

PICUM RECOMMENDATIONS ON THE LONG-TERM RESIDENTS' DIRECTIVE

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL CONCERNING THE STATUS OF THIRD-COUNTRY NATIONALS WHO ARE LONG-TERM RESIDENTS (RECAST)

AUGUST 2022

PICUM is a network of more than 160 organisations working in more than 30 countries, mostly in the EU, to ensure social justice and human rights for undocumented migrants. The following amendments focus on the area of PICUM's expertise, which is ensuring and protecting human rights for undocumented migrants. Therefore, provisions affecting the right to asylum are outside of the scope of the following analysis.

Introduction

Long-term residence status promotes social inclusion

Long-term and settled residence status promotes social inclusion. It can provide people – as well as their families, communities and employers - with stability, and significantly reduce risks of people living and working irregularly. Alongside pathways to citizenship, it facilitates the full enjoyment of rights and participation in all aspects of life.

Therefore, long-term residence status should be made as accessible as possible to people residing in Europe, in terms of criteria and conditions to access settled status, as well as associated procedures.

Long-term residents should enjoy equal treatment and rights approximate to nationals of the country, and measures to promote and facilitate family unity

and full inclusion of family members. Withdrawal of residence status from long-term residents should only be carried out in exceptional circumstances, with due safeguards.

Intra-EU mobility is an added value for EU level action in this area

Non-EU nationals often travel between different EU member states for reasons related to work, family or other opportunities to benefit and contribute to the European project. Limiting intra-EU mobility stifles labour market mobility, job matching and innovation, and can separate families. It also increases the likelihood of people moving irregularly. Some PICUM members work with people who have a long-term residence status in one EU member state, who are living and working irregularly in another EU member state. They are often unaware of the relevant regulations and procedures.

Therefore, there is significant added value to the EU Long-Term Residents' Directive promoting intra-EU mobility, both in terms of the acquisition of long-term residence status and for permit holders. Provision of information around permits, and related procedures and rights, is crucial.

PICUM's recommendations for the proposal to recast the Long-Term Residents' Directive focus on provisions that would improve access to settled status and avoid people working irregularly, and improve conditions of long-term residence permit holders, through amendments regarding:

- Ensuring a broad and inclusive scope, conditions and procedure
- Limiting withdrawal of status to exceptional circumstances, with due safeguards
- Ensuring equal treatment
- Prioritising family unity
- Streamlining applications and rights of long-term residents exercising intra-EU mobility
- Committing to provide information in a meaningful way.

Ensuring a broad and inclusive scope, conditions and procedure (Articles 3, 4, 5, 6, 7, 10)

The EC proposal makes several amendments which would improve access to long-term residence status, in particular, through enabling people to accrue long-term residence based on years of residence in different EU member states, as long as they have lived two years continuously in the country in which they are applying. It is also very important that it broadens the type of residence status that can count towards long-term residence status and provides for an individual assessment of 'sufficient resources' which would include resources 'made available by a third party'.

However, the proposal is extremely complicated, and it still contains various exclusions which deny people who have been regularly residing for five years in an EU member state access to settled status. Such exclusions are unjustified and unfair. They go against the objective of promoting integration of third-country nationals as well as the reality of people's residence and work in the EU, and risk to be discriminatory against particular groups of workers and individuals, in a way that perpetuates social exclusion and penalises low-income workers, people with disabilities, young people and families in precarious situations.

There are also situations when it would be particularly pertinent to issue a long-term residence permit to people who have resided in the EU for less than five years, due to their individual circumstances and the need for stability. For example, to provide a durable solution to a trafficked person, based on their personal circumstances, or for children in whose best interests it is to stay and grow up in the country.¹ There would be significant added value for the EU to provide for such circumstances in this reform.

