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THE SECOND GENERATION OF IMMIGRANTS

*Henry G. Schermers**

During the 1960s, many workers from the Mediterranean region migrated to more northerly regions of Europe. Often they brought their wives, and children were born in the host country. The situation of these children, the "second generation" of immigrants, deserves our attention.

In many respects the offspring who make up this second generation of immigrants are closer to their country of residence than to the country of their parents. Yet the desirability of integrating these young people into the country where they were born and live may be questioned. If they are able to speak their parents' language, they could be of great value to the country from which their parents came. It has been argued that sending these children, with their European educations, back to their native countries would benefit those countries by providing a sort of "technical assistance."¹

Nonetheless, whether these children could be integrated into the society of their native country and whether that society could make use of their foreign educations are questions whose answers remain unclear. Even if these uncertainties could be favorably resolved, it is unacceptable for host countries to force people to grant this sort of "technical assistance." Native countries that want the "second generation" back could try to persuade these young people to return to their "fatherland," or perhaps could even try to call them back. The European tradition of respect for the individual, however, demands that members of this second generation not be forced into rendering "technical assistance" to their native countries.

In some countries, such as the United States and France, birth in the national territory automatically confers citizenship, but in other countries, such as the Netherlands, Belgium, and Germany, a child has the nationality of his father, regardless of his place of birth. In this latter group of countries the position of the children of immigrants may be particularly difficult. To illustrate the situation, we will use a hypothetical example involving two brothers born in Holland of Moroccan parents and two brothers born in Holland of Italian parents. Morocco is taken as an example solely for the reason that Moroccans are the largest group of non-European foreigners in the Netherlands (93,100 out of a total of 537,600 foreigners).² Italy is used

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1. See, e.g., von Mangoldt, *Einbürgerungsanspruch für zeitweise in Deutschland aufgewachsene Ausländerkinder*, 37 JZ 174, 174-78 (1982).

2. The figures are from the June 30, 1983 letter of the State Secretary of Justice to the Second Chamber of the Dutch Parliament, Parliamentary Document 1982-83, No. 17984. Though the Turks are more numerous than the Moroccans (148,000), some special treaties are applicable to Turkey, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1955) [hereinafter cited as

as an example because it is the EEC country with the largest number of workers in foreign countries. We assume in our illustration that all the children mentioned have grown up in Dutch-speaking surroundings, that they went to Dutch schools, speak Dutch better than the language of their native country, and are culturally adapted to the Dutch way of life. One should not underestimate the tensions that develop within these families between parents who cherish their national cultural values and children who actually belong to a different culture. In this respect the boys will be better off than their sisters. In particular, the Moroccans' sisters may be under parental pressure to stay home all day and wait until their father gives them in marriage to a Moroccan Moslem, someone with whom they may have very little in common. Of course, the tensions within the family will also influence the lives of our four boys, and careful study is needed before one can really appreciate their position. In the present illustration, however, we will focus on the boys' legal status, and for this purpose assume that each set of brothers has one "good" brother and one "bad" brother.

The good boys will face little or no difficulty if they want to become Dutch citizens. They can easily naturalize. Conversely, if they want to keep the same citizenship as their parents, they will receive the most favorable treatment accorded to foreigners by the Netherlands. They are entitled to stay in the country and will receive unemployment allowances if they cannot find a job. Even if they commit a crime, they will not be deported, unless the crime is of a particularly serious nature, such as large-scale trafficking in drugs. Problems only arise when these boys want to marry girls from outside the Netherlands.

Until recently, foreigners lawfully residing in the Netherlands could bring in their wives without any difficulty. The basic human right to marry the person of one's own choice was considered to entail that the wives of people lawfully residing in the country had to be admitted as well.³ As a matter of principle, the authorities may not discriminate on the ground of sex. Therefore, a foreign girl lawfully residing in the Netherlands could also bring in her husband, once she got married. A boy from Morocco (or any other country) marrying a Moroccan girl living in the Netherlands was admitted to the Netherlands as easily as the girl from Morocco marrying a Moroccan boy living in the Netherlands. This led to abuse. Fictitious marriages were made by young foreigners who wanted admission to the Netherlands for economic reasons. Once in the country, the marriage was dissolved. The Dutch government objected to this, not only for legal and economic reasons, but also on social grounds. These immigrants were in an extremely weak position in the labor market. Only rarely could they find a job; usually they lived on unemployment allowances. The situation has recently worsened as the number of unemployed young people has increased. The handicap faced by unskilled foreigners is such that they have practically no chance of finding employment.

