1 Introduction

Maarten den Heijer & Pieter Boeles

1.1. General Remarks

This book provides an overview of the present state of migration law in Europe. Although the notion of migration covers both immigration and emigration, the book will concentrate on immigration. European migration law, as dealt with here, focuses on the immigration regime in Europe, which encompasses rules on (1) immigration from third countries into the European Union (EU) and (2) intra-EU migration. As will be explained in Section 1.3, relevant law is divided over different levels: national legislation (which will not be dealt with in this book), EU law and regional and worldwide international law. At all these levels, the development of European migration law is in an ongoing process, each level having its own pace, its own legal parameters, its own tradition. In this book we will take EU law as the primary source to be dealt with. The EU legal instruments that govern migration are discussed against the background of regional and international human rights treaties. These treaties form boundaries for EU law instruments.

This book contains 15 chapters. The first chapter, which you are reading now, explains the basic concepts of migration law as well as the multi-level structure of European migration law and its historical development. Chapters 2 and 3 deal with free movement of persons under EU law and comparable free movement rights that accrue to third-country nationals under association agreements between the EU and a third country. The remaining chapters (4-15) of the book are roughly structured according to the sequencing of the migration trajectory: border controls and visas (Chapters 4 and 5), rights of entry under either asylum (Chapters 6-8) or regular migration rules (Chapters 9-11), residence (Chapters 12 and 13), and we end the book with Chapters 14 and 15 on return, expulsion and detention.

1.2. Basic Concepts of Migration Law

1.2.1. What Is Migration?

Migration refers to the international movement of persons. In principle, anyone who can afford the transport or who is prepared to walk long distances has the possibility of moving around the world. The liberty to do so is, however, restricted by the fact that the world is divided into states. States not only have territories delimited by borders but also claim an exclusive bond with those who have their nationality. Persons possessing the nationality of a state are normally entitled to enter the territory of that state and to reside there as long as they wish. In principle, all others do not have those rights. In relation to that state, they are foreign persons, aliens. For them, that state is a foreign state.

In social sciences, the concept of migration is associated with establishing a new residence elsewhere. In law and in this book, a wider understanding of the term is used, which includes all types of international movement of persons, for both short-term and long-term purposes. Often, migration law is also referred to as the law on aliens or the law on (free) movement. Because this book deals predominantly with rights relating to entry and residence, migration law appears to be the most appropriate term.

Where migration is at stake, states and persons have different, sometimes opposite, interests. Characteristic problems for persons wishing to migrate are the following:

- how to get access to the territory of a state
- how to obtain permission to stay within the territory of a state
- how to obtain protection against expulsion from a state

Characteristic problems for states *vis-à-vis* migrating persons are:

- how to control the borders
- how to formulate norms for permitting access and residence
- how to organise effective implementation of those norms, including the removal of persons who are not entitled to stay within the territory

These questions form some of the essential elements of the study of migration law. Migration law is a field of law dealing with the cross-border movement of persons, establishing rights and obligations for both states and individuals. For an adequate assessment of states, persons and their mutual relationship in the context of migration, the clarification of a number of legal concepts is necessary. Hereunder, a succinct description will be given of some key concepts that play a prominent role in migration law.

1.2.2. Nationality

Nationality legally binds an individual to a state. In the *Nottebohm* case, the International Court of Justice (ICJ) described this legal bond as follows:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with any other State.[1]

Although the Universal Declaration of Human Rights boldly pronounces that everyone has the right to a nationality,[2] the state is competent to decide who its nationals are.[3] In conferring nationality, states normally operate on two underlying principles. The first is known as *jus soli*, which is an inherently territorial means of conferring nationality. The fact of birth within a specific territory, regardless of the parents' nationality, determines the nationality of the newborn. Employing the *jus soli* principle can easily lead to the conferral of nationality to persons without a solid bond or genuine link with the state whose nationality they acquire, such as children born to tourists or other short-term visitors. Therefore, this principle rarely operates in unmodified form. Within Europe, Ireland operated a particular unrestrained *jus soli* regime prior to 2004, which was challenged as inciting exploitation by immigrants. The new Irish Citizen Act requires that the non-Irish parent of a child born in Ireland has been lawfully residing in the state for three years for the child to acquire Irish citizenship. Of the other EU members, France still operates a nationality regime mainly based on *jus soli*, although with a number of alleviating elements.

