Conference proceedings

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In this paper I discuss definitions of the main legal notions provided for in EU acquis in the field of labour migration and irregular migration. Next I discuss Polish law in two respects – I give example of an evolution of legal notions in the field of migration and I present notions that are not defined in EU law but have definitions in the Polish law (repatriation and diaspora).

I. LABOUR MIGRATION

- General rules on labour migration

In December 2005 the European Commission issued a Policy Plan on Legal Migration which aimed at introducing a general framework for a rights-based approach to labour migration and laying down admission conditions for specific categories of migrants.

General rules on labour migration are set out in the Directive on a single permit agreed by the Council in 2010 (the text has not yet been agreed with the European Parliament). It concentrates on a common set of rights to be granted to all third-country national workers and on procedural aspect i.e. single permit issued in a single application procedure. Single permit is a combined work and residence permit issued in a single application procedure with rights attached to this permit e.g. equal treatment.

- Highly skilled workers

Part of the above mentioned Policy Plan on Legal Migration was a ‘Blue Card’ Directive (Directive 2009/50 adopted by the Council in May 2009). The EU Blue Card is the authorization entitling its holder to reside and work in the territory of a Member State under the terms of the Directive 2009/50. The core of the ‘Blue Card’ Directive is the definition of ‘highly qualified employment’. This definition has three parts:
- the person concerned must be protected as an employee under national employment law and/or practice irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of someone else
- this employee must be paid
- this employee must have required adequate and specific competence, as proven by higher professional qualifications

The notion of ‘higher professional qualifications’ is understood as higher education qualifications or (by way of derogation when provided by national
law) at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer.

- Other workers

Admission of intra-corporate transferees COM(2010) 378 final

The ‘intra-corporate transferee’ means any third-country national subject to an intra-corporate transfer (i.e. the temporary secondment of a third-country national from an undertaking established outside the territory of a Member State and to which the third-country national is bound by a work contract, to an entity belonging to the undertaking which is established inside this territory).

Seasonal workers COM(2010) 379 final

‘Seasonal worker’ means a third-country national who:
- retains a legal domicile in a third country but resides temporarily for the purposes of employment in the territory of a Member State
- in a sector of activity dependent on the passing of the seasons
- under one or more fixed-term work contracts concluded directly between the third country national and the employer established in a Member State

In this definition the ‘activity dependent on the passing of the seasons’ means an activity that is tied to a certain time of the year by an event or pattern during which labour levels are required that are far above those necessary for usually ongoing operations.

In this context of legal migration the Council Directive on a specific procedure for admitting third-country nationals for the purposes of scientific research (Directive 2005/71/EC of 12 October 2005) should also be mentioned. It applies to admission of a researcher for periods of more than three months. Here a “research” means creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this stock of knowledge to devise new applications. Definition includes social sciences, physical sciences and also applied research. "Researcher" means a third-country national holding an appropriate higher education qualification, which gives access to doctoral programmes, who is selected by a research organisation for carrying out a research project for which the above qualification is normally required.
II. IRREGULAR MIGRATION

- Prevention of irregular migration

Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

In the Directive a “facilitator” means any person who intentionally assists a person who is not a national of a Member State to enter, or transit across the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens as well as any person who, for financial gain, intentionally assists a person who is not a national of a MS to reside within the territory of a MS in breach of the laws of the State concerned on the residence of aliens. The Directive also specifies that a facilitator is not only a person who facilitates but also the instigator, an accomplice or a person who attempts to commit the infringement.


In the Directive a “immigration liaison officer” means a representative of one of the Member States, posted abroad by the immigration service (or other competent authorities) in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration.

- Treatment of irregular migration


In the Directive the “illegal employment” means the employment of illegally staying third-country national i.e. a third-country national present on the territory of a Member State who does not fulfill or no longer fulfills, the conditions for stay or residence. It should be noted that according to this definition “illegal employment” does not mean unauthorized employment of legal migrants regardless of whether those migrants are prohibited from taking up any work. Similarly, it does not concern self-employment by irregular
migrants or unauthorized self-employment of regular migrants. Where employers have breached the prohibition on employing irregular migrants they must be made subject to effective/proportionate/dissuasive sanctions.

III. EXPULSION


According to the Directive “illegal stay” means the presence on the territory of a Member State of a third-country national who does not fulfill, or no longer fulfills the conditions of entry as set out in Art. 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that MS.

In the Directive a “return” means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to his or her country of origin or a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.