Human Rights Convention], and the European Convention on the Legal Status of Migrant Workers, Nov. 24, 1977, 93 Europ. T.S. (1977). In total, about 12 million foreigners live within the European Community. See Turpin, *Le nouveau régime juridique des étrangers en France: changement et continuité*, 71 R.C.D.I.P. 25 (1982).

3. Cf. Human Rights Convention, *supra* note 2, art. 8.

In October 1983, new rules were made. Since then, only those foreigners who earn an income of at least 1445 florins per month (almost \$500) may bring a foreign spouse into the Netherlands.⁴ This requirement will not normally lead to an infringement of the basic human right of marriage, guaranteed by both article 23 of the International Covenant on Civil and Political Rights⁵ and article 12 of the European Convention on Human Rights.⁶ The Moroccan born and living in the Netherlands is free to marry whomever he (or she) wants, provided that he (she) moves to Morocco if the couple cannot make their living in the Netherlands. One cannot validly argue that a person who grew up in the Netherlands cannot be compelled to move to another country for married life, because one of the two spouses will have to move anyway. The choice of a partner from the person's native country may, furthermore, indicate that the person still feels close ties to that country. The couple as a unit is probably closer to the foreign country than to the Netherlands. Regardless, the two good boys of our example can, in practice, overcome all problems, as they may choose Dutch citizenship, after which they may marry whomever they like and stay with their spouses in the Netherlands.

More difficult, and therefore more interesting as a legal matter, is the position of the bad boys. Suppose that before their eighteenth birthday these boys are convicted for trafficking in drugs. Their naturalization is refused on the ground, provided for by law, that Dutch citizenship cannot be granted to persons convicted of serious crimes. So the bad boys remain Moroccan and Italian. Like the good boys who keep their foreign citizenship, they are not entitled to bring in a foreign wife if their declared income (which excludes income from theft) is less than 1445 florins per month. In addition, they cannot vote, and they continue in other respects to be treated as foreigners. Unlike the good boys, however, they cannot change the situation by accepting Dutch citizenship.

The bad boys' situation may become even worse. Let us assume that the bad boys, when they are twenty-five years old, again engage in drug trafficking and are caught and sentenced to several years of imprisonment. Legislation in the Netherlands, as in several other countries, provides that foreigners convicted of serious crimes may be expelled. Both boys still have foreign citizenship, so after they have served their sentences they may be deported to their country of origin, notwithstanding the fact that they never lived there, perhaps hardly speak the language, perhaps have no relatives there, and feel no cultural affection for the country. This seems wrong. The two boys are so much closer to the Netherlands than to Morocco and Italy that it seems unfair to expel them. It seems unfair not only with respect to the boys concerned and their families, but also to their countries of origin. If any general way of life or any form of education is responsible for their bad behavior, it must be the Dutch one. Neither Morocco nor Italy was

4. See the June 30, 1983 letter of the State Secretary of Justice to the Second Chamber of the Dutch Parliament, Parliamentary Document 1982-83, No. 17984.

5. International Covenant on Civil and Political Rights, Dec. 16, 1966, Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, reprinted in 6 INTL. LEGAL MATERIALS 368, 375 (1967).

6. Human Rights Convention, *supra* note 2, art. 12.

involved in the formation of these boys. It would be unfair to charge these countries with the reeducation and further control these criminals need. The Netherlands is also better able to look after these boys, who have their roots in Dutch society, where their families live.

Should the Netherlands and other states having similar legislation change their rules and automatically grant citizenship to all children of foreigners who are born in the country and have lived there ever since? As usual there is another side to this coin. Generally, foreigners are in a weak position. Insofar as they are racially different or speak with a foreign accent, they are identifiable as a group. They may be inclined to trespass against some rules that would not exist in their home country; they may be subject to stronger temptations than many others to commit property offenses since they belong to the economically weakest group. Even if the group as a whole behaves no worse than any other group, they will still be noticed as a group. The Moroccan committing a crime may elicit the comment: "Again a foreigner, we should get rid of them all." Thus, an explicit rule that only good foreigners will be allowed to remain in the country, and that all those who commit crimes will be expelled, may be of benefit to the group as a whole. Once the native population knows that criminal foreigners will be automatically expelled, it may be more willing to accept the others. In this way, expulsion may lead to a higher group standard.

