

SUMMARY

Structure of the study

This report answers questions raised by the State Secretary about the scale, composition and increase in the group of family migrants that apply for admission to the Netherlands under Community law and how they seek recourse to the law. Three sources were used for the report, namely:

- 2005-2008 population data obtained from the information system (INDIS) of the Netherlands Immigration and Naturalisation Service (IND);
- 2005-2008 random sample data obtained from case studies conducted by Regioplan Policy Research (Regioplan Beleidsonderzoek);
- data obtained from IND's 'Belgium Box' (based on a questionnaire circulated among persons who applied for admission under Community law in 2008/2009).

The information obtained from these sources needs to be interpreted differently due to its dissimilar composition. Sometimes the information makes it possible to make pronouncements about the entire group and sometimes about a certain selection of the group. The report always states the source underlying pronouncements. The Institute of Immigration Law of the University of Leiden conducted interviews and desk research to elaborate the figures obtained from the study.

Number of applications for leave to stay under Community law

A total of 7,068 applications received from third-country nationals from 2005 to year-end 2008 were tested against Community law. Of these 5,999 were approved. This is more than three times the number of applications reported to the Lower House of Parliament in November 2008. The difference stems mainly from a difference in selection criteria used in IND's system. For the present study a method was used to retrieve as fully as possible from the IND information system (INDIS) the numbers of applications made under Community law. Data is entered manually in INDIS but it may be assumed that all applications made under Community law are registered.

Between 2005 and 2008 the number of annual applications rose from more than 1,100 in 2005 to more than 2,900 in 2008. In the same period the number of approved applications rose from approximately 900 in 2005 and in 2006 to 2,558 in 2008. Relatively speaking the proportion of approved applications was virtually the same over these years, i.e. about 85%. In the period under study 753 applications were made with a Dutch referee.

Characteristics of referee and applicant

In most cases (53%) the referees were EU nationals (other than Dutch nationals). A smaller proportion consisted of Dutch nationals and based on population data 30% had an unknown nationality. Further analysis on the strength of the case studies showed that a majority of this unknown group also

consisted of referees who were EU nationals (of member states other than the Netherlands).

Using the random sample data it is possible to estimate the nationality distribution of the referees in the population. It is estimated that three-quarters of all cases concerned EU nationals and that 16% of all cases concerned Dutch referees. An estimated 8% concerned non-EU referees and the nationality of the referee was unknown in less than 1% of all cases. Non-EU referees concerned, for example, a child of a third-country national, given leave to stay with the partner of this person, although the parent is often designated as the referee.

The country of birth of Dutch referees was checked in the case studies. The vast majority of Dutch referees, i.e. 72%, were found to have been born in the Netherlands. The study strongly indicated that this group included predominantly native Dutch people, although some may be second-generation immigrants. It is estimated that not more than one-quarter of this group of referees consisted of second-generation Turkish and Moroccan Dutch nationals.

A distinction was made between applicants for leave to stay with a Dutch referee and applicants for leave to stay with an EU referee. There was a very great diversity of nationalities among the applicants. The relatively largest groups of applicants with a Dutch referee were Turkish, Moroccan or Brazilian nationals. The relatively largest groups of applicants with an EU referee were US, Turkish or Brazilian nationals.

A majority of the cases concerned marital or civil partnership relationships (approximately 80%). Dutch referees and their applicants were found to be more frequently married than EU referees. The largest group of Dutch referees (29%) were found to have got married two to five years prior to application. The EU referees were found to have got married later; 51% married in the same year as the application.

The age of the referee was plotted against the age of the applicant. A noteworthy point is that the largest group of referees wanted a person in their own age bracket to come to the Netherlands. Examination of the age distribution of applicants and referees revealed a relatively large number of cases (approximately 17%) whereby at least one of the two, i.e. applicant or referee, was under the age of 21. This applied to 29 of the 174 Dutch referees (21 applicants plus 10 referees minus 2 overlapping cases).

Application process

The vast majority of referees were found to be resident in another EU member state (or in the Netherlands) for the purpose of paid employment. This qualifies them as economically active EC residents.

About 18% of applicants for leave to stay with a Dutch referee and 28% of applicants with an EU referee had previously completed a regular procedure. Prior visa and asylum procedures occurred significantly less (in 10% and 3% of all cases, respectively).

Most applicants for leave to stay with a Dutch referee came to the Netherlands from another EU member state (65%). 64% of applicants for leave to stay with an EU referee are third-country nationals who are residing in the Netherlands and who have preceding their application had not completed other admission procedures. The research results do not make clear whether these cases concern non-legalised (or not yet legalised) stays by applicants in the Netherlands or in one of the other member states. The recorded data does not register non-legalised stays.

Dutch referees were generally found to have resided for a long time in another EU member state before the application was made. Three percent did not register until after the application. Nine percent were found to have registered in another EU member state between one and six months prior to the application. Sixteen percent were found to have resided in another member state between six months and one year prior to the application. Thirty percent were found to have resided there between one year and five years prior to the application and 5% between five and ten years prior to the application. About 34% of these referees were found to be resident in Belgium. Other frequently occurring countries were Germany (21%) and Spain (15%).

Elaboration of results: explanations for increased recourse to Community law

There has been a significant increase in recent years in the recourse made to Community law by third-country nationals applying for leave to stay with a Dutch referee and with an EU referee.

