However, it is not consistent with the objectives of modern migration policies. Migration policies, including those from European states identified in Table 5.1, tend to focus on family and labour migration, with a component of humanitarian migration. So, how can a lottery be used to serve the objectives of migration policies?

As a tool for allocating benefits, a social lottery is useful for situations in which people are: 1) equally or indeterminately entitled to a benefit, and 2) the benefit is not sufficiently available to satisfy people's demand for it. Indeterminate claims are those where there is no fair or practical way to distinguish between multiple people. Policymakers instead rely on other mechanisms to distinguish indeterminate claims, such as 'first-come, first-served' or a lottery. Indeterminacy arises 'when claims are determined by considerations that are matters of degree' or where 'sources of claims may be intrinsically vague, so that it may be impossible even in principle to say that claims are exactly equal' (Broome 1984: 38, 49). Duxbury (1999: 44–45) identifies the use of lotteries in the allocation of benefits among indeterminate or equal claims to 'plots of land, public housing, church pews, proceeds of charity, oil-drilling leases, broadcasting licenses, prospecting rights, tickets for public events, vaccines and other drugs, haemodialysis machines, and places at medical and other schools'. Sandel (2020: 184–88) has proposed a lottery for the allocation of places at top universities, given the indeterminacy of many applicants' claims to such places. Lotteries are useful in these situations because the decision-maker has determined that all the people in the 'pool' of eligible applicants have an equal or indistinguishable claim to the good. Allocation of visas for family and humanitarian migration obviously satisfies both criteria: as discussed in section one, the number of people satisfying the eligibility criteria far outweighs the number of visas. New Zealand's migration lottery is a classic case of indeterminacy: it awards a very small number of permanent residency visas through its Samoan Quota and Pacific Access programs among large numbers of applicants who are all equally eligible (New Zealand Immigration 2023; RNZ 2019).

Where a decision-maker is faced with a pool of equally or indeterminately entitled applicants, a lottery brings in two key benefits that ensure the decision-making process remains fair: a sanitising effect and equality of opportunity. Both are shared, in theory, with a ‘first-come, first-served’ approach, though the second of these breaks down when the pool of eligible applicants is too large. A lottery has ‘sanitising effects’ because it suppresses ‘all reasons for making an allocative choice’ among a group of people with equal or indeterminate entitlements to a good (Kornhauser and Sager 1988: 488). This means that the risk of ‘falling into error and delusion’ as a result of our ‘rational capacities’ trying to discern reasons for distinguishing claims ‘that simply aren’t there’ is reduced (Stone 2009: 375, 383; see also Goodwin 1992: 97). In the context of migration, this can reduce the need for decision-makers to try to artificially distinguish between applicants, though the decision-maker can still apply criteria to determine who is in the eligible ‘pool’ for the lottery.

Second, a lottery provides equality of opportunity by giving everyone within the pool a chance to access the good (Duxbury 1999: 61). This led Greely (1977: 113, 122) to regard ‘random selection’ as ‘the only allocative method which can claim the objective equality of opportunity from which the satisfaction of equality of expectation springs. It is the allocative method which maximises the goal of equality.’ It should be noted that this pure conception of ‘equality of opportunity’ as giving everyone within the pool an equal opportunity to access the good is modified in the case of weighted lotteries. Under a weighted lottery, some people within the pool are more likely to ‘win’ because they have been entered multiple times. However, I suggest that even a weighted lottery delivers a degree of equality of opportunity to access a good, at least when compared with adjudicatory or market mechanisms. Such mechanisms would otherwise simply exclude people from the opportunity to access a good because a person did not rank sufficiently high or have enough funds. Formal equality of opportunity is preserved in weighted lotteries because any entrant still has the possibility of ‘winning’ and has the (theoretical) opportunity to satisfy whatever criteria lead to greater weighting, thereby increasing the number of entries.⁹

Last, lotteries can be useful and flexible for decision-making because policymakers can use them in conjunction with other allocative mechanisms—notably, adjudicatory and market mechanisms (Kornhauser

9 As long as the factors increasing a person’s weighting are not the product of a natural lottery, such as height, race or sex.