Another argument against an automatic grant of citizenship to immigrant children born and raised in a host country such as the Netherlands is that, generally speaking, a country need not grant hospitality to people that it does not want. Understandably, a host country may desire to rid itself of undesirable foreigners, and international crime would become too easy if criminals could claim refuge in foreign countries. Thus, in principle, the Netherlands should be free to expel foreign criminals.

The strength of this principle is weakened, however, where a second generation of immigrants is involved, and in cases like the ones in our example, where the relationship between the boys and the host country is so close, the persons concerned need adequate legal protection. Dutch law grants them that protection. They may challenge a deportation decision in an administrative court, and they may bring a civil action against the government for committing a wrongful act. The Dutch courts will prevent deportation if it is illegal.

But what grounds for illegality can be invoked? Is deportation to a strange country a form of inhuman treatment, and thus prohibited by article 3 of the European Convention on Human Rights? Usually this will be difficult to argue. In several cases the European Commission of Human Rights has held that expulsion may, in exceptional circumstances, be contrary to the Convention, and in particular to article 3, but in these cases there were strong reasons to believe that the expelled person would be subject to some type of treatment prohibited by article 3 in the country to which he was to be sent.⁷ Could it be submitted that our Moroccan and Italian boys would be subject to inhuman treatment in Morocco and Italy?

7. See, e.g., *X contre la Belgique*, Le Recueil de Décisions de la Commission Européenne des Droits de l'Homme (No. 984/61) at 39-40 (1961); *X against The Federal Republic of Germany*, 1963 Y.B. EUR. CONV. ON HUMAN RIGHTS 462 (Eur. Commn. of Human Rights); M.

It should be clear that not all ill treatment violates article 3. That would frustrate the purpose of the Convention, which is to guarantee *specific* human rights in the participating states and not to grant a general right to be well treated. In the case of Ireland against the United Kingdom, the European Court of Human Rights held: "Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative . . ." ⁸ For our present case this means that expulsion to Italy could never be in breach of article 3. Since Italy is also bound by the Human Rights Convention, violations of article 3 are prohibited there. On the basis of article 13 of the Convention, Italy must provide a remedy for violations. Even if Italy provided no remedy, an alleged violation of the Convention could be brought to Strasbourg, because individuals in Italy have the right of individual petition under article 25 of the Convention.

For the Moroccan boy the situation may be different. Normally, expulsion cannot be seen as inhuman treatment, but additional circumstances may alter the situation. Our Moroccan boy may have participated in anti-Moroccan activities or he may run the risk of being badly treated in Morocco for other reasons. The court reviewing the expulsion order would have to assess the full situation before deciding whether the order violated article 3.

Could the Italian boy invoke European Community law to preclude his expulsion to Italy? Probably not. The Italian boy's father was a foreign worker. The boy, as long as he is under the age of twenty-one or a dependent, may claim certain rights, including the right to remain with his family, due to his father's status.⁹ Indeed, the Court of Justice of the European Communities has gone quite far in accepting that the equality of workers from other Member States also applies to the children of such foreign workers.¹⁰ Employment of the father would be affected if his children did not receive the full protection of the national legal system, including social security benefits and school grants. However, it may simply go too far to claim that the children of a foreign worker should have the same rights as children of domestic workers in claiming the citizenship of the place where they were born.

Perhaps there are other grounds for the bad Italian boy to claim a right to stay with his family in the Netherlands. One could argue that an adult foreigner with a severe criminal record is in such a weak position socially and would be so severely affected by expulsion to a strange country that he must be considered a "dependent" in the sense that term is used in article 10 of EEC Regulation 1612/68.¹¹ Yet this alone would not entitle such an

Giama *against* Belgium, 1980 Y.B. EUR. CONV. ON HUMAN RIGHTS 428 (Eur. Commn. of Human Rights).

8. Ireland v. United Kingdom, 58 I.L.R. 190, 264 (Eur. Ct. of Human Rights 1978).

9. See EEC Regulation No. 1612/68, On Freedom of Movement for Workers Within the Community, [Eng. Special Ed. 1968 (II)] O.J. EUR. COMM. (No. L257/2) 475 (Oct. 15, 1968). The texts of the EEC acts referred to are published in T. HARTLEY, EEC IMMIGRATION LAW (1978).