Besides the tougher aliens policy (notably the more stringent income requirement, the overseas civic integration requirement and to a lesser extent the higher age requirement), it would appear that the awareness that exists of possibilities under Community law has increased significantly due to the Internet (i.e. websites containing information about and experiences of the 'Belgium route'). In addition, but to a smaller extent, awareness is perhaps also increased due to the political and media attention. The information found on the Internet will have helped sway people to take this step. Another explanation could be the increased labour mobility. Quantitative research showed that many referees were relatively long-term residents of and economically active in the host member state. It should also be stressed that while the number of applications has increased sharply in recent years, an examination of the four-year timeline shows that this concerns in total of not more than 753 applications with a Dutch referee.

The increase in the number of tests of third-country family members of an EU referee against compliance with Community law is explainable in part by the opening up of the labour market on 1 May 2007 to eight new member states,

the increase in the number of workers from Eastern Europe and the accession of two new member states on 1 January 2007. Other explanatory factors might be the possibility of family reunification by virtue of a partner relationship in the Netherlands, a greater awareness of the Europe route, the existence of reverse discrimination in the person's own country and an increased mobility of workers within the European Union. These factors cannot be substantiated without further quantitative research, however.

Elaboration of results: types of recourse to Community law

The research also had to answer the question of whether the right of the free movement of persons was being used/abused. The Court has not yet confirmed the Commission's interpretations of fraudulent conduct and the abuse of law, however, so those interpretations cannot be considered legally binding. This makes it impossible to draw conclusions as to whether or not there is an abuse of law or fraudulent conduct. Therefore, this report refers to the use of Community law without attaching any conclusion as to whether such use constitutes abuse.

However, the Commission has named indicators in the guidelines for the better transposition and application of the Directive. These indicators concern mainly determination of a genuine and actual stay and identification of sham relationships and they may occasion the institution of a further investigation. The named indicators concern such matters as the duration of the referee's residence in the host member state, the duration of marriage, the completion of multiple procedures for family reunification, continued employment in the member state of origin and the situation concerning children (whether or not they also relocated to the host member state).

A conclusion that may be drawn is that the group of third-country nationals with a Dutch referee that seek recourse to Community law is highly diverse. Nevertheless, a few types of recourse are identifiable. The main distinguishing criterion is whether there is genuine and actual residence. A cautious attempt to construct a typology made it possible to identify three variants. The first variant is genuine and actual residence without the premeditated intention to seek recourse to Community law on return. The second variant is genuine and actual residence with the intention of activating Community rights. The third variant is when there is the absence of or doubt about genuine and actual residence but the intention exists to activate Community rights. The first two variants concern completely legal recourse to Community law. Based on the Commission's criteria, the third variant might constitute a reason for conducting a further investigation into residence in the host member state or into the relationship or marriage, whereby the Commission's guidelines place the burden of proof on the state, which in this instance means IND. The quantitative research showed that a large proportion of the Dutch referees had resided for a long time in a host member country. Only one-quarter to one-third had resided in a host member state for one year or less before submitting an application. Most cases were also found to concern relationships formed well before the date of application (two-thirds got married one year to more than

ten years before the date of the application). The impression of prolonged and genuine marriages is reinforced by the fact that more than one-quarter of the applicants had completed one or more procedures to bring about family reunification. A minority (17%) of Dutch referees continued to be registered in the municipal personal records database. Insofar as there were children, they relocated in most cases (70%) with the parents to the host member state. This could allow the cautious conclusion that most cases concern genuine and actual residence and that the marriages are usually long and genuine.

As regards the group of third-country nationals that apply for leave to stay with an EU referee, a distinction should be made between the group of referees who take up residence in the Netherlands more or less permanently and the group that stay here for a shorter time and then return to their country of origin. However, it cannot be distilled from the research whether this concerns referees who have been resident in the Netherlands for a long time or for only a short time. Some of the group of EU referees who stay in the Netherlands for a short time might do so with the intention of activating Community rights. However, this is again difficult to validate properly using the figures obtained from the research. An important distinguishing criterion for EU referees appears to be whether there is a genuine relationship or a genuine marriage. Third-country nationals who apply for leave to stay with an EU referee tend far more often to have short relationships or marriages. In more than two-fifths of all cases the date of marriage occurred after the application or in the six months immediately before the application. Brief relationships or marriages might be an indicator for a further investigation into the genuineness of the relationship or marriage. Based on this research it is not possible to determine whether sham relationships occur frequently among this group. Another difference is that the application date is closer to the starting date of the stay in the Netherlands: forty-five percent were found to have been in the Netherlands for one year or less at the time of application for family reunification. As we do not know whether and when EU referees return to their member state of origin, we are unable to draw any further conclusions in this respect. A noteworthy point is that some of the applicants were found previously to have completed one or more procedures. It is likely that some of these people reside in the Netherlands without residence papers. Where non-legalised stays are concerned it might be an indicator of a possible sham marriage or sham relationship based on the Commission's criteria. But the simple fact that a third-country national obtains a migration advantage by entering into a relationship with an EU referee does not necessarily mean that there is a sham marriage. All in all, the figures produced by the research provide insufficient pointers for drawing clear conclusions about third-country nationals who apply for leave to stay with an EU referee.

