

Immigration in Latvia

Currently Latvia does not stand out with a large number of immigrants. About 2.2 thousand foreigners enter Latvia every year for a time period exceeding three months, obtaining the required residence permits. A part of these foreigners do not come to Latvia with a wish to reside here permanently, but for a short period of time for the purposes of work, for example, shipbuilders, trainers in educational institutions, consultants in public and local authorities.

The number of foreigners in Latvia is not large in comparison with the European countries where foreigners represent 4–5% of the total number of inhabitants. In Latvia foreigners represent approximately 33 thousand or 1,4% of the total population. On 1 January 2003 33,267 foreigners resided in Latvia, 7,128 of them held temporary residence permits, and 26,139 – permanent residence permits.

Global migration trends depend on two important considerations – the wish of inhabitants of the developing countries to improve their standard of living by finding better conditions of life, and demand for workforce as well as fear of the ageing population and decreasing number of inhabitants in the developed countries. This problem also starts to become topical in Latvia. In the near future it is necessary to carry out surveys on the demographic and economic development in Latvia, especially in relation to the EU, in order to develop an appropriate long-term migration policy.

On 1 May 2003 the new Immigration Law came into force in Latvia. It protects the national interests of the state, complies with international obligations and human rights instruments. This law applies to citizens of third countries. According to the forecast of the Office of Citizenship and Migration Affairs immigration from the so-called third countries of the EU will not increase significantly in Latvia. For the time being and in the subsequent years foreigners will enter Latvia from the former CIS states, with which the local people have kept family relations, acquaintances and do not face language problems.

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The number of asylum seekers will increase but not so rapidly as in the European countries. Asylum seekers usually choose an economically stable, developed country with a high standard of living, a country where good social benefits are provided to those who have obtained an alternative status, but in Latvia they are minimal. Asylum seekers prefer countries where communities of their countrymen have already developed and they can join an environment that they know without experiencing language problems. The number of asylum seekers could be similar to the current situation in Portugal (about 150–200 asylum seekers per year) or in the worst scenario – the example of Finland (about 1,500). It should be remarked that rights to stay in the country by obtaining the status of a refugee or an alternative status are granted only to about 20–30% of asylum seekers.

In the first six months of this year the largest number of illegal immigrants tried to enter Latvia from the Ukraine and Lithuania, according to the Annual Report of the State Border Guards regarding the first six months of 2003. Ivars Zālītis, Head of the Main Office of the State Border Guards considers that most often these immigrants try to enter Latvia with an aim to go further to the countries of the European Union. This year eight citizens of the Ukraine, four citizens of Lithuania, two persons from Georgia, Russia and Estonia, as well as people from Belarus, Moldavia, India and Iran tried to use Latvia as a transit country. In the first half of this year 280 people entered Latvia legally but were detained due to infringements of the residence and visa regime. Another 21 person entered Latvia illegally.

According to the latest studies on migration in the Baltic States conducted by the International Organization for Migration the Baltic States “run a risk of turning into a camp for illegal immigrants who have not reached the West, if migrant readmission agreements are not signed with Russia and Belarus in the near future”. This IOM publication provides a summary of the most important academic studies and assessment by several top level officials on problems and future trends in this area, which was little studied until now. The potentially important role of the Baltic States in the fight of the

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EU against illegal immigration from the territory of the CIS has become the centre of attention of researchers.

According to the study illegal immigrants from the CIS do not have many other real opportunities to enter the territory of the EU apart from crossing the Baltic States or Poland. The geographical location especially complicates the situation of Lithuania, however, Estonia and Latvia also become a popular transit road for those migrants who currently reside in the territory of CIS, awaiting the possibility to reach the Nordic countries or the Schengen area, concludes the study. According to the official estimates of the Migration Service of the Russian Federation, the number of these people might even reach one million in Russia. The second most popular temporary residence country for illegal immigrants is Belarus with approximately 300,000 people 'who wait and see'.

The Ministry of Foreign Affairs of Latvia is currently drafting readmission agreements in respect of illegal immigrants with Russia and Belarus, but they will not be signed in the near future. For this reason the readmission agreements with the EU Member States which have been already concluded, actually create unequal conditions for the Baltic States which will be obliged to accept and take care of the immigrants who had reached the West in transit from the CIS but were later extradited. The study, though, expresses a wish that in the future the EU countries might be more inclined to accept migrants because the ageing population and the general indisposition to low-skilled jobs will create a demand for migrant labor amounting to at least 1.6 million people per year.

According to the information of the Latvian Ministry of Interior, the number of offences committed by foreigners has increased six times this year if compared to the previous year. Gunārs Dāboliņš, head of the State Border Guards said that the largest share of these offences was related to illegal crossing of the state border, illegal residence in the country and illegal work. Recently foreigners have also committed

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more thefts and burglaries than in the previous years; these crimes are especially widespread in the border towns.