10. See, e.g., Casagrande v. Landeshauptstadt München (Case No. 9/74), 1974 E. Comm. Ct. J. Rep. 773.

11. [Eng. Special Ed. 1968 II] (No. L 257/2) O.J. EUR. COMM. 475 (Oct. 15, 1968).

adult to stay in the country since he would be covered by Council Directive 64/221 on the coordination of special measures, justified on grounds of public policy, public security, or public health, concerning the movement and residence of foreign nationals.¹² However, the bad Italian boy's status as a dependent would ensure that he was considered a member of his father's family even after he reached the age of twenty-one. This would bring into play article 8 of the European Convention on Human Rights, which obliges the Netherlands to secure to everyone within its jurisdiction the right to respect for family life. Expulsion of one member of the family could be contrary to this provision.

At first sight the position of the Italian boy in this respect does not differ fundamentally from that of the Moroccan boy. He too may plead that he is still a dependent member of the family and that his expulsion would therefore violate article 8 of the Human Rights Convention. Still, the position of the Italian boy seems stronger because Italy is a member of the European Community. If he can demonstrate that he is a dependent, he may be deported only under the conditions of Council Directive 64/221 — which means not only that he can invoke some procedural protections, such as court remedies, but also that the question whether his expulsion is justified on grounds of public policy could be considered by the Court of Justice in a preliminary ruling.¹³ "Public policy" is a rather vague notion, and some national judiciaries have interpreted it far more broadly than others. The divergence in interpretation leaves much discretion to the Court of Justice in interpreting the Community notion of "public policy." So far the Court of Justice has been careful to avoid any interpretation of Community law which might infringe upon the European Convention on Human Rights. We may, therefore, expect that the Court of Justice would not find it easy to justify on grounds of public policy an expulsion that could lead to the splitting of a family.

Apart from the human rights aspects, other reasons may exist for the Court of Justice to rule in favor of the Italian boy. In case of doubt the Court has repeatedly relied on the interpretation that best serves the purposes of the Common Market or the general principles of law and equity.¹⁴ Both would benefit if immigrants of the second generation had a right to remain in the country to which their fathers migrated. Hence, it is likely that the Court of Justice would not be unwilling to interpret the applicable provisions of Community law in a way helpful to our Italian boy. Nevertheless, while it would be appropriate to request a preliminary ruling on the status of our Italian boy as a member of the family of a migrating worker, it remains doubtful that the Court of Justice would extend the freedom of

12. *Pour la coordination des mesures spéciales aux étrangers en matière de déplacement et de séjour justifiées par des raisons d'ordre public, de sécurité publique*, 7 J.O. COMM. EUR. (Directive du Conseil No. 64/221/CEE) 850 (Feb. 25, 1964).

13. Domestic courts applying either the Directive itself or national rules promulgated under it may request a preliminary ruling on the interpretation of the Directive under art. 177 of the EEC Treaty. *Treaty Establishing the European Economic Community*, Mar. 25, 1957, art. 177, 298 U.N.T.S. 3, 76-7 (1958) [hereinafter cited as EEC Treaty].

14. See Schermers, *The European Court of Justice: Promotor of European Integration*, 22 AM. J. COMP. L. 444, 453-64 (1974).

movement of workers so far that the adult son of an Italian worker would have a right to stay in the Netherlands.

May the Italian boy claim a right of his own under Community law to stay in the Netherlands? He cannot if he is not a worker or someone looking for work in accordance with the rules of EEC law.¹⁵ Even if he were covered by the EEC rules for foreign workers, they would probably not help him since article 48 of the EEC Treaty permits the Netherlands to restrict the free movement of workers on grounds of public policy or public security. It is generally understood that this provision entitles the Member States to deport criminals.

Our conclusion must be that under international law and Community law the Netherlands is under no obligation to grant its citizenship or even residence to the adult children of immigrants who are no longer dependents. Any country is entitled to provide that children have the nationality of their father, rather than of the place of their birth.

Would it be *desirable* to change this law? It has strong roots in Dutch history. The Netherlands is a trading country. Its citizens have traveled all over the world for centuries. Often travelers took their wives and had children in foreign countries where they had sojourned only briefly. It is understandable that they wanted these children to be Dutch. Furthermore, the Netherlands has never tried to stimulate the immigration of foreigners. As a densely populated country it feels no need to facilitate immigration. For foreign workers, as for Dutch travelers, the place of their children's birth may be rather accidental. Many children born in the country leave again at a young age. Neither justice nor any pragmatic reason provides a strong basis for a *general* rule that everyone should be entitled to the nationality of his place of birth. Yet when birth in a given country has been followed by continuous residence there for the entire period of childhood, then, and only then, a strong reason exists for granting citizenship at the age of majority, regardless of a possible criminal record: A country should take the responsibility for those whom it has brought up.

15. See EEC Treaty, *supra* note 13, art. 48(3).