

Mobility rights in Europe

Yongmi Schibel. Migration Policy Group (MPG). Brussels, Belgium

This contribution will look at the immigration of third-country nationals into Member States of the EU, and ask what role mobility rights play in the process. It will argue that the moment of admission is not the only point at which mobility rights are relevant. On the contrary, they are an important part of the package of rights accorded to immigrants once they have entered a European country.

1. The legalisation regime

Third-country nationals entering a Member State of the EU can be refugees and asylum-seekers, family members of nationals and immigrants, and economic migrants. They have to go through a legalisation process consisting of eligibility and admission conditions tests. If successful, the tests result in a legal status (residence and/or work permit) for a limited or unlimited period of time. The 'legalisation regime' establishes how the status can be obtained, how secure the status is and which rights are associated with it.

How many migrants are admitted and of which category depends on humanitarian commitments, commitments to social rights (family reunion), immigration needs and capacity to integrate immigrants. The legalisation process normally starts before migrants enter a destination country. They, or their future employer, or family member apply for the status of an economic migrant or reuniting family member. However, in many instances immigrants apply for the status while they are already in the country (this is usually the case with asylum-seekers). Holders of a certain status may also apply for a different status some time after they were first admitted.

Those who do not have any status or have lost it may try to obtain (again) a status. Well-known examples are regularisations and amnesties. Persons who by-pass or fail the initial admission tests also often remain part of the pool of workers and may be 'legalised' at a later stage. How many are legally admitted compared with those who are not legally admitted depends on the capacity and willingness to carry out strict border and 'in-country' controls and to regulate labour markets. Policies can be more or less open or closed; liberal or restrictive; relaxed or apprehensive. Because immigration from outside the Union has remained primarily within the domain of the individual Member States, 25 different migration regimes exist within an integrating European Union with a common market and a single currency. This is in contrast to the mobility of EU nationals and has resulted in significant differences in treatment between EU citizens exercising their free movement rights and immigrants from outside the Union.

Legalisation

	Economic migrants	Family members	Refugees	Irregular migrants
Eligibility	Availability	Family ties	Hum. Commitment	Work record
Conditions	Labour market test	Housing and income tests	As per Geneva Convention	Number of years of work/residence
Protection	Against expulsion	Against expulsion	Against refoulement	Minimal
Rights	Equality	Equality	Equality	Minimal

2. Integration and mobility rights

Three areas are particularly central to integration policies across European countries:¹

- a. Securing residence rights and protection against expulsion
- b. Securing family life through family reunion
- c. Guaranteeing equality and fighting discrimination

Policies in the first two areas are migration and integration instruments at the same time. National policies are shaped to a great extent by adherence to Council of Europe instruments and developing Community legislation. In the third area, equality and anti-discrimination, legal measures and supportive policy measures are being adopted across Europe. Equality remains the cornerstone of European integration policies and national anti-discrimination policies have been reinforced with the adoption of European standards. This approach, summarised as the individual rights approach, is complemented by a pro-active equality approach (positive action).

How are mobility rights relevant to the integration process? If we look in particular at the areas set out above, three key ways can be identified in which mobility rights play a role.

- a. Family reunion
- b. The mobility of long-term resident third country nationals within the EU
- c. Leave and return of migrants between their host country and their country of origin

It is interesting to note that the Directive on family reunification and the Directive on long-term residents were initially conceived as integration instruments and presented as such by the European Commission, but the Council chose to treat family reunification primarily under the admission aspect (while using integration capacity as a possibility to restrict this right) and also focused on the 'admission' implications of third country nationals' mobility as proposed in the long-term residents Directive.

a. Family reunion

Family reunion is a basic human right and is vitally important for the immigrants' life and life planning. It also contributes to family stability and thus to cohesive societies. However, in the current debates family reunion is often considered as a less desirable form of immigration. In many countries, governments operate on the basis of the assumption that the system for family reunion is being abused. Consequently, the trend is to combat fraudulent marriages and adoptions, to restrict the family members eligible, and to make the 'sponsor' (the resident hoping to be joined by his/her family) financially responsible for the welfare of the family. Other trends include reductions of the age of children eligible to apply, and an increase of the age at which marriage partners become eligible to apply. Family migrants are considered less likely to integrate and they are often seen as an economic burden. This is, however, partly of governments' own making as there are many restrictions on economic participation and mobility.

