



REPUBLIC OF LITHUANIA
MINISTRY OF THE INTERIOR

Centre for Migration Law

Faculty of Law

Radboud Universiteit Nijmegen



Lithuania-Poland Free Movement Conference

CONFERENCE REPORT

I. General context

Lithuania-Poland Free Movement Conference took place on 28 October 2010 in Vilnius, Lithuania. It gathered officials of two countries (mainly from Ministry of Interior and Ministry of Labour), academicians interested in the free movement issues, as well as judges. Over 60 persons took part in the conference (full list of participants enclosed in Annex II to this Report). It was the first time ever that a conference devoted exclusively to free movement issues was held in Lithuania. The Conference was organised as a joint event of two neighbouring EU countries with a view of addressing common challenges of free movement of workers. The objective of the event was thus to address the issues of concern to both countries in the context of most recent developments on free movement in the EU and propose solutions to these concerns. The event also provided an excellent opportunity to meet counterparts across the border and enhance awareness on most problematic aspects of free movement in both countries.

The agenda included presentations from the Free Movement Network, European Commission, practitioners of countries, as well as judges and academicians. Main topics included the situation of Turkish workers, frontier workers in both countries in the context of most recent jurisprudence of the European Union Court of Justice on free movement of workers, as well as legal status issues of third country nationals who are family members of EU nationals. The presentations were followed by the discussions. Full agenda is enclosed in the Annex to this Report. Main points of presentations are summarised below. Full presentations are available upon request.

The Conference was co-organised with the Ministry of Interior of Lithuania and Mykolas Romeris University of Lithuania. The moderator of the conference was professor dr. Ignas Vegele from Mykolas Romeris University, who is specialising in EU law and free movement.

II. Main issues discussed, problems raised and solutions proposed

In the opening notes the **vice-minister of Interior Mr. Gintaras S. Vyšniauskas** referred to Schengen developments and appreciated the new initiatives of the EU. Another representative of the organisers, **Professor Saulius Katuoka** from Mykolas Romeris University stated that the issue of free movement is a complex topic, which should always be in the target of attention, as well as that absolute rights in this area are non-existent, thus a variety of factors should always be considered and understood.

The Conference started with the presentation of the activities of the Network on Free Movement of Workers, in which the coordinator of the Network, **Mr. Paul Minderhoud**, reviewed the tasks of the Network, reports it prepares and events it organises (including the upcoming ones). He has gone through the themes of the European Free Movement Report for 2009-2010, as well as the main concerns identified in the European report. Two following presentations, by Mr. Almantas Gavėnas, the Director of Migration Department to the MOI of Lithuania and Ms. Lucyna Gajda, Director of Malopolska Government in Poland presented a context of free movement in Lithuania and Poland. **Mr. Gavėnas** referred to constant developments in Lithuania in the area of free movement (change of institutions, abolishment of internal controls, etc.). He confirmed that there are not so many EU nationals in Lithuania, but their number is constantly increasing. The Director then

turned to problematic issues that are acute for Lithuania, including: 1) the issue of abuse of rights of free movement of workers; 2) additional burden to state institutions; 3) insufficient cooperation among the Member States; 4) unclear provisions of the Directive 2004/38. He informed that there are currently amendments to the Aliens' Law pending in the Parliament. Some of the amendments will address abuse of rights issue. The presentations were complimented with most recent developments at EU level on free movement. **Ms. Lucyna Gajda** emphasized that generally Poland has correctly implemented provisions of Directive 2004/38 into Polish legal order. She pointed out that as a result of Polish regulations; the definition of family member of EU citizen does not cover registered partners. However, as Poland does not recognize registered partnership as a new type of family, it is in conformity with Directive 2004/38. According to the presenter, Poland has generally a liberal approach to foreigners, including not only EU citizens and members of their families, but also third country nationals (without any family ties with EU citizens). The reason of such a situation is probably the fact that Poland is not attractive country for migration purposes, taking into account mainly economical situation, level of income per capita in comparison with other EU Member States, especially those that entered EU before 2004. Poland is treated mainly by foreigners (both EU and non EU) as a transit country rather than final destination for stay. There was a fear that after EU enlargement in 2007, there would be a massive influx of Romanian and Bulgarian citizens to Poland, but this turned out to be groundless. According to statistics, there is even less Romanian and Bulgarian citizens that arrived to Poland after 2007. They prefer to migrate to other EU countries that are more attractive for economical purposes. As from 2004 66.000 EU citizens have registered their stay at the territory of Poland, including 1680 Lithuanian citizens. However as from 2008 there has been a considerable decrease in numbers. However, there is an increase in number of applications by students. Ms. Gajda informed that between 2004-2010 301 028 foreigners arrived to Poland, including 235 000 third country nationals (arriving on their own and not as EU family members). Only 552 non EU family members of EU citizens applied for stay at the territory of Poland – mainly citizens from Ukraine, Russia, Belarus, Australia and Brazil. 10 negative decisions as regards registration of stay have been issued so far for family members, mainly because incomplete documentation. Among 35 441 decision on expulsion only 41 concerned EU citizens (mainly because of serious criminal files). Currently, taking into account 4-year experience with the Act on Entry (implementing Directive 2004/38), there are plans to amend the Act in order to facilitate free movement of workers and other categories of EU citizens at the territory of Poland. These amendments will cover abandonment of all fees for issuance of residence documents (as a consequence of the fact that as of 2011 Polish citizens will not need to pay for Polish identity cards). Moreover there will be a possibility to submit an application for stay without the need to be present in person (in justified circumstances such as disability or serious illness). Additionally separate regulations for studying children will be introduced with the aim of facilitating their stay for educational purposes together with their parents.

