

'Tolerated stay': what protection does it give?

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Persons invoking the same grounds for protection may benefit from different rights, depending on the status which is granted to him/her and in which EU country.

'Tolerated stay' is only one among over 60 different protection statuses granted on 15 different grounds among European Union (EU) countries. It is often granted to persons whose removal is impossible either for practical reasons (such as lack of documents or the country of origin's refusal to accept the person) or because their removal would be tantamount to *refoulement* (and therefore in contravention of the Refugee Convention).¹ Fifteen EU Member States² grant tolerated stay status, with differing definitions and regulated by different legal instruments.

The grounds on which Member States grant tolerated stay are often the same as those for other complementary forms of protection, such as the 'subsidiary protection' status that is now standardised – 'harmonised' –

throughout the EU. (Applicants who do not qualify for refugee status but who cannot return to their country of origin due to a real risk of suffering serious harm have the right to 'subsidiary protection'.) However, tolerated stay most often comes with a different, usually reduced, 'package of rights', thus lowering the standards of protection. And whether the principle of *non-refoulement* is viewed merely as a negative obligation not to remove someone or also as a positive obligation deriving from recognition of the fundamental rights of the individual is relevant to the degree to which tolerated stay statuses comply with that principle.

Example rights attached to tolerated stay

In Poland, a permit for tolerated stay is granted either in respect of human rights enshrined in international

instruments or where practical obstacles make removal impossible. The scope of the grounds for granting the permit are the same as applied for subsidiary protection but the scope of the permit for tolerated stay seems to be even wider, including explicit reference to the right of fair trial and other rights contained in the European Convention on Human Rights (ECHR). However, the set of rights attached to tolerated stay is different from those linked with subsidiary protection; although access to the labour market and health care are guaranteed for both, the same is not the case for social assistance rights (limited to basic shelter, meals and essential clothing), pension and family reunion rights (not available for tolerated stay permit holders). If they wish to obtain a permit to settle, tolerated stay permit holders must have proof of ten years of uninterrupted residence in Poland, and a further five years if they wish to apply for citizenship; the tolerated stay permit does not, in principle, entail the right to a Polish travel document.

In Hungary, tolerated stay is granted when removal would be considered *refoulement*, on grounds which overlap with those for subsidiary protection and even with the grounds for refugee status (based on a well-founded fear of persecution). However, here again there are differences in the rights attached. Education is the only right which is granted equally for all these statuses. Tolerated stay status holders need an additional permit to work and they receive free access only to basic health care, such as emergency services and vaccination; they do not benefit from preferential conditions for family reunion; they can only apply for naturalisation after 11 years of uninterrupted stay and upon obtaining a permanent residence permit; tolerated persons are also not entitled to a Hungarian travel document.

In the UK, 'discretionary leave to stay' may be granted to protect persons excluded from the definition of refugee status and is most often granted for reasons relating to the ECHR, namely prohibition of torture, respect for private and family life, and freedom of thought, conscience and religion. Here too there are differences regarding the rights attached to each status. Discretionary leave is usually granted for three years (as against five years for subsidiary protection) and while rights to education and health care are fully granted on equal terms, access to the labour market and social benefits are curtailed for discretionary leave holders who are also not eligible for family reunion unless they are granted Indefinite Leave to Remain (ILR). This may be obtained after a longer period (six years rather than five) and is also necessary for naturalisation.

Figures for implementation levels and trends for tolerated stay differ from country to country too. In Poland, when the permit for tolerated stay was introduced in 2004, 840 permits were issued that year; that number increased continually, reaching a peak of 2,910 in 2007; from 2008 onwards, when subsidiary protection status was introduced, the trend reversed. The number of tolerated stay permits issued started to decrease until in 2009 only 82 permits were issued – a remarkable drop, apparently caused by an increase in grants of subsidiary protection. Hungary experienced a similar downward trend until 2009 when the trend reversed; tolerated stay

has again become the dominant form of complementary protection there. Given the lower degree of protection offered by tolerated stay, this is a heavily debated issue at the national level in Hungary with questions raised about the reasons and/or interests behind the favoured use of the tolerated stay status. In the UK, a stable trend characterises state practice of granting discretionary leave, with the limited data available indicating the extent to which discretionary leave is favoured (8-11% as a proportion of all applications) as against humanitarian (subsidiary) protection status (1% or less).

Although far from exhaustive, this comparative analysis both highlights the differences in different Member States' application of tolerated stay status and identifies common aspects in its application: firstly, that tolerated stay shares 'grounds for protection' with other forms of complementary protection, in particular subsidiary protection; and, secondly, that it confers a lower degree of protection than other forms.

It is important to highlight that the consequences of differentiating between tolerated and subsidiary statuses go far beyond a mere academic or legal exercise. Tolerated stay statuses may entail unfavourable conditions for individual holders of that status, often causing difficulties when seeking employment, travelling abroad, reuniting with family or obtaining permanent residence or nationality. The results can be social exclusion, extreme poverty, homelessness and a push to migrate by irregular means.

Concluding questions

Is tolerated stay an historical relic or a necessary safety net? The historical importance of tolerated stay as a protection mechanism before the introduction of subsidiary protection is undeniable. However, can it still be useful nowadays as a third layer back-up protection? Is tolerated stay a genuine effort to comply with the principle of *non-refoulement* – or merely window-dressing?

Why this lowering of protection standards? Financial motivation could explain why States continue to use (or may be interested in creating) 'poor' protection statuses rather than 'richer' forms of protection which involve higher costs. Another potential explanation specifically in the EU context is the so-called 'asylum fatigue' which appears in recent years to have undermined the willingness to provide protection.

Finally, is tolerated stay being misused and abused – ultimately raising concerns about the integrity of our asylum systems and our respect for international protection principles?

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1. See the European Migration Network Report 'The different national practices concerning granting of non-EU harmonised protection statuses' <http://emn.intrasoft-inf.com/Downloads/prepareShowFiles.do?directoryID=122>

2. Austria, Belgium, Czech Republic, Finland, Germany, Hungary, Ireland, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and United Kingdom.