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REPORT
on the Free Movement of Workers
in the Netherlands in 2008-2009

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General Remarks

Three events have dominated the public and political debate on free movement of workers in the Netherlands in 2008.

Although the Netherlands ended the transitional regime for workers from the EU-8 Member States in May 2007, in the press and in the political debate both at the local and the national level discussions about pretended negative effects of the employment of large numbers of Polish workers in the Netherlands continued all during 2008. The government in Parliament several times had to reply that measures demanded by MP's, such as obligatory integration test, unequal treatment in social security or forced return of unemployed workers, were incompatible with the rights of Polish nationals under the EC Treaty. Three reports on the social and economic effects of the employment of EU-8 and EU-2 workers were commissioned by the government and published in 2008. But the facts and the rational arguments in those reports did not convince the MP's concerned. The reports are cited in Chapter VIII.

In this political climate there was little support for the idea to end the transitional measures for workers from Bulgaria and Rumania at the end of 2008. Thus, the *second* important issue was the debate on the continuation of transitional regime with Bulgaria and Rumania after 2008. The government's decision was made finally in November 2008 and discussed in Parliament in December 2008, see Chapter VIII.

The *third* major issue was the debate on the feared or real effects of the *Metock* judgment, the abuse of free movement rights and the so-called 'Belgium route' – nowadays called the 'Europe route'. This term indicates the Dutch nationals, being unable to comply with the strict national rules on family reunification and not be allowed to rely on Directive 2003/86 on the right to family reunification because they are Union citizens, using their free movement rights in order to reunite with their family members in another Member State and return after a period of work and residence in that Member State to the Netherlands. The judgments in *Metock* and *Eind* were implemented in a major change of the chapter on free movement rights in the Aliens Circular that entered into force in January 2009. Those amendments also introduced a new rule aimed at reducing abuse of free movement rights by unmarried partners of nationals of other Member States, see Chapter VI.

Internet sites

The main portal to legislation, draft legislation and other official government documents is: <http://www.overheid.nl>.

The main portal to Dutch case law is: www.rechtspraak.nl. Most of the case law mentioned in this report can be found on this website, using the LJN number mentioned in the reference.

Other websites of interest are:

- The website of the Justice Department: www.justitie.nl
- The website of the Department of Social Affairs: www.szw.nl
- The website of the Immigration and Naturalisation Service: www.ind.nl
- The site giving access to official publications: www.overheid.nl/op/index.html
- The site giving access to all Dutch legislation in force: <http://wetten.overheid.nl>

Chapter I

Entry, Residence and Departure

A. ENTRY

Texts in force

In The Netherlands Directive 2004/38 is mainly transposed by provisions of the Aliens Decree but the Aliens Act 2000, the Social Assistance Act and the study grant legislation were amended as well. Chapter B10 of the Aliens Circular 2000 contains the policy guidelines for the implementation of Directive 2004/38 as embedded in the amended Aliens Decree.

Article 4 of the Directive concerning the right of exit is not transposed in the Aliens Decree while it is already embedded in Article 2(2) of the Fourth Protocol to the ECHR.

Article 5 of the Directive concerning the right of entry is transposed in Article 8.8 of the Aliens Decree. Article 8.8(1) and (2) of the Aliens Decree transposes the restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health of Chapter VI of the Directive.

The wording ‘in possession of a valid document for border crossing’ in Article 8.8(1) Aliens Decree implies that family members who are not nationals of a Member State are required to possess a valid passport and entry visa in accordance with Regulation 539/2001. According to Article 5(2) of the Directive the possession of a valid residence card exempts such family members from the visa requirement. This provision is implemented by Article 8.9 of the Aliens Decree. The same Article contains the prohibition of Article 5(3) of the Directive to place an entry or exit stamp in the passports of such family members. According to the Explanatory Memorandum of the Aliens Decree third country family members are exempted from the long stay visa requirements as well, irrespective of their legal residence in another Member State. The exemption is included in B10/2.2 of the Aliens Circular. In October 2008 the Ministry of Foreign Affairs issued a new (internal) working instruction concerning the exemption of the visa requirements and the facilitation of family members of EU/EEA nationals. Subsequently, chapters A2 and B10 of the Aliens Circular are amended to clarify more precisely the entry formalities for family members of EU/EEA or Swiss nationals. At the same time the policy concerning the administrative formalities for unmarried partners of EU national are clarified (*Staatscourant* 29 January 2009, no. 1380, coming into force 31 January 2009). For more details see chapter VI.

