



THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Exceptions to the Principle of Free Movement of Workers in the European Community: the Case of Persons Infected with HIV/AIDS

Zemri Elezi¹, Abdula Azizi², Octavia-Daniela Steriopol³

Abstract: The movement of workers in the years after the foundation of the European Community (EC) was as a result of the labor market needs, essentially in most developed countries in which there was a lack of specific profiles of occupation and skilled workers. Due to the fact that, every member state of EC discretionary regulates the issues relating to free movement of workers, working conditions and organization of working hours, it was inalienable the harmonization of rules at the EC level. Even today there are a large number of legal measures regarding the harmonization of legislation on free movement in the EC member states; however, they are sometimes interpreted differently by its member states, particularly those related to movement restrictions. Specifically, in the framework of realization of the right to free movement will also analyze the rules that exclude this right and states conduct against persons who violate the rules on free movement. As states, under the protection of public health of their citizens, they have the right to restrict the free movement of workers coming from other states, in this context this paper will analyze the behavior of states towards persons infected with the virus HIV. This paper will analyze the right to free circulation of workers in the EC, and the limitations that exist in several member states, whereas suggests eliminating the obstacles which are not based on the positive acts of the EC.

Keywords: Public Health; EC Member-States; Free Movement of Persons with HIV

1 Introduction

Movement of workers as a legitimate opportunity was provided by Art. 48 of the Treaty on European Economic Community(1957), which among others, confirms the right of workers to accept the offer for employment in another member state, and employed by the same criteria as domestic workers, excluding the public sector employment. Whereas, Art. 49 of the same Treaty include the necessary measures to ensure free movement of workers, then the close cooperation of employment services and elimination of administrative barriers and practices. Relief of this nature also enabled the balance of needs in the labor market.

A practical realization of the free movement of workers requires the simplification the administrative procedures and elimination of the legal barriers on mobility (work permit, visas and residence permits). In this respect, important contributions have given the provisions of secondary legislation of EC as follows:

- Council Directive 68/360/EEC (OJ L 257) of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families;

¹ Associate Professor of Public Administration, Faculty of Public Administration and Political Science, South East European University, Address: street Ilindenska b.b. Tetovo 1200, Republic of Macedonia, e-mail: a.azizi@seeu.edu.mk.

² Associate Professor of Public Administration, Faculty of Public Administration and Political Science, South East European University, Address: street Ilindenska b.b. Tetovo 1200, Republic of Macedonia, Corresponding author: a.azizi@seeu.edu.mk.

³ Professor at Technical College of Public Alimentation And Tourism "Dumitru Motoc", Galati, Romania, e-mail: octavia1310@yahoo.com.

- Regulation 1612/68 EEC (OJ L 257) of the Council of 15 October 1968 on freedom of movement for workers within the Community; and
- Regulation 1251/70 EEC (OJ L 142) of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State.

Also, The European Union Treaty-EUT (1991) marked the significant stage in the development of European policy on freedom of movement. Art. 8 of the EUT established the principle of the citizenship of the European Union, by which employees were given the right to vote or run in local elections, as well as in the European Parliament elections under the same conditions as for local citizens (Gormley, 1998).

Usually, the free movement is been limited for the certain cases by secondary EC legislation, such limitations which are based on consistent reasons.

2. Exceptions to the principle of free movement of workers in the EC

The EC is composed of 27 states with widely varying in histories, economies, cultures, legal systems, health-care systems and approaches to the balance between public good and private right (Martin, 2009).

The right to free movement is a fundamental and personal right, but this right might be restricted by Member-States. The EC legislation provides a safeguard and guarantees in order to limit the discretionary power of Member-States in this respect and to ensure that the fundamental right to free movement is protected.

‘Public policy, public security or public health’ form a effective formula for exceptions concerning the fundamental principles of free movement, citizenship rights, freedom to provide services and freedom of establishment within the EC. This means that a citizen might be refused entry or residence in another Member-State, or even be expelled from the Member-State where he/she is established on these grounds. Though this may appear to be a broad and general proviso, EC legislation and the Court of Justice case-law have zoomed in on the essentials. The Court of Justice of EC has stated that restrictions may only be imposed in individual cases where there is sufficient justification. In other words, Member-States must specify on a case-by-case basis the exact reasons for imposing restrictions. Furthermore, measures taken on the grounds of public order or public security will be based exclusively on the personal conduct of the person and need to be motivated by a present and serious threat affecting one of the fundamental interests of society. The Member-State cannot impose restrictions to serve economic grounds.