We recommend:

- Maintaining the EC proposal for years of residence in different EU member states to count towards long-term residence status, including the definition of 'continuous' residence which allows for people to nevertheless leave the EU and their country of residence for a limited period of time (art. 4).
- Ensuring that any period of residence under a residence or work visa or permit issued according to Union or national law counts towards the period of residence, including time working as a seasonal worker or au pair (art. 4).
- Simplifying the whole process and concept for administrations and applicants, by enlarging the scope and enabling people with any type of regular residence status who meet the criteria regarding duration of residence and other conditions, to apply for long-term residence status (art. 3).

¹ For more on this, see PICUM webpage '[Doing what's best for children](#)'.

- Maintaining the EC proposals that require an individual assessment of ‘stable and regular resources’ for each applicant, and to take into consideration resources from a third party (art. 5) as well as to delete the reference to documentation related to accommodation, as this is not a condition according to articles 4 or 5 (art. 7).
- Removing the restriction that excludes people who have recourse to the social assistance system of the member state concerned from meeting the condition of stable and regular resources. This risks to discriminate against people with disabilities and young people, ² and denies people access to vital social protection supports, including when they have been paying into the social protection system for a number of years. If people are eligible to receive social assistance under national law, access to that social assistance should not be a barrier to accessing secure and settled status (art. 5).
- Aligning article 5 with the preamble and case law of the European Court of Justice, by stipulating that integration conditions set by national law should not jeopardise integration (art. 5).
- Maintaining provisions in the EC proposal related to procedural safeguards and guarantees (art. 6, 7, 10).
- Aligning the provision on fees with the ‘Single Permit Directive’ (2011/98/EU), so that they shall be proportionate and shall be based on the services actually provided for the processing of applications and the issuance of permits (art. 11).
- Adding a new provision that member states may issue an EU long-term residence permit for someone who has resided less than 5 years, based on an individual assessment of their personal circumstances, according to conditions set out in national and Union legislation (art. 4).

² For example, the Spanish government recently changed their policy preventing benefits from counting towards income because it excluded so many young migrants. Up until November 2021, unaccompanied children who had turned 18 and then became undocumented had to meet an (exceedingly high) monthly income from work requirement to access a residence permit. Finding gainful employment is very difficult for young people in Spain, and the amount required for renewals was extremely high (4x minimum income) – much higher than what would be sufficient to live. Therefore, tens of thousands of young people stayed undocumented despite having lived regularly in Spain for years. In 2021, the government reformed the law, requiring resources, from work, subsidies, or grants, equal to the minimum income (470 EUR) and giving unaccompanied children older than 16 access to the labour market. For more on this reform, PICUM, [Spain adopts law to facilitate regularisation of young migrants](#), blogpost 18 November 2021.

Limiting refusals and withdrawal of status to exceptional circumstances, with due safeguards (Articles 6, 9, 13, 19, 20, 25, 26)

The EC proposal makes some minor amendments which serve to further limit situations in which a long-term resident would be refused or lose their long-term residence status. In particular, it is important that it extends the time that a long-term resident can leave the EU to 24 consecutive months, while maintain the possibility to leave for a longer period of time, for specific reasons. This caters for the reality that long-term residents continue to have family and social connections and responsibilities in other countries and promotes economic investment in people's countries of origin. The proposed details of the facilitated procedure for re-acquisition are useful but do not go far enough.

While there is to some extent a logical progression in safeguards against refusals of applications, withdrawal of long-term residence status and a decision to end residence of a long-term resident, there remain inconsistencies and insufficient safeguards. Long-term residents are settled in Europe and any decision to withdraw their residence permit or status should be rare, clearly justified and proportionate, especially considering the significant human rights implications a withdrawal might have.