Following the presentation of Ms. Gajda, participants were curious in the new legislative amendments. According to the presenter, the aim of future amendments is to change provisions that proved to be cumbersome. Liberal approach towards foreigners in Poland results in a relatively small number of third country nationals that choose Poland as their destination. During the discussion Lucyna Gajda pointed out that non EU nationals (other than family members) are problematic in Poland, especially Vietnamese. Additionally, there is a problem with marriages of convenience between Polish nationals and third country nationals – despite systematic controls of such marriages and legal tools to make such controls it is very difficult to prove that marriage is of convenience.

Ms. Monika Hochheim from the European Commission presented the newest Communication of the Commission of 13 July 2010 on reaffirming the free movement of workers: rights and major developments (COM 2010 373). She began her presentation by confirming that introduction of EU citizenship significantly changed the dimension of free movement. Originally, free movement rights were addressed solely to economically active migrants. However, nowadays, free movement rights have considerable social dimension. According to Eurostat statistics, currently more than 11 million EU citizens live abroad, including 6 million workers and 1 million frontier workers. In the presentation Ms. Hochheim defined the personal scope of EU free movement rights by referring both to the definition of workers contained in TFEU and to the Court of Justice jurisprudence. Later she analyzed rights that migrant workers enjoy, such as right to look for a job, to benefit from equal treatment as regards access to work, working conditions and other social and tax advantages as well as recognition of professional qualifications. However, the speaker made a reference to Art. 24(2) of the Directive 2004/38 which authorizes Member States to restrict the right to financial benefits during first three months of residence or for a longer period. Additionally Ms. Hochheim pointed out the there is a possibility to restrict access to certain posts in the public sector according to Art.

45(4) TFUE. However, every restriction shall be assessed very strictly on case-by-case basis. As regards residence rights, the speaker confirmed that there is a distinction between economically active and economically not active migrants as regards certain obligations that have to be fulfilled in order to register for a stay longer than 3 months. Finally, Ms. Hochheim informed participants that European Commission is currently working on Communication on employment in public sector and Communication on sport. The first document is planned to be published in December 2010, whereas the second in January 2011.