Other notions that are important in the context is:

- ‘return decision’ which means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return
- ‘removal’ which means the enforcement of the obligation to return, namely the physical transportation out of the MS
- ‘entry ban’ which means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the MS

IV. POLISH LAW

- Evolution of notions – temporary residence permit

Under the influence of the EU acquis the legal notions in the field of migration in Poland changed. I could talk about notions such as visa, right to enter, different kinds of residence permit. Here I give an example of the temporary residence permit (permit to reside for a fixed time).

The notion of ‘temporary residence permit’ existed under 1997 Law on Aliens and was from the beginning in 2003 Law on Aliens. However its meaning
changed. In 2005 due to the implementation among others of Long-Term Residence Directive points 13,14 were added and also provision on victims of trafficking in human beings. After this amendment the residence permit for a fixed period shall be granted among others to an alien, who:

- possesses a long-term resident’s EC residence permit granted by another member state of the European Union and is going to take up
- employment or carry out an economic activity in conformity with the regulations of the law in force in the Republic of Poland
- to take up or continue studies or professional training, or
- demonstrates that there are circumstances that justify his / her residence on the territory of the Republic of Poland

- is a member of a family of an alien referred to in p.13, with whom he/she has resided on the territory of another member state of European Union, who accompanies an alien or intends to join him/her
- is a victim of trafficking in human beings within the meaning of Council Framework Decision of 19 July 2002 on combating trafficking in human beings (O.J. EC L 203 of. 1.08.2002), and fulfils jointly the following conditions:
  a) resides on the territory of the Republic of Poland
  b) has undertaken cooperation with an authority competent with respect to conduct procedure on combating trafficking in human beings
  c) has terminated contacts with persons suspected of committing related to trafficking in human beings

Such permit can be issued if circumstance, on which he/she applies for this permit justifies his / her residence within the territory of Poland for the period exceeding 3 months.

In 2007 additional points on researchers status were added (implementation of 2005/71 Directive on a specific procedure for admitting third-country nationals for the purposes of scientific research). After this amendment the residence permit for a fixed period shall be granted among others to an alien, who is a researcher who stays on the territory of Poland in order to conduct scientific research or has a residence permit with mention „researcher” issued by another Member State (under some additional conditions).

- Definitions of “repatriation” & “diaspora” in the Polish law

In the Polish law there is a definition of the term “repatriation”. Depending on the Member State, this term has different meaning. In Poland it refers specifically to repatriating Polish nationals back to Poland. According to Act on Repatriation, those holding a repatriation visa automatically acquire Polish nationality on the day they cross the Polish border. Repatriation visas are
granted to those of Polish descent, which is further defined to include those who once had Polish nationality or who have at least one parent or grandparent or two great-grandparents who were ethnic Poles or held Polish nationality. Other conditions include a declaration by the person concerned that he or she is of Polish ethnicity and proof of attachment to Polish culture by nurturing Polish language, traditions and customs.

**Diaspora as a term is not defined in the Polish law.** Nevertheless Poland has passed in 2007 a law giving certain benefits to members of its diaspora living abroad. The Act on the Polish Ethnicity Card was passed in September 2007. The scope of the card is restricted to ethnic Poles who are not Polish nationals, but are nationals of one of the fifteen successor states of Soviet Union republics. The Polish Ethnicity Card confirms a person’s belonging to the Polish nation and the right to benefits provided for by the Act. It may be issued to a person who declares himself or herself to be a member of the Polish nation and who fulfils the conditions specified in the statute. These conditions are of mixed ethnic and cultural character and it should be noted that the ethnic criterion (descent) is not obligatory. Instead of proving Polish descent a certificate issued by one of the non-governmental organisations operating in these countries may be presented, confirming active engagement in activities concerning Polish language and culture or other involvement in Polish national minority communities for at least three years prior to the application. In any event, it is necessary to prove attachment to ‘Polishness’ through having at least basic knowledge of the Polish language, which must be considered by the applicant to be his or her native language, as well as knowledge and practice of Polish traditions and customs.

The law provides for different benefits, which include easier access to the labour market (holders of the card do not need a work permit and they can undertake economic activity in Poland on the same basis as Polish nationals), and some educational, cultural and health benefits. In order to enter Polish territory, the holder of a Polish ethnicity card still has to apply for a visa, but may be exempted from the fee for a national visa (or this fee may be refunded). The actual meaning of these benefits is different depending on whether a holder of the card is a citizen of a European Union country (in this case Latvia, Lithuania, Estonia) or not. Third country nationals holding the Polish ethnicity card enjoy free access to the labour market, free immediate medical assistance and access to education at tertiary level, free entry to state-run museums and 37 per cent travel reduction for train transport. For EU citizens, only the last two benefits are of any significance.