We recommend:

- Maintaining the EC proposal to enable long-term residents to leave the EU for 24 consecutive months as a rule, with possible extension depending on individual circumstances (art. 9).
- Ensuring that former long-term residents do not have to meet conditions regarding duration of residence, as well as integration conditions, for re-acquisition (art. 9).
- Prohibiting the withdrawal of long-term residence status founded on economic considerations, as is the case in articles 6, 13, 19 (art. 9).
- Including a state of statute of limitation, a cornerstone of other fields of law (e.g. criminal law) (art. 9(1)(a) on detection of fraudulent acquisition and art. 6, 13, 19 on previous offences).
- Including a *bona fide* clause (e.g. the status can only be withdrawn if the person was aware that the documents were false – with the burden of proof on the state). This could be relevant for instance if people provided wrong information in the application form by mistake, for instance because they did not understand the procedures or did not receive legal assistance (art. 9).
- Strengthening the language in para 13.3 from 'having regard' to a motivated, written decision which balances the 'public security' reason with these factors.

The list of factors could also be improved, for instance including explicit references to the best interests of the child as well as other factors mentioned in *Boultif v. Switzerland* and *M Üner v. the Netherlands*³ (art. 6, 9, 13, 19).

- Adding a definition of “public policy or public security” in line with CJEU jurisprudence⁴ (art. 2).
- Deleting paragraph 13.6 and 25.3, or at least clarifying that the principle of non-refoulement as interpreted in international human rights law⁵ should prevail.⁶
- Deleting paragraph 26.4 to remove the possibility for the second member state to end the residence in that member state of a person who has acquired long-term residence status in that second member state, and their family members, because they need recourse to the social assistance system. This risks to discriminate again people with disabilities and young people, and denies people access to vital social protection supports, including when they have been paying into the social protection system for a number of years. If people are eligible to receive social assistance under national law, access to that social assistance should not be a reason to withdraw their long-term residence status (art. 26).

³ In *Boultif v. Switzerland* and *M Üner v. the Netherlands* the ECtHR clarified that, when the return of a third country national would separate them from their family or when the person has been previously residing regularly in the country, states have the obligation to balance: • the nature and seriousness of the criminal offence committed by the applicant; • the length of the applicant’s stay in the country from which they are to be expelled; • the time elapsed since the criminal offence was committed and the applicant’s conduct during that period; • the nationalities of the various persons concerned; • the applicant’s family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple’s family life; • whether the spouse knew about the criminal offence at the time when they entered into a family relationship; • whether there are children involved, and if so, their age; and • the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled; • the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and • the solidity of social, cultural, and family ties with the host country and with the country of destination.

⁴ “Public security’ covers both the internal security and external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security.” (CJEU, J.N, C 601/15, para 66-67).

⁵ See OHCHR, [The principle of non-refoulement under international human rights law](#).

⁶ While similarly encoded in previous EU law (art. 21 of the Qualification Directive), this provision could lead to violations of the principle of non-refoulement, which is an absolute principle of international law.

Ensuring equal treatment (Article 12)

Equal treatment is essential to promote equal opportunities and social inclusion of long-term residence permit holders and their dependents. The recast should align with the purpose of achieving EU social objectives, policies and commitments, as set out, for example, in the European Pillar of Social Rights, the European Child Guarantee, the EU Strategy on the Rights of the Child and the Social Investment Package.

We recommend:

- Keeping the EC clarification that long-term residence permit holders should have equal to private housing and access to procedures for obtaining public housing (art 12.1(f)).
- Clarifying that member states may require proof of appropriate language proficiency for access to (higher) education and training, but not for access to early childhood education and care (art. 12.3(b)).
- Keeping the EC proposal to delete article 12.4.
- Ensuring EU-long term residents and their heirs retain their right to benefits linked to old age, invalidity, or death when they move or live in a third country, ensuring equal treatment to EU nationals (art. 12.5).

Prioritising family unity (Article 15)

The EC proposal makes important amendments to improve access to long-term residence status for children of long-term residents and facilitate family reunification more broadly. However, it differentiates between children born or adopted in the member state issuing the long-term residence permit and those born or adopted in another. To ensure siblings are treated the same and to prevent mixed-status families, children born or adopted in another member state should also acquire long-term residence status without having to meet the conditions in article 4 and 5.