and Sager 1988: 483). For example, access to a lottery for haemodialysis machines may be conducted through adjudication, with access to the pool limited to patients with a reasonable postoperative life expectancy, good prospects of a successful operation and a significant need for the treatment. In contrast, access to a lottery for broadcasting licences may be determined by a market mechanism that requires payment of a fee to enter the lottery. Lotteries only become necessary if the number of people in the pool exceeds the number of haemodialysis machines or broadcasting licences, which themselves are indivisible. In both cases, a small pool could be achieved by relying solely on the adjudicatory or market mechanism. For example, the criteria for access to haemodialysis machines could be set in such a way to limit the pool to the number of machines, and broadcasting licences could be auctioned (Broome 1984: 41). However, reliance on market mechanisms is often inappropriate or regarded as immoral for scarce goods that bring significant benefits because such mechanisms reward privilege and wealth (Sandel 2012). A market mechanism would be inappropriate for allocating humanitarian or family visas and reliance on market mechanisms, such as reference to a person's income, often leaves a pool of eligible labour migrants that is greater than the number of available visas. Reliance on adjudicatory mechanisms to reduce the size of the pool to less than the number of places is often impossible or so resource-intensive as to be impractical. The impracticality stems from the challenges of indeterminate claims. The impossibility of adjudication due to indeterminate claims is obvious for humanitarian and family visas, where policymakers are limited in the criteria that can be used to restrict applications. The current approach to managing this migration policy challenge is to rely on the principle of 'first-come, first-served'.

The problem with 'first-come, first-served'

Several scholars have analysed the normative basis of 'first-come, first-served' and the system of queuing (that is, standing in line) or waiting lists (Perry and Zarsky 2014: 1595; Larson 1987: 895; Sandel 2012: 18–36). The concern in migration policy is largely with waiting lists, given these predominate over physically or virtually standing in a line waiting for a visa, as a way of allocating the visas (rather than as a final step in collecting a visa, for instance). Waiting lists do not require standing in line and therefore lack many of the justifications that relate to physical queues, such as the fact that physically waiting in line is 'seen as generating desert' (Elster 1992: 74). Instead, the applicant submits their application and then joins a waiting

list. While they are on the waiting list, they can continue to live their life with no other sacrifice stemming from having joined the list. In some contexts, time on the waiting list is a proxy for need (Saunders 2008: 359, 370). For example, Elster (1992: 74) notes that time spent waiting for a kidney transplant can be used as ‘a proxy for medical need, since a patient’s condition often deteriorates over time’. Irrespective of whether queuing is a meaningful proxy for need in the context of migration, the metaphorical power of the ‘queue’ is significant and ‘the queue is seen to represent a system in which legitimate claims are ordered and rendered orderly by a recognizable system of allocation’ (Young 2016: 65, 137). Perry and Zarsky’s (2014: 1602–14) extensive review of the literature on the issue suggests that it is widely agreed that ‘first-come, first-served’ is fair, both normatively and in people’s perceptions. For others, though, ‘first-come, first-served’ and waiting lists are justified largely because they are ‘assumed to be natural lotteries’ where a person’s entry into the line and the amount of time they have to wait are dependent on need and/or luck rather than privilege or wealth (Saunders 2008: 370). Indeed, Perry and Zarsky (2014: 1609) acknowledge that several of the normative justifications for ‘first-come, first-served’ are shared with social lotteries, including their apparent commitment to egalitarianism. Stone also notes that ‘[a]llocation on a “first-come, first-served” basis is frequently mentioned as an equivalent alternative to allocation by lottery, especially in the biomedical literature’, though he suggests they are ‘not equivalent’ (2009: 2011; Childress 1970: 339, 347–48; Scanlon 1969: 620, 621).

Regardless, my key reservation about ‘first-come, first-served’ and waiting lists is that they become unfair for a group of people with equal claims to a resource where the waiting time becomes excessive. If a group of people with equal claims to a resource waits for an hour, a day or even a month to access the resource, this arguably does not significantly impair the equality of opportunity among them. Each has a reasonable prospect of accessing the resource within a fair time. However, equality of opportunity and a sense of egalitarian fairness disappear when waiting times become unreasonable or so long as to effectively deny later applicants the chance to access the resource. This is particularly true where the scarce resource is as important as a visa. Under the policy challenge discussed in section one, many people who apply for a visa under ‘first-come, first-served’ models will never have the opportunity to get a visa: the waiting list is simply too long. This makes waiting time arbitrary—a product of birthdate and the luck of joining

the line before it became too long (OECD 2014: 213). This offers no meaningful sense of equality of opportunity despite applicants' equal claims to the visa.

Implementing a migration lottery

Lotteries can be a powerful alternative or complement to 'first-come, first-served', offering enhanced equality of opportunity in situations where demand among people with equal claims is significant, while also preserving many of the normative benefits of 'first-come, first-served'. This section considers two potential designs for a migration lottery. First, it discusses a 'non-weighted migration lottery' in which each person who meets the entry criteria has an equal chance of 'winning'. Second, it explores a 'weighted migration lottery', which offers an alternative to the 'first-come, first-served' arrangement that still considers the time spent waiting in a lottery system. The section concludes by discussing the implementation of a migration lottery in the EU.