Expert opinions about situation in Latvia

Ilmārs Mežs,
representative of the International Organisation for Migration in Latvia:

The number of illegal immigrants in Latvia is small. In comparison with the past the efficiency of border control is better and Latvia manages the small number of immigrants very well. It is possible that some dozens have managed to cross the border. For the time being Latvia is not very attractive to immigrants but in some time the average illegal immigrant might find some opportunities here. Already now citizens of Bangladesh would agree to work here for LVL 100 per month. A Vietnamese has no interest in LVL 100 – 200. Theoretically Latvians themselves could take the simple jobs but it does not happen in practice. A municipality gives potatoes for planting to an unemployed family but they use them for food and ask for assistance again. Skilled workforce is a problem already now. It is a myth that there is enough skilled workforce in Latvia. For this reason Lithuanians come here and after they finish their contract with the Lithuanian entrepreneur, they get contracts with Latvians because their work is cheaper and good. Especially those who live near the border. Every year the illegal workers from Lithuania are caught and sent home.

General Gunārs Dāboliņš,
head of the State Border Guards

At the moment approximately 250,000 illegal immigrants from the Ukraine and other CIS countries reside in Belarus, and when the political situation changes in the neighboring country, Latvia should be ready for the potential inflow of these people in our country. Latvia needs to reconstruct the centre for illegal immigrants "Olaine" urgently by investing about two million Lats. The present infrastructure of the centre does not ensure full compliance with the requirements of the Immigration Law and staff

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work safety regulations because it is impossible to separate representatives of different, mutually hostile religions, to ensure unity of families, to provide for isolated accommodation of aggressive detainees who are dangerous to the others and the staff, as well as prevent cases of unsanctioned leaving of the centre. About 50 illegal immigrants reside in the centre every month.

Maira Roze,

**deputy head of Migration Policy Department,
Office of Citizenship and Migration Affairs of the Ministry of Interior,
Republic of Latvia**

There are 1.4 % “pure” foreigners in Latvia. On 1 January 2004 there were 33,012 foreigners with temporary and permanent residence permits. Approximately 60% of them were the local non-citizens who adopted foreign citizenship, mostly Russian. The reasons for this process are various, mostly practical, for example, in 1998 there was a wide-spread myth that if a person does not adopt citizenship he or she will not be entitled to the retirement pension in Russia. Until 2000 non-citizens could travel to Russia without a visa, however, then Russia introduced a visa regime also for non-citizens. A visa is for charge and those who traveled often to visit relatives or for business decided to take the Russian citizenship. Often the Russian citizenship is acquired by mistake. A curiosity – a travel agency arranged the citizenship for a woman and brought the new passport to the market where the woman was working because it was easier to travel that way. After this the woman became hysterical and demanded her old passport back, etc. It means that ignorance or myths also have caused the wish to live in Latvia with the passport of a Russian citizen.

Annually about 2,5 thousand foreigners arrive in Latvia, of these approximately 60% from Russia (this division – 60% from Russia – can also be observed in other parameters). Based on the purpose of the visit it is possible to make approximate forecasts that a “private visit” means an intention to stay, “spouse of a citizen of the Republic of Latvia” means an intention to stay, “missionaries” Mormons serve for 2 years and are replaced by others, the Orthodox nuns stay after 10 years. Often people

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arrive to repair ships – 40 Ukrainians at once, but it is a temporary job. Many Lithuanians come, they cannot be controlled and create disorders. They are cheap and a threat to our workforce. Problems can be predicted, and they already exist.

Ilze Briede,

**Head of Department for Methodology and Management,
Office of Citizenship and Migration Affairs, Republic of Latvia**

The number of refugees in Latvia is very small. It is awkward to mention these data elsewhere in Europe. In 1998 there was a relatively large surge of refugees – 58. They explored the situation, found out that social guarantees are minimal, benefits apply only for one year, and in the subsequent years the number of refugees decreased. The refugees do not use Latvia as a transit country to go to Sweden because they can get stuck here. If they go through Latvia to Sweden, they can be sent back from Sweden to Latvia, and it is not their goal. They choose air traffic to go to Sweden. This year 4 Chechens who were granted the alternative status of a refugee (if danger is temporary) cancelled their status and returned home.

Visvaldis Valtenbergs,

MA – Vidzeme University College, Department of political science

Author of a research in the USA on international migration and globalization and ways how the countries organize their policies. He studied churches as a centre of support and organization for immigration communities.