Judicial practice

The decision of 22 February 2008 of the Judicial Division of the Council of State, 200707416 [LJN: BC5224], *Jurisprudentie Vreemdelingenrecht* 2008/142 concerned a third country national family member who did not accompany or join his Union citizen spouse. He could not provide an entry visa or a valid residence card for Sweden and was subsequently held in immigration detention. The Council of State approved the detention, while during the proceedings the third country national has not brought forward the argument that a reasonable opportunity to obtain the necessary document was not provided for, the State Secretary

of Justice had speedily investigated the issue on her own initiative and the detention was lifted as soon as his residence in Sweden was confirmed.

Literature

- Aleidus Woltjer, *Gemeenschapsrechtelijke beginselen en het Europees migratierecht, Migrantenrecht* 2008, no. 1.
- D. van Dam, *Een ander kader dan immigratie. Onderzoek naar de overeenkomstige begrippen in de Gezinsherenigingsrichtlijn, Langdurig ingezetenen richtlijn en de Unieburgersrichtlijn*, 18 August 2008, Masters thesis Radboud University Nijmegen.
- T. Abali, R. Benevento, *Gedreven wetenschap*, interview with prof. Kees Groenendijk, *Migrantenrecht* 2009, no. 1
- A. Venekamp, *Het arrest Eind. Het vrije personenverkeer: een begin zonder einde?*, *Nederlands Ijdschrift voor Europees Recht (NTER)* 2008, p. 130-136.
- I. van Steen, *Vrij verkeer van personen – Zuiver interne situaties: geen omwenteling, wel inperking*, *Nederlands Tijdschrift voor Europees Recht (NTER)* 2008, p. 301-307.
- A.A.M. Schrauwen, *Naar een waarlijk ‘fundamentele status’? Democratie en Europees Burgerschap na het Verdrag van Lissabon*, *Sociaal-Economische wetgeving (SEW)*, 2008, p. 288-292.

B. RESIDENCE

Texts in force

Union citizens and their family members who hold a valid identity card or passport have the right of residence for a period of up to three months in another Member State without any formalities (Article 6 of the Directive). This right is contained in Article 8.9(1) of the Aliens Decree for (a) holders of a valid identity card or valid passport or for (b) a person who can prove his identity and nationally unequivocally with other means (see also the Aliens Circular B10/2.5.1). The optional clause of Article 5(5) concerning the obligation to report to the authorities within a reasonable time is not materialised in the Aliens Decree for residence for a period for up to three months. According to B10/2.3 of the Aliens Circular Union citizens are exempted from the obligation to report. Only in cases of residence for more than three months they are obliged to report to the authorities.

Article 7 of the Directive concerns the right of residence for more than three months. Article 7(1) distinguishes workers and self-employed, non-actives, students and the family members of these groups. The right of residence for more than three months is transposed by Article 8.12 of the Aliens Decree in a rather complicated way due to the very differentiated categorisation of family members. Article 8.13 concerns the right of residence for more than three months of third-country family members. In the Aliens circular the right of residence for more than three months is elaborated in B10/2.5.2 and 5. The obligation to report is embedded in Article 8.12(4) of the Aliens Decree. After the period of residence for up to three months of Article 8.11 the migrant has to register himself with the aliens administration (the Immigration and Naturalisation Service). The obligation is sanctioned in Article 108(5) of the Aliens Act 2000, with a maximum of imprisonment for a period of one month or a fine of the second category. After registration the Immigration and Naturalisation Service issues a registration certificate (Article 8.12 (6) of the Aliens Decree). This is a sticker that is placed

in passports or attached to other identity papers. Once registered, an EU citizen is in principle entitled to stay in the Netherlands for as long as (s)he wishes.