The **panel on the family members of EU nationals who are not EU citizens** started with a presentation by **Mr. Ryszard Cholewinski** from International Labour Organisation, who talked about the problems of marriages of convenience, dependence definition. He also referred to the findings of the European Free Movement Report for 2009-2010 on this subject. According to the European Report, registered partners do not benefit from free movement rights in 10 MSs. The term of durable relationship is interpreted in a variety of ways in MSs (e.g. in some 6 months is sufficient, like the Netherlands, in others - 2 years are required). He touched upon the issue of reverse discrimination (because sometimes EU nationals who did not exercise free movement rights fall under national immigration rules). Some positive tendencies were noted from the information of the European Report, e.g. that 6 MSs assimilated national family reunification rules with European rules, which show liberalisation as concerns family definition. Problems in some MSs were mentioned with regard to reporting in Schengen system (ECJ judgement in a case of *Commission vs. Spain* was mentioned). According to the presenter, Schengen Border Code should not be applicable; otherwise it is in violation of the Directive 2004/38. He also talked about residence rights of third country nationals' family members and mentioned that generally the MSs complied with the rules. With regard to abuse of rights (e.g. marriages of convenience) he stated that measures to fight the abuse should be proportionate, while proving such marriages is very difficult. With regard to MSs practices, some are questioned by the European Report (e.g. in Denmark, Estonia, UK). The first panellist in the discussion on third country nationals family members **dr. Inga Dauksienė** from Mykolas Romeris University in Lithuania started by saying that it is obviously beneficiary to be a family member of an EU citizen. She talked about autonomous rights of family members and the issue of reverse discrimination. Using examples of two situations: a) TCN family members of EU citizens residing in Lithuania (non Lithuanians); b) TCN family members of Lithuanian nationals residing in Lithuania, she analysed the delineation between the free movement rights guaranteed by the EU law and national situations. She also presented problems in Lithuania related to regulation of these two mentioned situations, as well as lack of guarantees for family members to remain in the country in case of death, discontinuation of marriage, etc. with EU citizen. Second panellist - a judge from Higher Administrative Court of Lithuania, **dr. Skirgailė Žalimienė** mentioned the situation of applying the free movement provisions in the Lithuanian courts. She has also analysed several ECJ judgements, referred to the EU Residence and Blue Card Directives. She mentioned a problem in Lithuania concerning equal treatment provisions - they are included in the Aliens' Law and not in the relevant legislation as per areas in which equal treatment has to be guaranteed - this results in lack of understanding and knowledge by the institutions and courts in applying this principle in concrete situations. Among the Lithuanian cases the judge analysed a situation where TCN family member was included in the Schengen system, which would disqualified him from residence under national law, however he was entitled to free movement rights under EU law. Lithuanian panellists were joined by the Polish panellist - **Mr. Tomasz Cytrynowicz**, the Director of Department for Legalization of Stay in the Office for Foreigners of Poland, who pointed out that indeed Poland does not have serious problems with migrating foreigners. As an example, he informed that in 2009 143 residence cards were issued and 21 permanent residence cards. There are more third country nationals than EU nationals that reside in the territory of Poland. He referred to *Metock* and *Eind* judgments. In his opinion, Poland complies with these judgments, especially the *Metock* judgment. He informed that there are plans to amend Act on Aliens in order to fully implement the *Eind* judgment. The fact that the definition of family member does not cover registered partnership results in the fact that Poland does not recognize such forms of family relations in its legal order. However, according to Mr. Cytrynowicz the Act on Aliens provides facilitations for such other forms of relationship to legalize the stay on the territory of Poland. These regulations, according to him, implement provisions of Art. 3(2) of Directive 2004/38 (however, he informed that there are opinions that Act on Aliens does not implement this article in a proper way). Tomasz Cytrynowicz referred to Commission guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM 2009, 313) in the context of marriages of convenience. He concluded that the restriction to assess a marriage as sham only if the sole purpose is to enjoy the right of free movement and residence under the Directive makes it very difficult to prove that a marriage is fictitious.

Following the presentation the participants noticed that probably Directive 2004/38 is one of a few EU legal acts that inspired so many discussions within the Member States.

The moderator summarised the morning session, which raised the following main issues:

- 1) independent rights of TCN family members;
- 2) internal situations vs. free movement situations;
- 3) legal certainty principle when the law implementing the Directive is not clear and refers to other laws.

The afternoon session started with the presentation on **problems related to return of Polish workers from UK**, which was made by **dr. Maciej Duszczyk** from the Centre of Migration of Warsaw University in Poland. Mr. Duszczyk devoted his presentation to practical problems related to return of Polish workers from United Kingdom to Poland. According to the speaker, more than 2 million Polish citizens made use of free movement of rights and left Poland in 2007. Currently, many of them decide to return to Poland. Up to 90% of migrations are typical migrations for economical purposes. The most popular destination for migrating Polish citizens is undoubtedly the United Kingdom. Also popular are Germany and Ireland. Lithuania is not a popular destination for Polish citizens mainly due to comparable income per capita and the level of salaries in both countries. According to Mr. Duszczyk, the main reasons why Polish citizens decide to return to Poland is deterioration of economic situation in destination countries, recession and rising competition in the labor market along with a risk of job loss. Moreover, the economic situation in Poland remains relatively stable and enjoys better prospects than most EU economies. Among the main problems for returning Polish citizens are: rules of transferring social benefits, ways of paying taxes from income earned outside Poland. There are also more practical issues such as problems to register in Poland a car bought abroad or to take (import) animals to Poland. Additionally, many returning Polish citizens wonder how hitherto abroad education of their children shall be assessed in Polish educational system. For many Polish citizens the fact of return to Poland is considered as a kind of failure. Therefore, they are frequently not eager to come back to their home place and decide to move to a different place in Poland in order to start entirely a new life. Maciej Duszczyk informed that Polish government decided to initiate a special program which aims to support people that decide to turn back to Poland and provide them with reliable and comprehensive information. The first part of the programme was information campaign on possible hindrances and ways to overcome them while coming back. There is a special website <http://powroty.gov.pl> where interested migrants may find practical information.