1. *Refugees use Latvia for transit to countries with better-developed welfare systems, for example, Sweden. Legal migration – 6 refugees are placed in the camp and another 50 – 60 await the refugee status. Illegal – it is the work of the police on the border, electronic IDs, etc.*

The level of immigration is usually high in the countries where there are internal networks which reproduce illegal immigration.

2. *Workers. Already now Byelorussians go to Lithuania for work, but for the time being they are only men without families and they return home. In Latvia*

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– Lithuanians build their Maximas, etc., but they will go back. Problems will appear when they come with families. If we accede to all the EU immigration laws, also families will have to be taken care of. Outside the EU Schengen agreements do not work but the international human rights do. Therefore it will be easier to deal with the citizens of CIS countries, not with immigrants from the EU.

Latvian inhabitants are not accustomed to other races. There was a skinhead movement against Muslims in the Czech Republic. However, these cases are episodic – in Latvia there are few incidents – for example, the Los Amigos court proceedings. Practically all countries experience such spontaneous phenomena.

Usually politicians want to discover something new.

In Germany, France and Austria the right extremist parties are active but in the previous years also the social democrats announce that benefits should be redistributed equally, they are no longer so favorable to immigrants. All parties have more or less agreed on immigration issues. In 1986 Le Pens announced that he did not want to see Algerian immigrants in France. Now he would not venture to say something like that because there is not only the aspect of cultural diversification but also the fact that the pie should be divided in some way. After all immigrants are the potential electorate. And it is the question about the state naturalization policy – it can be very welcoming and also very formal. In this aspect the countries have a large autonomy. The carrot – to facilitate integration of immigrants in the social life and culture, or the stick – here is your citizenship, take it, because international organizations demand it. In Latvia there is an ethnic example when citizenship is inherited. However, in general citizenship is no longer very important because social benefits apply both to citizens and non-citizens, only voting are not possible. Europe considers the possibility to establish a new citizenship model where the political rights are acquired gradually but the social benefits apply right away.

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Mārtiņš Bičevskis,

State Secretary of the Ministry of Justice, Republic of Latvia

First of all, we have to be open – what we are concerned about – legal or illegal immigration? It is very important. And if we discuss illegal immigration, exactly the fact that we become a EU Member State will let us return persons who have been identified as illegal residents, to their home countries more efficiently by common effort. Second, it provides possibilities to receive useful assistance, technical and training – related, regarding prevention of risks of illegal immigration. In this situation there are more benefits than risks.

If we are talking about legal migration, it is the issue, which was discussed by Ms Karnīte, that with the accession we assume the obligation to open our borders to those citizens of the EU Member States, who want to choose the state of Latvia as their place of work.

Let us discuss an example: Sweden – Finland. Both are geographically very close, both have a language not known to any person arriving from the South, but at the same time Finland which defined its migration asylum policy rather precisely at the time, by not providing big social guarantees without a reason to anybody traveling through this country, has achieved a situation where asylum issues are not the most topical because the number of people is measured at plus / minus 1,000 per year in the entire Finland, and it is not a large number. At the same time Sweden has 15, even 20 thousand asylum seekers a year.

It is a question of not adopting historical decisions that would allow artificially large communities to develop, being a stimulus in itself.

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Raita Karnīte,

director of the Institute of Economics, Latvian Academy of Sciences

The stumbling stone which is very widespread at the moment is the denial of the process. The arguments that are used are entirely unconvincing, it is considered that, first, this surge of people is harmful to the Latvian society, I can partly agree to this because we are a small society and we want to keep our identity but on the other hand we have to recognize that exactly the need for economic development will require this process.

Trends are important in the analysis of any process, and during the last two years they implicitly indicate that the number of immigrants tends to increase, though slowly.

Capital should come to Latvia because there is a high return on capital in Latvia, and it will stay so for some time. Capital requires people who would process and operate it, and Latvia does not have these people because every month we lose more than 1,000 inhabitants. Our unemployment rate is very low, our unemployment structure shows that it might be difficult to start or operate the capital with our own local resources.

I do not want to agree with those who use analogies with other countries as an argument. Look, in other countries migration has not been large, Latvia and the Baltic States in general, here we can talk about a region – it is a unique case because our level of development is very low and the speed of growth, which means return on capital for an entrepreneur, is very high. There are many opportunities here, and there is a lot of space, too.

Immigration situation in Russia

According to the calculations of the Ministry of Interior of Russia about 20 million foreign citizens live in our neighboring country, and a quarter of them avoid official registration.