Non-weighted migration lotteries

A non-weighted migration lottery offers a useful policy tool where a policymaker does not want to prioritise among equal or indeterminate claimants to visas, which includes every situation where a policymaker currently uses 'first-come, first-served' as the decision-making tool. A non-weighted migration lottery would see policymakers use a simple set of minimum criteria, such as a type of familial connection, skill level or status such as recognised resettlement refugee. People who meet these criteria would form the pool of eligible persons for the lottery. Key to this type of lottery is that people within the pool are not assessed comparatively so everyone has an equal or indeterminate claim to the visa. This means there is no need to weight the lottery. For example, every person eligible for a parent visa is equally entitled, as is everyone who satisfies a minimum high school qualification or job offer requirement for a labour visa. Within the pool, there is complete equality of opportunity, even if the criteria for getting into the pool have comparatively ranked people. For example, to get in the pool for a 'high-risk' humanitarian visa a person may need to meet certain criteria of need and risk. The lottery will only be used if the 'pool' of people meeting those criteria is larger than the number of eligible places and the waiting time becomes so long as to be an obstacle to equality of opportunity.

Weighted migration lotteries

A weighted migration lottery can be used where a policymaker wants to favour certain characteristics of a migrant or if disregarding waiting time entirely is seen as unfair. For example, time spent on the waiting list could be used to accrue additional entries in the lottery. This would mean that a person who has been waiting five years for a visa might be entered into the lottery five times, while a person who has been waiting for less than one year would have just one entry. Increasing the number of entries can be used to achieve equality of opportunity when compared with a ‘first-come, first-served’ approach while still reflecting the values of a society that considers waiting time as ‘generating desert’. Another way a weighted lottery can be used to increase equality of opportunity while still reflecting migration policy objectives is in skilled migration. It is possible to build a weighted lottery that favours skills, attributes or occupations but still gives an opportunity to workers who would otherwise be excluded by an exclusively points-based system that ranks and excludes lower-scoring people. For example, we might turn here to Australia’s points-based migration system, which requires eligible migrants to achieve a score of at least sixty-five. However, due to the caps on visas and the approach to comparatively ranking applicants, people need far higher scores to be successful. Using a lottery could complement this ranking, with everyone above 65 points placed in the lottery pool but people given more entries in the pool depending on their score. This preserves a greater degree of equality of opportunity while still favouring highly skilled migrants. This reasoning—preserving the opportunity for qualified persons to access valuable benefits—also underlies Sandel’s (2020: 184–88) proposal for a lottery for admission to elite US universities.

At least two additional benefits flow from a lottery used in conjunction with a points-based approach, the first of which deserves more attention to verify. First, randomisation reduces the need for state prioritisation of economic sectors. For example, in the UK, prioritisation based solely on points for non-EU migrants has resulted in doctors, nurses and other critical health workers largely being excluded from the skilled migration stream. The *Financial Times* noted in 2018 that, due to high demand for capped places, ‘[t]he minimum salary needed to qualify [for a skilled visa], which used to be £30,000, hit £55,000 in December and £50,000 in January’ (Wright 2018). When demand is high, many health professionals fall down the rankings relative to other better-paying professions, such as finance and legal. The UK is taking steps to address this for National Health

Service staff, but the example demonstrates that this requires a highly interventionist approach to managing migration. A carefully designed and executed lottery can reduce this need for extensive government management of migration streams by producing distributions of migrants that are more likely to reflect the skill needs of the economy more broadly, rather than delivering only for industries in need of very highly skilled, qualified or paid migrants. Second, a migration policy that favours high-skilled migrants but does not exclude lower-ranked applicants is arguably one that better sees migrants as humans rather than simply economic units, while still working to achieve economic objectives in a migration policy.

A migration lottery in the European Union

As the member states of the EU move from ‘borders to pathways’, they will increasingly face the challenge of ‘indeterminate claims’ to limited visa places, as discussed in section one. In the context of the growing demand for limited visas, section two has demonstrated how a migration lottery could produce a fairer policy than a ‘first-come, first-served’ approach. However, introducing a migration lottery to the EU or any of its member states raises unique issues.

The failure of ‘first-come, first-served’ is already acute in countries that have traditionally experienced high levels of migration, such as Australia, the US and Canada. In those states, the federal government has sole competence over migration and naturalisation.¹⁰ Federal governments can implement a visa lottery for one or more migration streams, as Canada has done (Mares 2023: 27) and Australia is presently legislating.¹¹ However, the European Union has a substantially more complex legal structure in which visa arrangements are subject to shared competence with member states.¹² The European Union has the authority to legislate with respect to both short-term and long-term visas,¹³ and these powers are extensive (Thym 2016: 277–78). It appears possible that an EU member state could nonetheless

10 *The Australian Constitution*, s. 51(xix); *Constitution of the United States*, art. I, s. 8; *Canada Act 1982 (UK)* c. 11, Sch B s. 91(25).