These exceptions should be interpreted in a right way in order not to have abuses by the authorities of member-states. However, member-states have the discretionary right to determine what they include in public policy in the light of national needs.

What includes public policy and public security is defined in Directive 2004/38/EEC, which contains the minimal procedural measures to protect migrant workers, discrimination in the areas of public policy, public security and public health. They have the right to official information to limit certain rights in these areas in precise and understandable manner.

This Directive 2004/38/EEC relates to all measures for entry into the territory, granting or renewal of residence permits, or expulsion from their territory, these measures undertaken by the member-states based on public policy, public security or public health (Section 2).

In addition, the right of institutions, respectively the European Parliament and the Council, given that the regular legislative procedure to approve directives for coordination of the law’s provisions concerning the special treatment of foreign on the basis of public policy, public security and public health, is also known at the Treaty of Lisbon in Chapter 2 (Article 52) "The right of establishment"

(Azizi, 2009).

2.1. Public Policy and Public Safety

The Directive 2004/38/EEC provides the exceptions, where the employee of another member-state can be deported for violating security as a measure of preventive nature. These measures are conditioned by the existence of the serious threat that could risk the social interests of member-state. In the case *Calfa*, the Court of Justice of EC on the request of the person's decision for permanent removal from the Greek authorities, because the person was accused of using drugs, stressed that the expulsion of citizens of the Community action is justified only if it presents serious threats violating the fundamental interests of society. In this case, the Court concluded that the conditions of expulsion had not been met, so it cannot justify such restriction is inconsistent with democratic interests.

Endangering public policy and public security, as usually considered in terms of people's personal behavior, and measures taken on the basis of public policy and public security will be based solely on personal behavior in question. It is worth mentioning the case *Bo signore*, who was an Italian citizen who had gone to Germany for work. Three years later he injured his brother in an accident, using gun which possession was illegal. He was imprisoned because of negligence causing the stabbing and was then ordered to be deported. German court asked the Court of Justice of EU to answer the question whether Community law allows member-states to deport persons for preventive reasons or reasons must be specific to individual cases. To that question for preliminary issues the Court answered that: these measures should be based only on the personal conduct in question and previous accusation not present basis to undertake such measures. In fact, it should avoid the belief that the deportation of foreign workers, particularly those of the common market, represents the result of the expression of hostility, and xenophobia against foreigners.

Also, in the case *Van Dyne* the Court of Justice of EC was interpreting the exclusion from the freedom of movement of workers due to the protection of public policy, as a discretionary right of member-state. Indeed, the United Kingdom authorities refused to permit entry into its territory to a German lady, that wanted to work at a Scientology Church, organization which activities was considered by the state as harmful. Longtime states undertake administrative measures to eliminate the organization's activities, but because of fact that UK could not deport its citizens who worked in scientology church, the Court of Justice of EC accepts the deportation of foreigners for the same activities on the grounds of protecting public policy. The case drew a critical comment to the recognition of inequality in the treatment of local citizens and foreign nationals. If such activities are indeed oppose to the public policy that results in undertaking measures to deport foreign citizens or their refusal to enter in the territory of the State, without a doubt that action must be taken against own citizens engaged in such activities. The court stated that there is an inevitable discrimination between the local citizens and nationals of other countries and must be taken restrictive measures against activities that endanger public policy.

The Community law doesn't specify what measures should be taken against member-state citizens, when they should protect the public interest. More logical measure that can be taken is the deportation, but it is calculated as the last, when other options have been expended to discipline the person and to harmonize the actions of current regulations.

2.2. Public Health

The individual nation states are signatories to Europe within the International Health regulations, but the capacity of states to undertake measures to control transmissible disease is constrained by their obligations to comply with EC law. Some, but not all states are signatories to the Schengen Agreement that provides further constraints on disease control measures. The porous nature of borders between EC member-states, and of their borders with other non-EC member-states, limits the extent to which it protects states are odious to their populations in a pandemic disease.