After the presentation, the participants were interested in governmental return programme. Mr. Duszczyk informed that in reality the governmental programme is not focused on making incentives or encouraging Polish citizens to come back. Moreover, according to the speaker Polish government is not really interested in their return as the level of salaries and standard of life in the United Kingdom, Ireland or Germany is unquestionably higher than in Poland. According to him, Polish government is aware that in previous few years around 3 million Polish citizens have migrated to other EU MSs. Therefore the Polish government feels the duty to support those who definitely decided to return.

The presentation of Mr. Duszczyk was followed by the in-depth review of the situation of Turkish nationals in Lithuania by **dr. Loreta Šaltinytė** from Mykolas Romeris University of Lithuania. Ms. Šaltinytė started from a general negative approach to Turkish workers in Lithuania, which in itself is already problematic and is reflected in the courts' practice. She analyzed in detail two cases decided by the Lithuanian courts (of Turkish nationals who were refused residence on threat to public order and national security grounds by the Migration Department and the lower courts). Dr. Šaltinytė was surprised to learn that only one of the 4 courts relied on the specific regulation related to Turkish nationals and was of the opinion that Lithuanian administrative and sometimes judicial institutions interpret public order ground quite broadly, which is of concern. Later she analysed the specificity of regulation of the Turkish nationals' situation in the EU. After reviewing relevant documentation and relevant case law she concluded that the position of the EU Commission concerning application of a visa requirement to Turkish citizens is still unclear.

The panel on **the situation of frontier workers** was commenced by **dr. Agnieszka Piekutowska** and **dr. Tomasz Dubowski** from the University of Bialystok in Poland. Dr. Piekutowska started by referring to definition of a frontier worker in Regulation 883/2004. Frontier worker shall mean any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week. Ms. Piekutowska recognized two criteria in the definition – political and periodical. She pointed out that the definition causes many practical difficulties. According to her, it would be desirable to change the definition of frontier worker in order to change the

requirement for a frontier worker to return at least once a week to his home country. She informed that in some Member States it is popular to work in one country and have a residence in another country and to come back home not once a week but generally once a month (especially such situation takes place between United Kingdom and Spain). Such workers are defined as long-term commuters. The speaker also listed migration factors, such as development of means of transport and decrease in costs of transport as well as possibility due to technologies to have constant contact with family residing in home country. She confirmed that there is a very low scale of workers migrating between Poland and Lithuania. The reason is comparable income per capita and comparable level of unemployment in both neighboring countries. Moreover, language barriers and lack of sufficient information are additional reasons that discourage migration between Poland and Lithuania. Later on, **Mr. Tomasz Dubowski** focused on rules that apply to frontier workers according to Regulation 883/2004. He analyzed Art. 18(2) of this Regulation, which states that the members of the family of a frontier worker shall be entitled to benefits in kind during their stay in the competent Member State, unless this MS is listed in Annex III. In this event, the members of the family of a frontier worker shall be entitled to benefits in kind in the competent Member State under the conditions laid down in Article 19(1). He emphasized that Lithuania is listed in the Annex III. Additionally he pointed out that there are also special rules for retired frontier workers. They are entitled in case of sickness to continue to receive benefits in kind in the Member State where they last pursued his activity as an employed or self-employed person, insofar as this is a continuation of treatment which began in that MS. These rules shall apply to members of his family unless a country is listed in Annex III, which is the case as regards Lithuania. The presentations by Polish speakers were followed by the intervention of **Ms. Mariana Žiukienė** from the Ministry of Labour and Social Affairs of Lithuania, who is also a member of the Administrative Commission that resolves various issues related to the implementation of EU Regulations. She reviewed the implementation of social guarantees of workers and mentioned that definition of frontier worker can be different for the purpose of social legislation, taxation and immigration legislation. Ms. Žiukienė mentioned problems of migrant workers related to accumulation of work record in foreign countries for unemployment benefit. Ms. Žiukienė input was complemented by **Ms. Lina Noreikienė** from the State Patients' Fund of Lithuania who reviewed the situation with health care benefits. She informed that there are problems with abuse of rights of persons that live in Poland and work in Lithuania. Sometimes there are cases where Polish citizens work in Lithuania for minimal wages and receive all relevant benefits in Poland. However, there is a comprehensive cooperation between Lithuanian and Polish social security institutions which aim is to detect such infringements.