Job seekers are treated in Article 8.12(1) of the Aliens Decree on the same footing as workers and self-employed. According to Article 8.12(1) a job seeker is entitled to a right of residence for more than three month when he is able to prove that he is still looking for a job and has a real opportunity to get a job (see also Aliens Circular B10/3.1). As other EU citizens a job seeker has to register himself with the Immigration and Naturalization service after the period of residence for up to three month. The same restrictions on grounds of public policy, public security or public health apply.

Union citizens who have resided legally for a continuous periods of five years in the host Member State shall have unconditionally the right of permanent residence there (Article 16 Directive). Situations which do not affect the continuity of residence are enumerated in Article 16(3). Article 8.17(2) of the Aliens Decree contains the same enumeration.

When certain conditions as to the length of residence and employment are fulfilled Article 17 of the Directive grants by way of derogation from Article 16 before completion of a continuous period of five years the right of permanent residence to workers or self-employed persons who are entitled to an old age pension (including early retirement), who stop working as a result of permanent incapacity, or who are cross-border workers. The provisions of Article 17 are more or less literally transposed by Article 8.17(3)-(5) of the Aliens Decree. The specific rules for family members of Article 17(3) and (4) of the Directive are included in Article 8.17(6) and (7) of the Aliens Decree.

Upon application Member States shall issue Union citizens entitled to permanent residence after having verified duration of residence as soon as possible with a document certifying permanent residence (Article 19 Directive). A new document 'permanent residence for EU citizens' was introduced from 1 May 2006 on (Article 8.19 Aliens Decree). It will be issued automatically to Union citizen who have already resided for more than five years in the Netherland when the validity of the old document expires and costs € 30. Member States shall issue to third country family members entitled to permanent residence a permanent residence card, automatically renewable every 10 years (Article 20 Directive), which is implemented in Article 8.20 Aliens Decree. Permanent residence is elaborated in B10/2.5.3 of the Aliens Circular.

Judicial practice

According to District Court Roermond 4 March 2008, AWB 07/20391 [LJN: BC5732], a deposit receipt of € 7.000 is insufficient prove that a Polish national has sufficient resources. The receipt should be considered as a capital deposit inadequate to generate the sufficient resources. It is doubtful whether this decision is in conformity EC Court of Justice 10 April 2008, C-398/06 (*Commission v. The Netherlands*), *Jurisprudentie Vreemdelingenrecht* 2008/223, with annotation C.A. Groenendijk.

With reference to EC Court of Justice 30 March 2006, Case C-10/05 (*Mattern and Cikotic v Ministre du Travail et de l'Emploi*), para. 18 the Judicial Division of the Council of State 2 July 2008, 200704789/, *Jurisprudentie Vreemdelingenrecht* 2008/332, with annotation H. Oosterom-Staples, ruled that two Polish nationals could not be considered as workers, while they did not perform services for and under the direction of another person in re-

turn for which they received remuneration. The house painting activities were of a small scale, the other person could not give directives and they did the activities for free as friends.

In District Court Haarlem, 10 April 2008, 07/35827, 07/39225 and 07/39226 [LJN: BE9592] two Polish nationals requested explicitly a residence card instead of the sticker. The court considered their appeal inadmissible. According to the court a residence card does not provide a stronger legal position as the sticker. *Idem*, District Court Haarlem 17 July 2008, AWB 07/41877 [LJN: BF34912].

District Court Arnhem 11 august 2008, AWB 08/8057, 08/8058 [LJN: BE9420] concerned the issue whether the document called ‘Residence card of a family member of a Union citizen’ should mention the date of application or the date of issue (as the applicants stated). The appeal was considered inadmissible, while an interest was lacking. The document does not prove in itself the entrance date of legal residence in the Netherlands.

Judicial Division of the Council of State 10 December 2008, 200802754/1 [LJN: BG6419] *Jurisprudentie Vreemdelingenrecht* 2009/84 considered a request for compensation due to the fact that a union citizens was not informed about his right on residence based on EU law inadmissible, while the Council of State is not competent concerning tort claims

C. DEPARTURE

Texts in force

The right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years (Article 16(4) of the Directive). This provision is transposed in Article 8.18 of the Aliens Decree which adds serious reasons of public order and public security as another ground for withdrawal (see Article 28(2) of the Directive).