Precise data on the number of legal, semi-legal and illegal migrants in Moscow are not available. It is true that not only foreigners but also Russian citizens who are not Moscovites, if they arrive in Moscow or the Moscow region for more than three days, have to register and obtain a notice of temporary residence. In 2000 approximately one million of foreigners had officially registered their residence in the Russian capital, of which 65% were non-residents from the CIS countries. However, according to the data given by Boris Nadezhdin, deputy head of State Structure Committee of the Russian State Duma, 300 thousand people who are not citizens of Russia, reside legally in Moscow. Less than a thousand, though, hold permanent residence permits.

According to estimations of various experts approximately three million people arrive in Moscow every day from the Russian regions, the CIS countries and the so-called 'far abroad'. These data are at the disposal of the Migration Affairs Committee of the Moscow Government. It means that the official number of permanent residents in Moscow – 8.546 million people (data in the beginning of 2001 – 457 thousand less than in 1991) – actually should be considered the 'night' number of inhabitants, but the "day" number is approximately 11.5 million people (the largest part of 'day' residents – about 2 million people – come to Moscow from the neighboring regions to work). Neither of these numbers includes semi-legal and illegal immigrants. It is estimated that the number of semi-legal immigrants (people who have entered the country officially but live without official registration) in Moscow is 600 – 800 thousand people, of which 100 – 150 thousand are representatives of the 'far abroad', mostly from Afghanistan, South-East Asia and Africa. In respect of illegal immigrants (who have entered the country or reside in the country illegally) estimations of the City of Moscow Interior

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Office Department of Visas and Registration show that there are about 30 thousand of them in the capital – traditionally most of them are Vietnamese or Chinese.

Refugees are a special category; they started to flee to Moscow already since the beginning of 1990ies but the surge gained volume shortly before the start of the Chechen war – in 1994. The total number could be estimated at more than 100 thousand people – after all, about 50 thousand refugees from Chechnya alone (both Russians and Chechens) live in Moscow and the Moscow region. Although on the state level the refugees are promised all kinds of benefits, actually it is extremely difficult not only to obtain financial assistance, but also to secure the official registration. In order to be granted the status of an official refugee (*vinuzhdenniy pereselenec* in Russian) it is necessary to obtain temporary registration first of all, but it is conditional on a person or an institution which provides accommodation to the refugee.

Russia still does not define criminal liability for the organization of illegal emigration. Migration posts established on the national frontiers in the South resemble gates built on a stretch of open plain, besides, some CIS countries have entered into agreements on visa free regime with Russia providing for 14–18 types of personal identification documents which can be presented upon entering the country, including even birth certificates. Nikolay Skorik, head of the Immigration Regime Division of the Moscow Interior Department says that last year alone more than 700 illegal organizations were closed which used their status and name of a legal entity to let foreign citizens enter the country, however, it is only a drop in the bucket.

The EU migration debate

In Europe's great migration debate, the effect of migration to the new EU member states in the East has been largely overlooked. West Europeans have been preoccupied with Eastern Europe's great unwashed coming in droves to sap their benefits and steal their jobs.

But recent surveys conducted by the International Organization for Migration on all carried the same sober warning: As living standards in the new EU member states rise and income and price differentials decrease, outward migration will slow down and these countries will become more attractive for immigrants.

For the most part, the surveys said, the soon-to-be EU members are unprepared for such an influx. Migration patterns are already changing. Heikki Mattila, a researcher for the International Migration Organization, says "some Central and Eastern European countries – Poland, Hungary, the Czech Republic and Slovenia – already have been turning from mere emigration countries to countries of emigration, transit, and immigration at the same time."

When Spain and Portugal joined the EU in 1986, the older, established member states expressed concerns about workers from the Iberian Peninsula swamping their labor markets. That didn't happen. But by the mid-1990s, Spain, which traditionally had low immigration, was one of the most popular destinations for migrants to the EU – mostly low-skilled workers from North Africa.

This time around, the majority of migrants are likely to follow existing patterns and come from the former Soviet Union. Ukrainians or Byelorussians working in Poland are already doing the construction or agriculture jobs that traveling Poles are doing in Brussels.

Geographical proximity, family ties and compatriot networks are the crucial factors making Central Europe a popular destination. For a young, work-seeking Ukrainian, neighboring Slovakia or the Czech Republic are much more attractive

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prospects than Britain or Austria. The language is easier to understand, home is only a bus ride away, and there's a good chance a friend of a friend will be working the construction sites.

This is all good. Like Western Europe, Central and Eastern Europe needs migrants. Fertility is dropping and populations are aging. Experts in the Czech Republic recently predicted that the country's population could drop by as much as a half by 2050. The nation has one of Europe's lowest birth rates at around 1,17 children per family. And if more and more large multinationals, fed up with high labor costs and powerful unions in the West, relocate to the East thus creating more highly skilled jobs for locals, there will be plenty of openings for ditch-diggers or other menial workers.