At the EU level, the Directive on the right to family reunification was agreed after a negotiating period of three years. The Commission submitted no less than three different proposals of this directive, moving from a rather liberal approach presented in 1999 to more restrictive texts presented in 2000 and 2002. In 2003, an agreement was reached on a compromise text and the directive was adopted on 22 September.² On 22 December 2003, the European Parliament brought a complaint regarding this directive against the Council before the European Court of Justice, arguing that certain provisions are contrary to Article 8 of the European Convention on Human Rights on the right to private and family life. Three provisions are criticized as particularly unacceptable, Article 4(1), Article 4(6) and Article 8, dealing with

¹ See, for instance, K Groenendijk, E Guild, R Barzilay, *The Legal Status of Third-Country Nationals who are Long-term Residents in a Member State of the European Union* (2000); E Guild and P Minderhout (eds), *Security of residence and expulsion: Protection of aliens in Europe* (2001). Naturalisation is likewise central to integration but is not regulated at European level.

² Directive 2003/86/EC. The deadline for transposition passed on 3 October 2005, with 16 Member States failing to notify the Commission of implementing measures. Denmark, Ireland and the UK have exercised their right to opt out.

age limits for children and with waiting periods respectively. On 8 September 2005, the ECJ Advocate General presented her Opinion on the case. The final judgment is pending.

As a right accorded to already resident immigrants as well as to nationals, family reunion implies a right to migrate for those family members considered eligible, if certain conditions are fulfilled. However, Member States appear increasingly reluctant to grant these rights.

b. The mobility of long-term resident third country nationals within the EU

Following a draft prepared by the Commission in 2001, the Council approved a changed version of the Directive on the status of third-country nationals who are long-term residents on 25 November 2003³.

According to the directive, the status of long-term resident will be obtained after legal and continuous residence of 5 years. The directive gives long-term residents a more secure status. Chapter 3 deals with residence in the other Member States. This chapter contains many limitations, which could be implemented very restrictively. For instance, long-term residents coming from another Member State may have limited access to employed activities in the second Member State. The second Member State may impose quotas for granting the right of long-term residence to third-country nationals if a provision already exists in national law when the Directive is adopted (Article 14(4)). The second Member State may also, for a period of up to one year, restrict the long-term resident's access to employed activities different than those for which they have been granted their residence permit. Article 15(3) provides that third-country nationals moving to a second Member State may be required to attend language courses or comply with other integration measures. This integration requirement is a restriction to the free movement of workers; there is no such condition for EU citizens moving from one Member State to another. In fact, the promotion of mobility of persons is a declared policy priority at European level. Efforts towards the elimination of mobility barriers include portability of pensions and other social security rights, dislocation tax incentives and other mobility incentives, reducing border control formalities, etc.

The status of long-term resident includes mobility rights that, although limited, go some way towards guaranteeing equal treatment to third country nationals. However, this status is relatively difficult to acquire in many Member States. In some (proposed) systems of selective economic migration, strict distinctions are made between the positions of formally and informally skilled workers. Those not entering in the 'skilled' category enter on temporary permits which, although they may be renewed, are very difficult to change into long-term permits. Such barriers mean that this group remains deliberately excluded from equal rights including mobility rights.

d. Leave and return of migrants between their host country and their country of origin

Migration has in recent years emerged as a topic on the foreign policy agenda, and the foreign relations dimension of migration is increasingly considered in national and European debates. Two topics are receiving particular attention, namely immigrants' contribution to their country of origin through remittances and transfer of knowledge, and the drain of human resources. However, the recognition of the positive impact immigrants can have on the development on their country of origin has not overall led to a more flexible granting of mobility rights to immigrants resident in EU Member States.

For instance, the long-term residents Directive Article 4, which specifies the periods of residence taken into account for granting long-term resident status, allows Member States to reject applicants who have been absent for longer than six consecutive months (or a total of ten months). Member states may accept longer absences for 'specific and exceptional reasons', although it is unlikely that contributions to the development of their country of origin would be accepted as a legitimate reason.

Article 9 of the same directive deals with withdrawal or loss of status. Withdrawal can take place after an absence from the territory for 12 consecutive months, with a qualifying 'specific and exceptional reasons' clause. Thus even the status of long-term resident, which grants equal treatment across a wide range of fields, restricts the mobility rights of third-country nationals.

³ Directive/109/2003. The deadline for transposition is 23 January 2006. Denmark, Ireland and the UK have exercised their right to opt out.

3. Concluding remarks

Mobility rights are a key component of equal treatment, which in turn is at the centre of integration policies across the European Union. Therefore an examination of mobility rights should not be limited to a discussion of admission systems and entry channels. Analysing the extent of mobility rights granted to those immigrants already in the country draws attention to the full meaning of integration in Europe: comparable treatment of migrants and EC nationals and equal treatment as far as possible of EC nationals and long-term resident third country nationals. A brief look at two adopted Directives confirms that this “Tampere promise” has not yet been fulfilled.