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in case of abuse or fraud such as marriages of convenience (Article 35). Article 8.25 Aliens Decree uses a more general wording: ‘the Minister may withdraw the right of residence if the alien has submitted wrongful information or has withheld information which should have had as a consequence the refusal of entry or residence’. This provision suggests that grounds for withdrawal of the residence right may be used in cases that actually are not covered by Article 35 of the Directive.

Chapter VI of the Directive contains the restrictions on the right of entry and residence on grounds of public policy, public security or public health. In the Aliens Decree public health is mentioned in Articles 8.8(1), sub b (entry) and 8.23. For public policy and public security the relevant Articles are: 8.8 (1), sub a and b (entry), 8.22 and 8.24. Public health may only be applied as a restriction on the right of entry during a three-month period from the date of arrival. This is also the case in the Aliens Decree. The relevant diseases are diseases defined by relevant instruments of the World Health Organisation (WHO) and other diseases if they are the subject of protection provisions applying to nationals of the host Member State. Article 8.23 of the Aliens Decree refers to the lists of the WHO and other infectious diseases or contagious parasitic diseases which are subject of protection provisions applying to Dutch citizens. The Explanatory Memorandum mentions in this respect plague, cholera and yellow fever and recent diseases as SARS (*Staatsblad* 2006, no. 215, p. 32, 33 and 46).

Article 27 of the Directive codifies the case law of the Court concerning public policy and public security. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Article 8.22(1) of the Aliens Decree contains the same definition. The provision of Article 28(1) of the Directive according to which Member State shall take into account of number of personal considerations is – against the advice of the Council of State – not transposed in Article 8.22 of the Aliens Decree while the general (but less specified) clause concerning the weighing of interests of Article 3:4 of the General Administrative law Act applies. According to Article 28(2) of the Directive as transposed by Article 8.1, sub b of the Aliens Decree, the host Member State may not take an expulsion decision against Union citizens or their family members, who have the right of permanent residence, except on serious grounds of public policy or public security. After 10 years legal residence or in case of minority only imperative grounds of public security may justify an expulsion order, see Article 28(3) of the Directive as transposed by Article 8.22(3) of the Aliens Decree.

The notification provision of Article 30 of the Directive is not transposed as such in the Aliens Decree. More in general stipulates Article 8.8(2) of the Aliens Decree that a refusal of entry shall be notified in writing. The procedural safeguards of Article 31(2) and (4) of the Directive are embedded in Article 8.24(1) and (2) of the Aliens Decree. The maximum period of three years for the submission of an application for lifting of the public policy or public security exclusion order of Article 32 of the Directive is transposed in the Aliens Decree in the possibility of automatic review of the expulsion after two years, see Article 8.22(6).

The departure of EU citizens is elaborated in A4/3 of the Aliens Circular and the restrictions on the right of entry and residence on grounds of public policy, public security or public health in B10/71.1.1.

Judicial practice

Despite information of the State Secretary of Justice about a rather limited number of court cases (TK 2007-2008, 19 637, no. 1207, p. 26) the year 2008 saw a remarkable increase in case law concerning the declaration as undesirable alien, immigration detention and departure.

In line with the decision of the Judicial Division of the Council of State, 21 December 2007, 200707858 [LJN: BC1586] – mentioned in the 2007 national report – the District Court 's-Hertogenbosch 11 March 2008, AWB 08/6546 [LJN: BC7069] ruled that the court which has to decide on the lawfulness of the immigration detention may not consider the legality of the decision to withdraw residence and to declare a Polish national undesirable based on Article 27 (1) of the Directive. Only when in the appropriate procedure the withdrawal and the declaration as undesirable alien are annulled the judge who has to rule on the (continuation of the) aliens detention may take into account the consequences of this annulment. The consequence of these judgments is the clear possibility of a continued detention contrary to EU-law. By these rulings of the Judicial Divisions of the Council of State and the courts the existing legal remedy against the detention of EU-nationals proved to be inadequate.

District Court Amsterdam 27 March 2008, AWB 07/30322 [LJN: BC8350] concerned a Rumanian national who was declared undesirable while he was condemned to imprisonment of 45 months. The court annulled the decision while the State Secretary of Justice had insuf-

ficiently investigated whether the personal conduct of the person concerned still represents a genuine, present and sufficiently serious threat.