Migration is also good for the source countries. According to the International Migration Organization, from January to November 2002, Bulgarians living and working abroad transferred \$ 449.6 million back home. That's about 3 percent of the gross domestic product. In the same period, foreign direct investments amounted to around \$20 million.

But unlike Western Europe, Central and Eastern European societies are still ethnically homogenous, due largely to the isolationist policies of the communist regimes. Skinhead violence, especially against the region's Gypsy population, grabs the headlines but meat-and-dumplings xenophobia is a greater barrier for most migrants. These are societies not used to foreigners, rather than societies against them. The process of assimilation in these countries is slow.

In the next decade, a new policy debate is likely to evolve, to be played out on the editorial pages and in the tabloid press in Eastern Europe. Governments in this region, wanting to allay EU fears about porous borders, will want tighter controls; big business, which stands to benefit from cheap labor, will push for a more flexible migration policy.

Populist media will increasingly characterize migrants, especially those with darker faces, as scroungers. People will eat less dumplings and order out more Indian

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food. And, thus, countries in Central and Eastern Europe will become a little more like their counterparts in the West.

Third country nationals and the European Union

Between 1989 and 1998, large flows of immigrants came to Europe. About 1,2 million persons a year enter the EU legally, and perhaps 500,000 illegally. For many European countries the surge of arrivals in the 1990s came as a shock. The Economist provides an example of Greece. The Greek census of 2001 found that, of the 1m rises in the population in the previous decade (to 11million), only 40,000 was due to natural increase. This movement of humanity brings undoubted gains, and not just to the immigrants. As suggested in the survey conducted by The Economist "the potential economic benefits to the world of liberalizing migration dwarf those from removing trade barriers. Immigrants, unlike natives, move readily to areas where labor is in short supply, so easing bottlenecks."³⁰ The discussions in relation to the status of third-country nationals have entered the debate at both levels – national member States and the EU institutions.

Legal regimes in the EU Member states

The practice of EU member States in relation to third country nationals is not uniform. The most liberal country in the EU is Sweden which since 1975 has allowed third country nationals who are legally residing in Sweden for 3 years to vote in local elections as well as national referendums. Great Britain has adopted a similar approach to citizens of Overseas territories. There is ongoing discussion on possibilities to give rights to third country nationals to participate in local elections in France, Belgium and Spain since 2000. Italy is expected to pass the law giving rights to third country nationals to vote in local elections on 9 November. The conditions set are at least six

³⁰ Special survey on migration, *The Economist*, November 2-8, 2002 p.11

years of residence, no criminal record and proof of enough financial resources to support their family. The law is discussed not without controversies and its adoption might be delayed. These developments indicate that EU Member States are gradually accepting considerable communities of long-term resident third country nationals and are ready to integrate them by giving certain legal status and rights.

The EU legal framework on third country nationals

Similarly to different national practices there is no coherent body of EU Law setting out the rights and status pertaining to third country nationals residing in the Union³¹. Their rights and status has been generally derived from respective agreements concluded between third states and the European Community. Access to the territory is in all cases determined by provisions of national law which apply in the Member State where a third country national wants to reside. In principle, national law also governs the legal status of third country nationals once legally resident in a Member State³². Community law, Association Agreements, the Schengen Agreements, provided for Cooperation in Justice and Home Affairs, prior to the entry into force of the Treaty of Amsterdam, and the European Convention on Human Rights and Fundamental Freedoms – these are the main instruments which in addition to national legislation influence the status and rights of third country nationals.

As argued by Helen Staples only three groups of Association agreements provide some protection of individuals, namely, the Association Agreement concluded with Turkey, the Co-operation Agreements with the Maghreb countries and the Europe Agreements³³. The main groups of rights provided to different extent in the Agreements are the principle of equal treatment, right to access to the labor market, right to

³¹ M.Hedenamm-Robinson, An Overview of Recent Legal Development at Community level in Relation to Third Country Nationals Resident within the European Union, With Particular Reference to the Case Law of the European Court of Justice, CMLR 38, 2001, 525-586, 525.

³² H. Staples, The Legal Status of Third Country Nationals Resident in the European Union, 1999, p.329

³³ Ibid., p.240

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establishment, right to provide services, social security entitlements, and right of residence for Turkish nationals. In relation to the agreements the situation is complicated by the fact that they are not identical. None of the Association Agreements give individuals a right to free movement, equivalent to that established by Article 39 of the EC Treaty³⁴. However, according to the ECJ there is a possibility for Turkish workers to claim rights to enjoy certain rights in the Member State where they have lawfully entered and have legal employment on basis of Decision No. 1/80³⁵. This right relates to Turkish workers who already reside in the EU. The intention to secure free movement in progressive stages after the entry into force of the Association Agreement has not been implemented. The same applies to the right to establishment and the right to provide services which have remained, according to H.Staples 'paper rights'³⁶. The Association Council has not adopted a timetable for progressive introduction of these rights as required by Ankara Agreement.