We recommend:

- Maintaining EC proposals for automatic acquisition of long-term residence status for children born or adopted by long-term residence permit holders on the territory of the member state, and to improve labour market access for partners, without the need for labour market tests.
- Adding a provision that children born to or adopted by long-term residence permit holders on the territory of another member state acquire long-term residence status (art. 15).⁷
- Maintaining EC proposals that any integration conditions should not delay in any way family unification, and aligning article 15 with the preamble and case law of the European Court of Justice, by stipulating that integration conditions set by national law should not jeopardise integration (art. 15).
- Including dependent children who have reached majority among the family members that member states should pay special attention to, when considering which family members are authorised to join long-term residence permit holders in a second member state (recital 37).

⁷ See also [Şen v Netherlands](#) and [Tuquabo-Tekle and others v. The Netherlands](#) in which the ECtHR considered not issuing a residence permit to a child born outside of the EU a violation of article 8.

Streamlining applications and rights of long-term residents exercising intra-EU mobility (Articles 16, 17, 18, 21, 24)

The EC proposal makes several amendments to improve intra-EU mobility for long-term residents and their family members. Despite the current possibility for long-term residents to reside in another EU member state for economic activity, studies or vocational training, or other purposes, conditions and application procedures alongside lack of information, result in long-term residents living and working irregularly in another member state. Therefore, proposals regarding a right of residence, as well as to remove labour market tests and quotas and improve recognition of qualifications, are crucial. However, the application process could be further streamlined and simplified in line with good practice, to avoid unnecessary bureaucracy, administrative costs, and risks of undeclared work.

Important protections for family members introduced to tackle dependency and risks of gender-based violence and/or situations of precarity of young people should be maintained also in the second EU member state.

We recommend:

- Maintaining EC proposals for an acquired right of residence if conditions are met, and removing labour market tests and quotas for long-term residents who wish to work in another EU member state and deleting the possibility to add additional conditions for long-term residents to work in seasonal work (art. 16).
- Simplifying the application process given that applicants are long-term residents in the EU who acquire a right of residence if the conditions are met, by:
 - Changing the application process to a communication procedure, similar to EU Blue Card holders⁸ (art. 17).
 - Enabling people to start work immediately, to enable them to show stable and regular resources and income (art. 17)
 - Aligning article 17 with the preamble and case law of the European Court of Justice, by stipulating that integration conditions set by national law should not jeopardise integration, and deleting the requirement to attend language courses if they are in employment, studies or vocational training (art. 17).
- Aligning articles 17 and 18 with article 5, to require an individual assessment of 'stable and regular resources' for each applicant, and to take into consideration resources from a third party (art 5) as well as adding that the assessment should also consider access to social assistance as a possibility, based on individual

⁸ See Article 15, Directive 2021/1883 (repealing Council Directive 2009/50/EC).

circumstances, to ensure compliance with non-discrimination (e.g. to ensure that restrictions would not, for example, prevent intra-EU mobility of a long-term resident with a disabled family member) (art. 17, 18).

- Deleting the possibility for member states to require family members two years of immediate prior residence in the member state before accessing an autonomous permit (art. 21).
- Specifying that the duration of the residence permit should match the length of corresponding the employment contract, studies or vocational training, and be no less than two years, to promote stability and integration (art. 21).
- Maintaining the EC proposal for equal treatment with nationals for long-term residents and their family members that are issued a permit for employment purposes, including regarding access to the labour market (art. 24).

Committing to provide information in a meaningful way (Article 27)

It is very positive that the EC proposal includes a new article on information, including an obligation to 'make easily accessible' to applicants, information on documents for application, status acquisition, conditions (rights, obligations, procedural safeguards). However, this provision needs to be strengthened, given the significant potential benefits of providing information in a meaningful way and the experience of PICUM members that unequal or insufficient access to information remains a major reason for social exclusion, irregularity and rights violations.

We recommend:

- In paragraph 1(b), requiring member states to proactively 'provide' and not just 'make easily accessible' information to people who have acquired long-term residence status (art. 27).
- Specifying clearly that information must include accessible information on rights and procedures related to living and working in another EU member state.