In District Court Amsterdam 19 May 2008, AWB 07/44213 [LJN: BD5213] a Nigerian national with a Spanish residence card was declared undesirable and expelled under application of the national public order clause. The court annulled the decision while State Secretary of Justice has insufficiently investigated whether the community provisions concerning public policy and public security should apply to this third country national married with a Spanish national. District Court Amsterdam 18 April 2008, AWB 07/28736, 06/61137, 06/60811 [LJN: BD0949], *Jurisprudentie Vreemdelingenrecht* 2008/257 concerned a Nigerian national too, this time married to a Belgian national in the UK and with residence in the UK. He was declared undesirable according to the national public order clause while according to the State Secretary of Justice the community provisions concerning public policy and public security do not apply since he and his spouse have residence in the UK. The court annulled the decision.

Taking into account the intensity, the scale and the dependency of the trade in cocaine by a French national the District Court Groningen, AWB 07/40215 [LJN: BD7243] considered recidivism very likely. Therefore, an actual threat still exists. The same considerations appeared in Judicial Division of the Council of State 17 September 2008, 2000801996/1 [LJN: BF3035]. The scale of involvement in international drugs traffic constitutes still a serious threat which can be considered as present as well except for proof of the contrary. Drug related offences seem to constitute a separate category in Dutch case law concerning the public policy and public security provisions in community law!

Judicial Division of the Council of State 12 September 2008, 200704924/1 [LJN: BF1415], *Jurisprudentie Vreemdelingenrecht* 2008/397, with annotation P. Boeles, concerned a third country national, declared undesirable, but married with an EU citizen. Article 1F of the Refugee Convention applied to this third country national while he was a member of Al-Jama'at Al Islamiyya which organisation is mentioned in the terrorism list of Article 2 (3) Regulation 2580/2001. Involvement in terrorist activities represents for a long, very long period still a present threat. The lifting of the declaration as undesirable alien constitutes a genuine and serious threat, considering the character and seriousness of his activities. Furthermore, his activities can be considered as personal conduct that still constitutes a present threat, although since his entry in 1993 nothing has happened.

According to District Court The Hague 26 August 2008, 08/12342 [LJN: BF0172] the (standard) consideration of the State Secretary of Justice 'that an indication for the seriousness of the threat has to be found in the length of the punishment (six years) and the risk for recidivism while evidence is lacking that there is not a present threat' is not in conformity with the case law of the EC Court of Justice (*Bouchereau, Calva, Commission v The Netherlands*). The personal conduct of the person concerned, the proportionality and the criteria of Article 28 (1), Dir. 2004/38 should be taken into account as well. See also the decision of this court of the same date AWB 08/7576.

In District Court Assen 23 September 2008, AWB 08/8224 [LJN: BF3214] the court concluded to a genuine, present and sufficiently serious threat based on the statements of the UK national about his behaviour in The Netherlands (cheating tourists, prostitution, alcohol abuse), his previous conviction for drug related offences (4,5 years) and the repeated use of forged travel documents.

Judicial Division of the Council of State 7 October 2008, 200707753/1, *Jurisprudentie Vreemdelingenrecht* 2008/429 concerned the declaration as undesirable alien of an Union

citizen, imam of the Al Fourkan mosque in Eindhoven, based on information of the Intelligence and Security Service (AIVD) in a report of 2004. While Article 3 of Directive 64/221 nor the case law of the EC Court of Justice do contain a precise indication about the date on which a ‘present’ threat should be established, the conclusion of the AIVD about the threat to the public security was still valid at the time of the declaration as undesirable alien (26 January 2006) while according to his statements the imam still persists in his attitude. Therefore, a danger of radicalisation and terrorism is still present.