The Europe Agreements concluded with Central and East European countries provide for the right of establishment. Opposite to the Ankara agreements they provide "the right to take up and pursue economic activities as self-employed persons and to set up and manage undertaking, in particular companies, which they effectively control..."³⁷ without adoption of any specific time table for gradual implementation. The same applies also to the right to provide services. Moreover, in accordance with the ECJ these rights are directly effective. In the Jany case³⁸ the Court was asked to answer the questions which arose in relation to claims by Polish and Czech nationals against the Netherlands contesting the dismissal on the merits of their objections to decisions refusing them residence permits to enable them to work as self-employed prostitutes. When interpreting the Association agreements the Court concluded that Article 44(3) of

³⁴ Ibid., p.242

³⁵ Case 98/96 Kasim Ērtamir v.Land Hessen(1997) ECR I-5179

³⁶ Supra note 79, p.255 and 259

³⁷ Article 44 Hungary, Poland, Estonia, Latvia and Lithuania Agreement, Article 45 Bulgaria, Romania, Czech and Slovak Agreement.

³⁸ Case C-268/99 Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie (2001) ECR I-08615

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Polish Agreement and Article 45(3) of Czech Agreement have direct effect. In accordance with Article 58(1) of Polish Agreement and 59(1) of the Czech Agreement those rights of entry and residence are not absolute privileges and they may in some circumstances be limited by the rules of the host Member States. However, the ECJ found in favor of the applicants and stated:

"Article 44(4)(a)(i) of the above Agreement with the Republic of Poland and Article 45(4)(a)(i) of the above Agreement with the Czech Republic must be construed to the effect that the 'economic activities as self-employed persons' referred to in those provisions have the same meaning and scope as the 'activities as self-employed persons' referred to in Article 52 of the EC Treaty."

In relation to social security entitlements, Helen Staples³⁹ has rightly established three different regimes to be found in the Association Agreements. The first regime is provided in the Maghreb Agreements which prohibit discrimination on the grounds of nationality between Maghreb workers and nationals of their Member State of residence in social security matters. The second regime relates to rights of Turkish nationals. The Community and Turkey are expected to draw up implementing measures of their respective territories. Presently there is no document adopted in this regard. The third regime relates to Europe Agreements oblige the Contracting Parties to set up a system for the co-ordination of social security systems. In general, these agreements do not prohibit discrimination on the basis of nationality in the field of social security.

Therefore, it can be concluded that there is no uniform set of rules regulating the status and rights of third country nationals in the European Union. However, not all rules regulating the status of third country nationals in different situations are contained in the agreements. Presently there are two options how third country nationals can become within scope of Community law in addition to strict conditions set in respective agreements. Firstly, they can enter the territory of the Member State as spouses of Member State nationals. Secondly, they can benefit from free movement in case if they are employed by the Community service provider.

³⁹ Supra note 79, p.260

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Rights of third country nationals according to ECJ

The first option is best illustrated in recent cases, i.e., *Singh case*⁴⁰, *Carpenter case*⁴¹ and *Akrich case*⁴². All three cases concerned third country nationals married to EU citizens resident in the EU. In the *Carpenter case*, Mrs. Mary Carpenter was married to a service-provider Mr. Carpenter but resided in his country of origin, i.e., the UK, without herself exercising the right of family members to move with an economically active citizen. Since stay of Mrs. Carpenter in the UK was illegal for years she was issued deportation order. The ECJ was confronted with the question whether there are basis in Community law which would allow the right of residence of members of the family of a service provider in his Member State. In this case the ECJ concluded that:

*"The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms... which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community Law"*⁴³.

Therefore, a third-country national which is not covered by the Community law still might acquire rights by the fact of marriage to an economically active EU citizen.

The *Singh case* concerned Mr. Surinder Singh, an Indian national married to UK national. They worked in Germany for a number of years after returning back to the UK in order to open a business. Upon arrival Mr. Singh was granted limited leave to remain in the UK as husband of a British national. After a year his wife started divorce proceedings against him. Because of that British authorities cut short his leave to remain and refused to grant him indefinite leave to remain as the spouse of a British citizen. The ECJ was asked to rule on the question whether a national employed in another

⁴⁰ C-370/90 *The Queen v. Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* (1992) ECR I-04265

⁴¹ Case C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* (2002) ECR I-06279

⁴² Case C-109/01 *Secretary of State for the Home Department v. Hacene Akrich*, judgement of 23 September 2003, not yet reported

⁴³ *Supra* note 88, para 41

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Member State after returning to his country of origin with a spouse shall be treated in accordance with national or Community law. The ECJ stated:

*"this case concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by Articles 48 and 52 of the Treaty... Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State"*⁴⁴.