The other principle of conferring nationality is known as *jus sanguinis*. This principle is the preferred means of passing on nationality in the majority of European countries. *Sanguis* is Latin for 'blood', and according to the regime of *jus sanguinis*, newborns automatically acquire the nationality of their parents, regardless of the territory in which they are born. Again, this principle is not without disadvantages, the main one being that descendants of immigrants will not be able to acquire the nationality of the country with which they may have the closest bond. Another complication connected to the *jus sanguinis* principle is that children of parents with different nationalities will acquire multiple

1 ICJ 6 April 1955 *Nottebohm Case (Liechtenstein v. Guatemala)* (judgment), ICJ Reports 1955, p. 23.

2 Art. 15 Universal Declaration of Human Rights.

3 According to the Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague 12 April 1930, Art. 1): "It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality." This provision is restated in Art. 3 of the 1997 European Convention on Nationality.

nationalities at birth. For a long time, this latter complication was circumvented by legislation providing that the nationality of the father would be decisive in passing on nationality. Partly due to the adoption in 1979 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), this discriminatory legislation has been gradually abolished.[4]

All European countries now have some mixture of *jus sanguinis* and *jus soli*, with specific provisions on acquiring nationality for second and later generation immigrants. Germany's nationality law as applicable since 1 January 2000, for example, provides that children born in Germany to foreign parents acquire German nationality at birth when one of the parents has resided lawfully in Germany for at least eight years and is entitled to further legal residence for at least three years. If the child also acquires one of its parents' nationalities (as provided by that country's nationality legislation), the child will, upon reaching the age of 18, have to choose between its German and other nationality. Under this regime, the 'risk' of retaining dual nationality is minimised, although the German legislation does provide for an exception if renouncement of the other nationality is not possible (due to legislation in the parent's country of nationality).

Apart from acquiring nationality by birth, states commonly provide for the possibility of obtaining nationality by naturalisation, a process in which a non-national, by fulfilling a number of conditions, may apply for another nationality. Such conditions may include a minimum period of legal residence; knowledge or familiarity with a state's language, culture and society; and the willingness to renounce the other nationality.

It may be noted that although states have the sovereign right to provide for rules on conferring nationality, not all grants of nationality are internationally effective. In the *Nottebohm* case mentioned previously, the ICJ was asked whether the state of Liechtenstein was entitled to assert diplomatic protection over Mr. Nottebohm, who had renounced his German nationality for that of Liechtenstein and had been deported from Guatemala, where he had been living as a businessman for more than 30 years. Liechtenstein had claimed restitution of property and compensation from Guatemala on the ground that Guatemala had acted contrary to international law. The ICJ considered, however, that whereas Nottebohm's connections with Guatemala were considerably stronger than his ties with Liechtenstein (to which he had only once paid a visit), Guatemala was under no obligation to recognise the diplomatic protection asserted by Liechtenstein.

It has sometimes been inferred from the *Nottebohm* case that a genuine and close link between the individual and the state conferring nationality is necessary for the conferral of nationality to have international effect, *i.e.* for other states to be obliged to treat that individual as the former state's national. This is not what the Court said, however. The ICJ was concerned with the particular question of whether a state has a right to diplomatic protection over a naturalised citizen with

4 Art. 9(2) CEDAW provides: "States Parties shall grant women equal rights with men with respect to the nationality of their children."

whom it has no real links *vis-à-vis* a state which does have real links with that person. The ICJ did not contest the legality of the conferral of nationality as such.[5]

Nationality can be distinguished from citizenship. While nationality is best described as a legal bond confirming the close ties of the individual with a state, citizenship implies the possibility for an individual to politically participate in the life of the community. Often, nationality and citizenship coincide, but not all persons having the nationality of a state have full citizenship rights. Minors will normally have the nationality of a state but will not be able to exercise rights of political participation. Conversely, persons without the nationality of the state in which they reside may still be granted limited citizenship rights, such as the right to vote and to stand as a candidate at municipal elections.

Discussion of the meaning and content of nationality is often obscured by the fact that lawyers tend not to differentiate between the terms 'national' and 'citizen'.[6] In migration law 'nationality' is generally the predominant concept. 'Aliens' are those who do not possess the nationality of a particular state and the accompanying right of abode in that state. In essence, they have no right to enter or remain in the state and may be susceptible to deportation. States can agree to mutually grant rights of access and residence to each other's nationals. In defining the legal position of a person under migration law, the first question will normally concern his or her nationality as it is leading for the question of which legal instrument applies. Persons with a nationality of an EU member state are often referred to as EU citizens (see Chapter 2). Persons with a nationality from a state outside the EU are referred to as third-country nationals (see e.g. Chapters 4 and 5), although this term is insufficiently precise (see Section 1.4).

EU citizenship has under EU law emerged as a primary source of the right to move and reside freely within the territory of the member states (see Chapter 2 of this book). In defining this concept, Article 20 of the Treaty on the Functioning of the European Union (TFEU) links the citizenship of the Union exclusively to the nationality of a member state. Hence, citizenship of the Union does not replace national citizenship but is supplementary to national citizenship and conditional upon holding the nationality of a member state. The EU is not a state comprising a federation of member states, and, consequently, the citizenship of the Union is not a nationality of that Union.[7] Although member states remain free to lay down the conditions for acquisition and loss of nationality, the Court of Justice of the European Union (CJEU) held in the cases of *Rottmann* and *Tjebbes* that if the loss of nationality impacts rights that are attached to EU citizenship, such

5 Macklin, 2017, p. 493.

6 O'Leary, 1996, p. 9.

7 CJEU 7 July 1992 (*Micheletti and Others)*, Case C-369/90, para. 10, and CJEU 20 February 2001 (*Kaur)*, Case C-192/99, para. 19.