11 Under the proposed s. 46C(2) of the *Migration Act 1958* (Cth), inserted by the Migration Amendment (Australia’s Engagement in the Pacific and Other Measures) Bill 2023 (Cth), ‘participants’ must be ‘selected at random’.

12 The EU can make legislation with respect to migration under its competence for the ‘area of freedom, security and justice’. *Treaty on the Functioning of the European Union*, Opened for Signature 7 February 1992, [2016] OJ C 202/1 (Entered into Force 1 November 1993), title V [hereinafter *TFEU*]. This is a shared competence under Article 4 of the treaty.

13 *TFEU*, arts. 77(2)(a), 79(2)(a).

create a visa allocated by lottery, so long as the state complied with existing EU directives and other legislation. For example, EU law restricts long-term visas to five years.¹⁴ Alternatively, the EU could consider legislating the use of a migration lottery in circumstances where ‘first-come, first-served’ is proving unsuitable due to excessive demand, such as for economic and family migration. In particular, Article 79(2)(a) of the *Treaty on the Functioning of the European Union (TFEU)* provides that the EU may create ‘standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification’. Legislation under Article 79 of the *TFEU* must be made through the ordinary legislative procedure, but achieving this level of support across the EU for a migration lottery could prove difficult.¹⁵ The EU’s unique decision-making processes perhaps make it more likely that a member state could experiment with a migration lottery, before it is adopted by other states or the EU. Ultimately, the exact legal method through which a migration lottery is adopted is outside the scope of this chapter, though any migration lottery should be designed to be appropriate for the circumstances of the member state in which it is being introduced. For example, the criteria for entry may vary between states and some states may wish to adopt weighted lotteries. The EU principle of subsidiarity could help guide the matters for which EU legislative action with respect to a migration lottery would be desirable.¹⁶

Conclusion

As critically reviewed in Chapter 7 of this volume, the EU has enthusiastically adopted the rhetoric of ‘safe, legal pathways’ into the EU and its member states. The promise of such pathways may be exaggerated, but the EU’s increasingly sophisticated attempts to strengthen its borders¹⁷ are likely to force more people onto the narrow pathways that exist today or may be created in the future. Moreover, the European states are increasingly seeking to attract ‘legal’ migrants in the face of growing demographic challenges and

14 *Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 Establishing a Community Code on Visas (Visa Code)* [2009] OJ L 243/1 art. 24(1).

15 The ordinary legislative procedure requires a qualified majority, which is defined to mean ‘55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States’. See *TFEU*, art. 238(3)(a).

16 *Treaty on European Union*, Opened for Signature 7 February 1992, [2009] OJ C 115/13 (Entered into Force 1 November 1993) art. 5(3)–(4).

17 See the discussion of Frontex in Chapter 1 of this volume.

to do so while maintaining ‘fair’ migration policies.¹⁸ As demonstrated in section one, European policymakers face the possibility of enormous demand for visas from people with equal or indeterminate claims to such visas, as some member states are already experiencing. The existing approaches to allocating visas, particularly ‘first-come, first-served’, will prove inadequate to this challenge, as they have in Australia, the US and Canada. The failure of ‘first-come, first-served’ or sole reliance on points-based migration has a very real impact on people’s opportunities to escape the distributional inequalities present in the world today. Innovative solutions are therefore required, particularly to ensure equality of opportunity among those eligible for a visa.

The review of randomised social decision-making in this chapter has sought to provide a basis for debate about the role that lotteries can play in increasing equality of opportunity among eligible migrants. Migration lotteries are flexible policy tools that offer a fairer method for allocating scarce visas when compared with existing approaches. Migration lotteries can also be adapted to the existing economic and social objectives of most states’ migration policies while increasing equality of opportunity among those who are eligible for family, labour or humanitarian visas. Explicitly introducing randomness into migration policy may appear unsettling, arbitrary or unfair. However, for those who wish to defend the existing system of allocating visas, one must grapple with how ‘first-come, first-served’ or points-based migration is not itself a natural lottery that rewards, respectively, people making applications earlier and those who are highly skilled, highly qualified and highly paid. A migration lottery offers a means to manage and minimise the impact of natural lotteries already present in migration policy, while still supporting the labour, family and humanitarian objectives of modern migration policies.

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18 TFEU, s. 67(2).

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