Concluding, although some of the first instance courts are of the opinion that the administrative decisions concerning undesirability are not in conformity with the case law of the EC Court of Justice, particularly not with the requirement that the personal conduct of the person concerned should be taken into account, the Council of State normally condones the individual decisions of the State Secretary of Justice on undesirability. A decision to declare a person undesirable implicates that a continued residence in the Netherlands is an offence according to Article 197 of the Penal Code. Even EU nationals are regularly prosecuted according to Article 197 of the Penal Code. In line with the decision of the Criminal Court Amsterdam 29 November 2007, 13/421598-07, 13/421609-07, *Jurisprudentie Vreemdelingenrecht* 2008/93 – mentioned in the 2007 national report – the Criminal Court Maastricht 11 April 2008, 03/700720-07 and 03/700035-08 [LJN: BC9282] declared the public prosecutor inadmissible in the prosecution of an EU national based on Article 197 of the Penal code while the Minister of Immigration and Integration in her decision of 17 June 2003 to declare the person concerned undesirable had insufficiently motivated why the personal conduct of the accused constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society as mentioned in Directive 2004/38. The sentence revealed the existence of an internal instruction for the public prosecutors to abstain from prosecution according to Article 197 of the Penal Code in cases in which the administrative decision lacks a clear motivation why the personal conduct of the accused constitutes a present threat.

Contrary to these criminal court decisions the Court of Appeal ‘s Hertogenbosch 1 augustus 2008, 20-003772-07 [LJN: BD 9239] ruled that confronted with a prosecution based on Article 197 of the Penal Code a criminal court is not competent to consider whether the decision to declare an EU national undesirable is in conformity with Directive 2004/38. From the point of view of the supremacy of Community Law this decision seems manifestly wrong. Supreme Court 10 March 2009, 08/01151H – 08/01154H, 08/01156H and 08/01157H [LJN: BH5418] did not deal with this issue (yet), but concerned the revision of a conviction of an EU national based on Article 197 Penal Code, while in the meantime the State Secretary of Justice had annulled the decision on undesirability.

In sum, many declarations as undesirable alien of EU nationals are still not in conformity with community law and when detained, the administrative court which has to decide on the lawfulness of the immigration detention, may not consider the legality of the decision to withdraw residence and to declare an EU national undesirable. According to the above mentioned decision of the Court of Appeal the same applies to the criminal courts confronted with the prosecution of “undesirable” EU nationals. On these points Dutch policy and (judicial) practise still contravene EU law.

Administrative practice

In a letter of 13 August 2007 the State Secretary of Justice informed Parliament about the efficiency of the public order policies (TK 2006-2007, 19 637, no. 1168). The stricter criteria of the ‘gliding scale’ introduced in 2005, will be continued till the evaluation fall 2008. Several measures to enhance the efficiency of the public order policy are proposed, inter alia a pilot in the police regions of The Hague and Rotterdam to get a better insight in the notion of a ‘present threat’. The aim is to declare more frequently Union citizens who are involved in criminal violence, as undesirable aliens and to expel them. On 17 December 2008 the State Secretary of Justice informed Parliament about the delays in the evaluation research (TK 2008-2009, 19 637, no. 1244): the evaluation will be finalized during the first half of 2009. But on 17 June 2009 a further delay was announced (TK 2008-2009, 19 637, no. 1286).

Literature

Raad voor de Strafrechttoepassing, Advies ‘*Vreemdelingenbewaring*’ (16 June 2008).

Anton van Kalmthout, Commentaar – Verbeteringen vreemdelingenbewaring – Beter laat dan nooit, *Migrantenrecht* 2008, no. 7.

Galina Cornelisse, Internationaalrechtelijke grenzen aan immigratiedetentie – Een ‘noodzakelijke toevoeging’ aan een ‘onbetwistbaar soeverein recht’?, *Migrantenrecht* 2008, no. 9/10.

D. REMEDIES

Several of the abovementioned cases are also relevant to the remedies available to EU migrants.

In line with Judicial Division of the Council of State, 21 December 2007, 200707858 [LJN: BC1586] the District Court ’s-Hertogenbosch 11 March 2008, AWB 08/6546 [LJN: BC7069] ruled that the court which has to decide on the lawfulness of the immigration detention may not consider the legality of the decision to withdraw residence and to declare a Polish national undesirable based on Article 27 (1) of the Directive. Only when in the appropriate procedure the withdrawal and the declaration as undesirable alien are annulled the judge who has to rule on the (continuation of the) aliens detention may take into account the consequences of this annulment. The consequence of these judgments is the clear possibility of a continued detention contrary to EU-law. By these rulings of the Judicial Divisions of the Council of State and the courts the existing legal remedies against the detention of EU-nationals proved to be inadequate.