According to Directive 2004/38/ EC (Art.29):

"1. The only diseases justifying measures restricting freedom of movement diseases with the scarf done Epidemic Potential as defined by the relevant Instruments of the World Health Organization and Other infectious diseases or contagious parasitic diseases are the subject IF broke Protection of provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from date of the Arrival scarf not constitute grounds for expulsion from the territory.

3. Where there are indications Serious That it is necessary, Member States may, Within three months of the date of Arrival, require Persons entitled to the right of residence to undergo, free of charge, a medical examination to certify That broke are not suffering from Any of the Conditions referred to in paragraph 1. Such medical examinations required may not even do a Matter of routine."

The exception on the right of free movement of persons is also provided because of the protection of public health. Disease and disability that justify a refusal of entry into member-state reject the granting of residence permits are only those diseases that are listed in the Annex of this Directive and are listed in 1951 in World Health Organization (WHO):

a) Diseases that may endanger the public health:

- Diseases that subservient to quarantine, listed in Section 2 of the International Health Regulation of 25 May 1951,
- Tuberculosis of reparative system in an active state or trend of development,
- Syphilis, and
- Other infectious diseases or infectious verminous disease, if are subject to the provisions for the protection of citizens of member-state.
- b) Diseases and invalidities that may present threats to public policy or public security:
 - Drug dependants,
 - Hard mental disturbance Anxiety, state of psychotic disturbance with agitation, Delirium, hallucinations or confusion.

Illness and disability to be presented after the residence permit doesn't provide a legal basis for refusing renewal of residence permit or expulsion from the territory.

The decision to grant or refusal of residence permits should be taken up within six months from the date of application for obtaining the permit.

Member-State may require from the other countries of origin of person who has submitted the request to provide information to police for the person in question and the answer must be given within period of two months. The person concerned will be informed officially for the decision regarding the permit application or his expulsion from the territory. At the same time, will set the exit deadline from the territory, which except in an emergency should not be shorter than 15 days (Sections 5-7). A person has the right to use the legal means regarding of decision to refuse the application for stay, or expulsion from the territory (Article 8).

2.2.1 Case of persons with HIV/AIDS

However, into practice such situations also arise when the limitations for the movement of citizens has no basis in EC law that especially limitations for the people infected with the HIV virus.

Over 50 000 people a year are diagnosed with HIV in the EU and its neighboring countries, while around two million people are already living with the virus.¹ Immigrants who are HIV positive or are infected with the AIDS virus are in unfavorable position. In the practice of states, such persons are not

¹ Joining together to tackle HIV/AIDS in Europe, European Public Health Programme, European Union, 2011, p.3 For more see at: http://ec.europa.eu/eahc/documents/health/leaflet/hiv_aids.pdf

allowed to enter in the country, although there are no specific prohibitions which justify such actions. Only four EC member-states which participate in this group (Cyprus, Lithuania, Poland and Slovakia), while the other 23 member states doesn't have any particular form of restrictions on entry and stay of persons with HIV in the territory of their state. These countries that maintain restrictions are sending the message to their own citizens and the rest of the world that HIV-positive people are *persona non grata* and should not be able to enjoy the same freedoms and opportunities as everybody.

By institutionalizing one type of HIV-specific discrimination, governments are implying that is acceptable the discrimination in other areas such as employment, housing, education and healthcare.

Over the years, many of the United Nations Agencies and Programmes, including the WHO, the Joint United Nations Programme on HIV/AIDS (UNAIDS), and the UN Office of the High Commissioner for Human Rights (UNHCHR), have strongly opposed the using of restrictions on traveling for peoples with HIV/AIDS. They have recognized them as being ineffective, costly and discriminatory and cannot be justified by public health concerns. This advice has been strongly reiterated and confirmed in various UN system documents. Such restrictions are complex and differ widely in their form, content and application from country to country.

There are broad types of restrictions on entry, stay and residence for people living with HIV.