III. Specific Issues of Interest to the European Commission

3.1. Estimation of the numbers of returning migrant workers back to LT and PL in the wake of the economic crisis: 2008-2010.

This issue was addressed in the presentation of Mr. Maciej Duszczyk who provided the statistics. As regards Lithuania, no clear estimation on the number of returning migrant workers coming back to Lithuania during 2008-2010 was provided; the speakers were uncertain whether such statistics are available at all. The informative figures on the population of Lithuania, including the number of migrant workers might be available after the forthcoming population and housing census in 2011.

3.2. Specific measures targeting frontier workers between Lithuania and Poland? Any specific proposals for such programmes?

The issue was addressed to some extent by Ms. Mariana Ziukiene, Ms. Lina Noreikiene and Polish speakers of the Frontier workers panel. However they referred not only to Polish-Lithuanian frontier workers. The speakers observed that there are no specific measures targeting frontier workers between Lithuania and Poland, however assured that taking into account the small number of such persons the relevant institutions are well familiar with Lithuania/Poland frontier workers' issues and help to resolve any problems on a case by case basis. The needed specific measures could include access to certain social benefits, however, it was noticed that some frontier workers might misuse social benefits mechanisms by using the same types of social benefits of both states – investigation on possible infringements is started.

3.3. Integration mechanisms for returning migrant workers and cooperation with Member State of employment

None of the speakers were specifically addressing this issue, except to a certain extent this was touched upon in the presentation of Mr. Maciej Duszczyk. The specific mechanisms for returning migrant workers first of all include provision of information for the migrant worker and facilitation of access to information. The speakers from Poland pointed out to the specific electronic web page introduced to migrant workers as well as to the recent publication providing the answers to the most common questions of migrant workers. The speakers did not provide examples of specific cooperation between Poland, Lithuania and the other MSs of employment for integrating the returning migrant worker except for exchange of information between the relevant institutions of the MSs.

IV. Conclusions of the Conference

The Conference was appreciated by both country participants as a first joint event and a possibility to discuss common problems, as well as to learn more about the free movement rules and jurisprudence, as well as national practices. Among the conclusions that can be drawn from the conference are the following:

1. The numbers of EU nationals in both countries are rather small. The tendency is increasing numbers in Lithuania, while decreasing in Poland, except students.
2. While Lithuania is rather concerned about abuse of rights of free movement by TCN family members, because it is an obvious benefit to be a EU national family member; Poland seems to be not concerned with this issue as the scale is really not significant.
3. Turkish nationals' situation raises some concerns both in Lithuania, but also from the EU level, as the position of the EU Commission concerning visa requirement is not clear to the MSs.
4. There is clearly a rather broad interpretation of public order and national security grounds for restricting the free movement rights in both countries.
5. The situation of frontier workers does not attract particular attention in both countries, as the numbers are small and there are no evident restrictions implying problems. However, there is a tendency that people do return home not once per week, but once per month, thus this might be taken into account for the purpose of revising the frontier worker definition.
6. Concerning frontier workers between both countries, the scale of migration is low and the reason is probably comparable income per capita and comparable level of unemployment in both countries. Moreover, language barriers and lack of sufficient information are additional reasons that discourage migration between Poland and Lithuania.
7. In Poland, significant numbers of Polish citizens are returning from other MSs after having worked there. Poland tries to facilitate their return and help them to re-assimilate in Poland. Facilitation programmes have been designed also in Lithuania, but lack financial support due to budgetary deficit.
8. Both countries are concerned about the problem with marriages of convenience. There are many difficulties in proving that a particular marriage has been entered for convenience. The main problem is to assess marriage as a sham marriage only if the sole purpose is to enjoy the right of free movement under Directive 2004/38.

Report prepared by: Ms. Lyra Jakuleviciene, national rapporteur for Lithuania and Ms. Aleksandra Czeka, national rapporteur for Poland, both from the Network on Free Movement of Workers