

# A short introduction to migration law in Europe

- \* This introduction gives an overview of legal instruments dealing with migration, not a moral evaluation.
- \* Nationality is a defining category in migration law. Migration concerns non-nationals (foreigners, aliens) entering or moving to another country.
- \* In the rich North-West migration is mostly about immigration and control and restrictions. Countries with more emigrants (the global South) will be more concerned with rights that emigrants can take with them. Both visions tend to clash when people expect to see their rights recognized.
- \* No person is illegal. The illegality concerns a person's entry or a person's residence, which doesn't fulfill legal requirements (f.i. not having a visa). Basic human rights should always be respected.
- \* Asylumseekers (refugees) are a specific category of migrants.
- \* Migration law is not very consistent and sometimes very vague. Since its scope is so huge, this presentation cannot give a full oversight of all concrete arrangements that exist. These are constantly changing anyway. True to the DIY-spirit of the biketour I'll mention the important legal tools and where to find and consult them.
- \* There's legislation on the international level, on the level of the European Union and on the national level. When countries are part of international bodies or treaties, or a member of the EU, they have to respect the legislation issued at these higher levels. Lots of issues are still completely up to individual countries to decide (f.i. conditions for acquiring nationality, long-term residency).

## I. International law

International legislation requires all participating states to agree.  
Important legal tools on the international level are:

- UN Convention on the protection of the rights of all migrant workers and members of their families (1990). This convention shows the tensions between the global North and South. No migrant-receiving country in Western Europe or North America has ratified it.
- UN Convention against Torture (1984)
- UN Convention on the Rights of the Child (1989): minor children, even when residing illegally, have a right to education and medical treatment
- Association treaties between the European Union and third countries, usually as a "waiting room" for accession to the EU. An association treaty between the EU and Turkey grants Turkey a very broad free movement.
- bilateral agreements
- **the most important international tool: the European Convention of Human Rights (ECHR) (1950)**, within the Council of Europe (47 member states: <http://hub.coe.int/web/coe-portal/navigation/47-countries>). The ECHR and the **European Court of Human Rights (ECtHR)** don't specifically regulate migration, but they have an enormous impact through case law, mainly on

- \* Art. 3 that prohibits torture. The ECtHR has ruled that people cannot be sent back to countries where there's a serious risk they will be tortured.
- \* Art. 8 that protects the right to family life
- \* Art. 13 the right to an effective remedy

The ECHR is used a lot by people denied their rights by national governments!!  
For an overview of the ECtHR's case law on migration issues, consult this excellent handbook by the ECtHR:  
[http://www.echr.coe.int/Documents/Handbook\\_asylum\\_ENG.pdf](http://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf)

## *II. European Union law* (EU 28 countries: <http://europa.eu/about-eu/countries/>)

An important feature of EU law is the free movement of **EU citizens**.  
A EU citizen is someone with the nationality of a EU member state.

The most important legal instruments on the EU level are regulations and directives. Regulations are legally binding as such. Directives usually only set minimum goals or standards for member states to comply with. They have to be implemented in national law by a certain date. The full text of regulations and directives can be easily consulted here: [http://eur-lex.europa.eu/RECH\\_consolidated.do](http://eur-lex.europa.eu/RECH_consolidated.do) (through entering year + number in designated fields, f.i. Directive 2004/38 = year 2004, number 38).

### **II.1. Union citizens (and family members)**

Very important here is Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states.

The family members can be Union citizens but also third-country nationals. In a case of migration to a EU country it's important always to see if there's a link with the EU!

#### **A. entry and short stay (up to 3 months)**

Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a member state, accompanying or joining the Union citizen.

#### **B. stay for more than 3 months**

All Union citizens shall have the right of residence on the territory of another member state for a period of longer than three months if they:

- a) are workers or self employed in host member state; OR
- b) have sufficient resources and comprehensive sickness insurance; OR
- c) are student AND have sufficient resources and comprehensive sickness insurance; OR
- d) are family members of a citizen who satisfies conditions in a, b, c

### **II.2. Third-country nationals**

Since the 1990s member states have lost more and more of their autonomy regarding immigration to the EU from so-called third-country nationals.

At first arrangements were made via the intergovernmental way (unanimity), but this has moved more and more to the communautarian level (supranational). Since the Lisbon Treaty (2007) most decisions are to be taken with the co-decision procedure: the European Parliament and the Council of the EU decide jointly, with qualified majority instead of unanimity.