Table 1 Types of restrictions on entry, stay and residence for people living with HIV

Types of restrictions	Countries, territories and areas
Some form of HIV-related restriction on entry, stay or residence	It appears that 4 member-states of EU (Cyprus, Lithuania, Poland and Slovakia) and other 55 countries, territories and areas of the World have some form of HIV-specific restriction on entry, stay and residence that is based on positive HIV status. These include those that completely ban entry of HIV-positive people for any reason or length of stay and/or are applied to visa applications for very short stays (e.g. tourist visas) and/or are applied to visa applications for longer stays (visas for residency, immigration, labour migration, asylum or resettlement, study, international employment, and consular service).
Deny employment visas and/or work permits based on HIV status	It appears that there are 39 countries, territories and areas in the World that have HIV-specific restrictions that are applicable to employment or labour. In some countries, HIV-related restrictions on entry, stay and residence are applied to certain professions or forms of employment. For example, in <i>Slovakia</i> an application for a work permit includes tests for HIV, hepatitis, syphilis and other sexual transmitted infections. In <i>Cyprus</i> , HIV tests are enforced for construction workers, bar staff, household help and people working in the tourism industry. Exceptions are made for employees of international enterprises and the United Nations.
Deny applications by HIV-positive students to study abroad	Health checks are required by the Ministry of Health for those who want to study or work in <i>Cyprus</i>
There is no information on HIV-related restrictions on entry, work or residence	In <i>Germany</i> , HIV tests are required in certain states for the entry of immigrants (including Bavaria, Saxony and New Brandenburg). Mandatory testing related to HIV travel restrictions may also include testing of refugees, pregnant women and their babies—as is the case in <i>Poland</i> .
Require declaration of HIV status for entry or stay for HIV-positive people	It appears that the following 7 countries (Brunei, China, Oman, Sudan, United Arab Emirates, USA and Yemen), require declaration of HIV status for entry or for any length of stay.
Deny applications for entry and for short stay	It appears that the following countries deny HIV-positive people their applications for visas for stays beginning as short as 10 days, up to 90 days (and subsequently for longer-term stays and residence): Egypt, Iraq, Qatar, Singapore, Tunisia, Turks and Caicos Islands.
Deport foreigners based on HIV status alone	It appears that 26 countries in the World which deport people once their HIV-positive status becomes known: Armenia, Bahrain, Bangladesh, Brunei, China, Democratic People's Republic of Korea, Egypt, Iraq, Jordan, Kuwait, Malaysia, Moldova, Mongolia, Oman, Qatar, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Sudan, Syria, Taiwan, China, United Arab Emirates, USA,

Uzbekistan, Yemen.

Hasn't HIV-related restrictions on entry, work or residence Some 108 countries, territories and areas don't have HIV specific restrictions on entry, residence and stay based on positive HIV status.

Source: Mapping of restrictions on the entry, stay and residence of people living with HIV UNAIDS-Geneva, May 2009

These restrictions in above mentioned cases aren't necessary or effective in protecting public health. It is hoped that the countries that have HIV-specific restrictions on entry, stay and residence based on positive HIV status will move quickly to rescind them as part of their fulfillment of the commitments they made in the Declaration of Commitment on HIV/AIDS (2001) and Political Declaration (2006) to end discrimination against people living with HIV.

The travel restrictions to protect the public health are relevant only in the instance of an outbreak of a highly contagious disease, such as cholera, plague or yellow fever, with a short incubation period and clinical course (Decosas, 1997), a recent example being severe acute respiratory syndrome or SARS. The entry restrictions relating to such conditions can help to prevent their increase by excluding travelers that may transmit these diseases by their mere presence in a country through casual contact. However, HIV is not transmitted casually but rather through specific behaviors. Sexual intercourse and use of contaminated injection equipment to inject drugs are the main routes of transmission. Furthermore, the means of protection against transmission are not only in the hands of the infected, but also in those of the non-infected. Thus, travel and migration of infected people doesn't in themselves entail a risk to public health. Excluding non-national travelers with HIV in order to prevent HIV transmission is based on the assumption that the infected will engage in unsafe sex or injecting behavior, and that the national will also fail to protect him or herself. Such assumptions are not founded in fact.

The world today is a much different than that at the beginning of the HIV epidemic over many years ago (Brian, 2000). Restrictive measures to achieve public health goals have largely been replaced by an emphasis on health education and support, and voluntary compliance, to achieve the same goals.