Therefore, as long as third-country national is married to economically active citizen his rights and status are no longer decided in accordance with national but with Community law.

Finally, the most recent *Akrich* case concerned a Moroccan citizen. He on a number of cases was whether refused leave to remain in the UK or was deported as a result of criminal offences. Whilst he was residing unlawfully in the UK he married British citizen. In accordance with his wishes he was deported from the UK to Dublin where his spouse had been established. After half a year they both intended to return to the UK. The authorities refused Mr. Hacene Akrich the right to enter the UK on the grounds that he had entered into a marriage of convenience in order to circumvent the provisions to entry and residence of nationals of non-Member States. After a lengthy examination of Community secondary legislation and previous case law the ECJ came to the conclusion that:

*"Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation No. 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State must none the less have regard to the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, provided that the marriage is genuine."*⁴⁵

⁴⁴ Supra note 87, para 23

⁴⁵ Supra note 89, para 60

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Therefore, it can be concluded that the free movement of EU citizens even when they return to their country of origin is regulated solely by the EU law. The same applies to their spouses. Even if a spouse has not resided in the Member state lawfully, he or she would still acquire legal residence permit on basis of the right to respect for family life under ECHR. This approach clearly limits the autonomy of Member States in relation to admitting third country nationals on their territory. Moreover, these cases require Member States to change the perspective when dealing even with their own nationals returning to their country of origin, i.e., they are not moving as nationals of state but as EU citizens.

The second option was crystallized by the ECJ in two cases, namely, *Rush Portuguesa case*⁴⁶ and *Vander Elst*⁴⁷. According to these cases the right of third country nationals to work in another Member State is derived from their employer's right to provide cross-border services in accordance with Article 49 of the EC Treaty. Thus, in *Rush Portuguesa case* Portuguese undertaking when providing its services in France was unable to use its own employees as transitional provisions that followed Portugal's accession to the Community did not allow Portuguese nationals to take up employment in the Member States. The ECJ rejected the arguments based on transitional period and said that such approach would be subject to discriminatory treatment of Portuguese companies if they had to employ nationals from other Member States to perform services in a Member State. Similar conclusion was made in *Vander Elst case* which concerned Belgian contractor who provided demolition work in France. For performing work he employed Moroccan employees. He didn't obtain special work permits for those workers and, thus, violated national immigration requirements. The ECJ relied on its ruling in *Rush Portuguesa case* and stated that posted workers do not seek access to the labor market in the Member State where they have been posted, as they return to their country of residence after they have completed their task.

⁴⁶ C-113/89 *Rush Portuguesa Ld v. Office national d'immigration* (1990) ECR I-1417

⁴⁷ C-43/93 *Raymond Vander Elst v. Office des Migrations Internationales* (1994) ECR I-3803

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Therefore, according to the second group of cases, even if there are no Treaty provisions providing for rights to the third country nationals to have access to the labor market, they do acquire such rights if employed in a company providing cross-border service or using right of establishment.

Draft directive on third country nationals

The most recent development in relation to a third country national is a draft Directive concerning the status of third-country nationals who are long-term residents. The Council has reached political agreement on this text at its meeting on 5 June 2003. One delegation maintains a parliamentary scrutiny reservation. The Directive concerns the terms for conferring and withdrawing long-term resident status granted by a Member State as well as the terms of residence in Member State other than the one which conferred long-term status.

For the purposes of this Directive an individual should meet a number of criteria to become long-term resident in the EU. According to Article 2 Directive 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty. This definition is somewhat unclear. As it has been mentioned above the Commission is taking the view that this definition includes persons with 'undermined citizenship', de facto stateless persons. In case if this holds true than the whole application of the Directive might become cumbersome, for instance, in cases of expulsion.

Article 4 puts an obligation on Member State to grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission to the relevant application. However, the most demanding requirement is embodied in Article 5, i.e., third country nationals shall provide evidence that they have stable and regular resources which are sufficient to maintain himself and the family as well as sickness insurance. The income will be evaluated by Member States by reference to their nature and regularity. Legitimate

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condition contained in Article 5 is that Member States may require third-country nationals to comply with integration conditions, in accordance with national law. The consequences of non-compliance, though, are unclear because this option is not provided in Article 9 on withdrawal or loss of status as well as Article 12 on conditions of expulsion of third country national. If that would be the case, it would, undoubtedly, only make the distinction between citizens and long-term residents exercising their free movement rights even bigger. There are no similar requirements to comply with integration conditions for EU citizens exercising free movement rights. Article 6 provides that Member State may refuse to grant long-term resident status on grounds of public policy or public security, expressly excluding the refusal on basis of economic considerations (paragraph 2). Second Member State to which long-term resident has moved may refuse him right to enter if he constitutes threat to public health (Article 18). If a second Member State decides to withdraw residence it must inform the first Member State from which a long-term resident has arrived.