The Lisbon Treaty lays out the groundwork for the future:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>

Art. 67

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the member states.
2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between member states, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals. (...)

see also Artt. 77-80

Concretely, there's a

- (realised) **common border- and visa policy**: Schengen

(all EU countries - UK, Ireland and Cyprus; not yet Romania, Bulgaria) (+ Switzerland, Iceland, Norway, Liechtenstein) = 27 countries

- (developing) **common immigration and asylum policy** (all EU countries - UK, Ireland, Denmark)

#### **A. entry and short stay (up to 3 months)**

Here the Schengen common border- and visa policy is at play.

The Schengen area is an area without *internal* borders, an area within which citizens, many non-EU nationals, business people and tourists can freely circulate without being subjected to border checks.

There's a single set of rules for *external* border checks on persons. The Schengen Borders Code and a common visa policy govern the crossing of the external borders. A number of information sharing mechanisms are central to this cooperation: The Visa Information System (VIS) allows Schengen States to exchange visa data, in particular data on decisions relating to short-stay visa applications. The Schengen Information System (SIS) allows Schengen States to exchange data on suspected criminals, on people who may not have the right to enter into or stay in the EU, on missing persons and on stolen, misappropriated or lost property.

Citizens from some non-EU countries are required to hold a visa when travelling to the Schengen Area. The EU has a common list of countries whose citizens must have a visa when crossing the external borders and a list of countries whose citizens are exempt from that requirement. Generally, a short-stay visa issued by one of the Schengen States entitles its holder to travel throughout the 27 Schengen States for up to three months within a six-month period. Visas for visits exceeding that period remain subject to national procedures.

- visa

\* Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

\* Regulation 810/2009 visumcode

- border control

\* Convention implementing the Schengen Agreement (1990):

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML)

\* Schengen Information System (SIS II-Regulation 1987/2006, entered into operation April 9, 2013)

\* Schengen Borders Code (Regulation 562/2006)

- Frontex

On October 26, 2004 the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) was established by Regulation 2007/2004:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R2007:20111212:EN:PDF>

## B. stay for more than 3 months

largely a competence of member states

but keep in mind that there are special arrangements for specific groups of people! (see point C.)

also keep in mind the international tools, especially the ECHR!

## C. Special categories

### 1. *asylum!*

- *international law*

\* UN Refugee Convention (1951)

\* ECHR, ECtHR

- *European Union law*

On June 12, 2013 a revised Common European Asylum System has been adopted by the European Parliament. It'll enter into force gradually by 2015. An overview of the revisions you can find here:

[http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas\\_factsheet\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf)

Here are the tools that are still in force now:

\* Dublin II Regulation 343/2003 establishing criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the MS by a third-country national

The Dublin regulation determines which country is responsible for dealing with an asylum request (usually the one through which the asylum seeker first entered the EU).

There's been tensions with the ECHR concerning the Dublin criteria (ECtHR: MMS vs Greece and Belgium).

Under the new rules, asylum seekers will not be transferred to EU countries where there is a risk of inhuman or degrading treatment. This is a good example of the EU changing its legislation under pressure of the ECtHR!

\* Qualification Directive 2004/83, on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees

\* Procedure Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status

\* Reception Directive 2003/9 laying down minimum standards for the reception of asylum seekers

2. ***temporary protection*** Directive 2001/55

3. Directive 2003/86 on the right to ***family reunification***

4. Directive 2003/109 concerning status of ***third-country nationals who are long-term residents***

5. Directive 2004/114 on the conditions of admission of third-country nationals for the purposes of ***studies, pupil exchange, unremunerated training or voluntary service***

6. Directive 2005/71 (***researchers***)

7. Directive 2004/81 (***victims of human trafficking***)

## **II.3. Illegal migration - expulsion and removal**

- \* Directive 2001/40 on the mutual recognition of decisions on the expulsion of third-country nationals
- \* Directive 2003/110 on assistance in cases of transit for the purposes of removal by air
- \* Directive 2008/115 on common standards and procedures in member states for returning illegally staying third-country nationals

*detention issues: watch the ECHR!!*

## ***III. National law***

All that isn't regulated on the international or EU-level, and also the implementation of EU Directives, is up to individual states to decide.

The best places to find info on national legislation and its interpretation will be (websites of) local migration ngo's. Usually on the website of the Ministry of Internal Affairs (or the Interior) you'll be able to find the legal texts.