2.2.2 UNAIDS Recommendations Regarding HIV Related Travel Restrictions (June 2004)

- HIV/AIDS should not be considered as a condition that poses a threat to public health in relation to travel because, although it is infectious, the human immunodeficiency virus cannot be transmitted by the mere presence of a person with HIV in a country or by casual contact (through the air, or from common vehicles such as food or water). HIV is transmitted through specific behaviors, which are almost always private. Prevention thus requires voluntary acts and cannot be imposed. Moreover, restrictions against non-nationals living with HIV may create the misleading public impression that HIV/AIDS is a "foreign" problem that can be controlled through measures such as border controls, rather than through sound public health education and other prevention methods.
- Any HIV testing related to entry and stay should be done voluntarily, on the basis of informed consent. Adequate pre-and post-test counseling should be carried out, and confidentiality strictly protected.
- Restrictions against entry or stay that are based on health conditions, including HIV/AIDS, should be implemented in such a way that human rights obligations are met, including the principle of non-discrimination, the right to privacy, protection of the family, protection of the rights of migrants, and protection of the best interests of the child.
- Any health-related travel restriction should only be imposed on the basis of an individual interview. In case of exclusion, persons should be informed orally and in writing of the reasons for the exclusion.
- Exclusion on the basis of possible costs to health care and social assistance related to a health condition should only be considered where it is shown, through individual assessment, that the person requires such health and social assistance.

- If a person living with HIV/AIDS is subject to deportation, such deportation should be consistent with international legal obligations including entitlement to due process of law and access to the appropriate means to challenge the expulsion.
- Any policy regarding HIV/AIDS-related travel restrictions should be clear, explicit, and publicly available. Implementation of the policy should be consistent and fair, with discretion guided by clear, written instructions.

3. Resume

All measures concerning the restriction of free movement of EC citizens are meaningful if they are closely related to the protection of public policy, public safety and public health. Legislative measures at EC level, would not have achieved its efficiency if member states did not implement in practice their full spirit. Thus, administrative and legal limitations of the Member States concerning the free movement of citizens within the EC should aim to implement EC rules rather than their degeneration. Any different interpretation of the right of the EC on the free movement of citizens, excluding the aforementioned limitations will cause discontent. In fact, persons infected with HIV according to EC law that are not exempted from the right of free movement, while the legislation of some Member States, unjustly put them in the group of persons to whom it denies the right of free movement because of public health protection of society.

Travel, mobility and migration have exploded and have become an ordinary and essential part of the lives of millions people. In this swiftly world of changes, governments of member-states in EC must implement the rational and ethical means possible to protect their citizens and their national interests, while at the same time opening themselves and others up to the benefits of ever-increasing travel and trade. HIV-related travel restrictions are an ineffective and discriminatory. People living with HIV should have an equal opportunity as the other EC citizen's to participate in economic, social, educational and other activities. Everyone at some point his lives, is affected by security and health conditions, but the nature and severity of these conditions should not be contrary to the principles of free movements in EC.

4. References

- Azizi, A. (2009). *Puna dhe politika sociale ne BE: Evoluimi, standardet dhe sfidat / Social policy and social work in the EU: Evolution, standards and challenges*. Tetovo: Arberia Design.
- Brian et al. (2000). *Population Mobility and Infectious Diseases: The Diminishing Impact of Classical Infectious Diseases and New Approaches for the 21st Century*. 31:776-80.
- Decosas et al (1997). *Migration and HIV/AIDS*. 11 (suppl A): S77-S84.
- Gormley (1998). *Introduction to the Law of the European Communities: from Maastricht to Amsterdam*. London / Boston.
- Martin, R. (2009). *The role of law in pandemic influenza preparedness in Europe*, *Public Health*, Volume 123, Issue 3, pp. 247-254.
- ***HIV/AIDS and Human Rights, International Guidelines, United Nations-Geneva. 1998, HR/PUB/98/1, p. 50.
- ***Mapping of restrictions on the entry, stay and residence of people living with HIV UNAIDS-Geneva, May 2009 p. 12.
- ***Report of the Consultation on International Travel and HIV Infection, WHO-Geneva, April, 1987; WHO/SPA/GLO/787.1