From a substantive point of view the most important Article illustrating the scope of the rights granted by Directive is Article 11 on equal treatment. To sum up the long enumeration given there it can be argued that long-term residents will have almost the same rights as economically active EU citizens. The provisions of Directive are by far not as clear as Community Treaty provisions and at present there are more questions than answers.

While this Directive is the most notable development coming from the European Council in relation to third-country nationals, it is also disappointing. Firstly, it is not clear what will be the relationship between the rights provided in the Directive on the one hand and international agreements between the Community and third countries on the other. Directive provides that Member States may apply more favorable national provisions in case of conflict with Directive. However, as it has been submitted most agreements with third countries provide less favorable treatment. Moreover, in the

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hierarchy of Community law, international agreements take precedence over the secondary Community legislation⁴⁸.

Thirdly, it was already after the adoption of Maastricht Treaty and before the Intergovernmental Conference 1996 that proposals were tabled by both NGOs and scholars to widen the definition of EU citizen's *ratione personae*. S.O'Leary was arguing that "By excluding third -country nationals and by possibly making their integration in Union Member States more difficult as a result, the Member States and Community institutions have contradicted and undermined Community 'objectives' and statements of principle with respect to the integration of such groups."⁴⁹

The Antiracist Network for Equality in Europe requested citizenship for "every person holding the nationality of a Member State and every person residing within the territory of the European Union"⁵⁰. Helen Staples is proposing a bit more conditional model "..... A person holding the nationality of a Member State or who has been lawfully resident in the territory of a Member State for five years shall be a citizen of the Union"⁵¹.

Joseph H.H. Weiler is more modest in his comments. He suggests that Articles on EU citizenship shall be confined to one stating: Every person holding the nationality of a Member State shall be a citizen of the Union. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby"⁵².

Proposals have been made also to harmonize national legislation in relation to naturalization procedures as well as to adopt common minimum standards. At Tampere the European Council specifically called for the establishment of a set of uniform rights to be granted to third country nationals who are residents which are to be 'as near as

⁴⁸ P.Wessman, *The Protection of Human Rights in European Community Law*, p.13.

⁴⁹ S. O' Leary, *The Options for the Reform of European Union Citizenship*, in S.O'Leary, T.Tilikainen, *Citizenship and nationality status in the New Europe*, 1998

⁵⁰ *Modifications to the Maastricht Treaty in Sight of the 1996 Inter-Governmental Conference*, Rome, July 1995.

⁵¹ H. Staples, *The Legal Status of Third Country Nationals Resident in the European Union*, 1999, p.355

⁵² *Supra* note 1, p.71

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possible to those enjoyed by EU citizens⁵³. However, much is left to national level rather than supranational to guarantee the equality in status between EU and third country nationals⁵⁴. This can be explained by general reservations towards influx of third country nationals (for political or economic reasons) and historical relations between the 'West and the rest'. Growing nationalism represents another hurdle. Thus, in recent years the far right has gained in elections in France, Denmark, Austria and the Netherlands.

It is important to note that the attitude in relation to the rights which shall be given to the third country nationals is becoming more liberal within some EU institutions. Thus, Commission in its explanatory memorandum to the Directive discussed mentions political developments, recognizing the importance of integration of voting rights and access to nationality. However, it also pointed out that there is no legal basis for including these two aspects in the Directive. The Economic and Social Committee in its Opinion on the Directive stated that it "While access to nationality is, without doubt, a matter reserved solely for Member States, the right to vote in municipal and European elections could be dealt with by European legislation. The next IGC on the reform of the Treaties must address this issue."⁵⁵ Present draft Constitution submitted by the European Convention to the IGC does not contain any proposals to this regard⁵⁶.

It remains to be seen whether the new directive on the status of third country nationals will be capable to solve all present problems in relation to this semi-citizenship group.

⁵³ Tampere Presidency Conclusions, p.21

⁵⁴ M.Hedenamm-Robinson, An Overview of Recent Legal Development at Community level in Relation to Third Country Nationals Resident within the European Union, With Particular Reference to the Case Law of the European Court of Justice, CMLR 38, 2001, 525-586, 525.

⁵⁵ Opinion of the Economic and Social Committee on the "Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents", OJ C036, 08/02/2002 0059-0062

⁵⁶ Draft Treaty Establishing Constitution for Europe, 18 July 2003