Chapter II

Access to Employment

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT OUTSIDE THE PUBLIC SECTOR

Developments in 2008

As of 1 May 2007, restrictions have been lifted on free movement of workers with the nationality of the eight middle and east European countries that acceded to the EU in 2004. The Dutch parliament urged the Minister to be alert on the effects of flanking measures designed to secure that the rules on minimum wages are maintained and to investigate measures against mala fide employers using workers hired out by temporary work agencies (TK 29407, 70). See also Chapter VIII.

General situation

Article 1(1)(b) of the General Equal Treatment Act (*Algemene wet gelijke behandeling*) explicitly forbids discrimination on the basis of nationality. The prohibition applies to all employment relations outside the public sector. Article 5(1) explicitly provides that the prohibition applies to job offers, recruitment procedures, private employment agencies, concluding and ending an employment contract, employment conditions, access to vocational and other training during or before the job, promotion and workplace conditions. The Act explicitly allows for only two situations where distinctions on the ground of nationality (in the meaning of citizenship) are allowed: (1) where it is provided explicitly in a statutory provision or in a written or unwritten rule of international law, and (2) in cases where a distinction on the ground of nationality is required by the context, such as the composition of a national sports team (Articles 5(5) and (6) of the Act and Royal Decree of 21 June 1997, *Staatsblad* 1997, no. 317, *Besluit gelijke behandeling*, *Staatsblad* 1997, 317). The Act established the Equal Treatment Commission (Commissie Gelijke Behandeling). A worker or an applicant may file a complaint with this Commission, if (s)he deems that an employer has violated the provisions of this Act. There is equal access to assistance of employment agencies.

2. LANGUAGE REQUIREMENTS

There are no explicit statutory requirements as to the knowledge of the Dutch language for private employment. In practice, for most white collar jobs applicants will be required to have a good knowledge of the Dutch language.

THE NETHERLANDS

Jurisprudence

There were no cases regarding violation of the prohibition of discrimination on grounds of nationality with respect to access to employment for EU citizens decided by the Equal Treatment Commission (*Commissie Gelijke Behandeling*) in 2008.

Chapter III

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS

Nothing to report.

2. SOCIAL AND TAX ADVANTAGES

Nothing to report.

3. OTHER OBSTACLES FOR FREE MOVEMENT OF WORKERS

Nothing to report.

Judicial practice

The Equal Treatment Commission published one preliminary decision in 2008 on discrimination between EU citizens and own nationals (Opinion 2008-127, full text can be found at www.cgb.nl).

In this case a Polish worker had complaint that he was enumerated systematically lower than his not Polish colleagues. Further research showed that all the Polish workers were seasonal workers and the Dutch workers not. The Polish workers, who do the same job as their Dutch colleagues receive a lower salary. This is a form of indirect discrimination by nationality for which the employer is asked to come up with a justification. There is no final opinion, yet

Miscellaneous

The government has announced a change of the Remigration Act, which provides financial support for migrants to return to their country of origin. According to the European Commission this Act is not in line with Community law. EU citizens (like Spanish, Greek, Slovenian, Italian and Portuguese citizens) will (have to) be excluded from the personal scope of this Act. The government is investigating the possibilities of a transitional arrangement (TK 30546, nr. 2).

4. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES), SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

4.1. Frontier workers

The *Hartmann* judgment (C-212/05) has been discussed in 2008 by Minderhoud in *RV 2007*, no. 83. He agrees with Van der Mei (see A.P. van der Mei, *Grensarbeiders en het recht op aan ingezetenschap gekoppelde sociale voordelen*, *NTER 2007*, p. 210) that the case-law of the ECJ shows a tendency to allow residence clauses for residence based benefits if they are used in a strict sense.

Report Commission Frontier Workers

In June 2008 the Commission Frontier Workers (Commissie Grensarbeiders) presented to the State Secretary of Finances a report with recommendations to solve cross border problems (mainly tax and social security related) which occur with Germany and Belgium. These problems are related to tax interest, premium for health care insurances based on double pensions and difference in qualifying period for disability benefit between Germany and The Netherlands (TK 26834, nr. 20). The issue is under discussion at this moment.

Retired people living in the Netherlands with a Belgian or German pension must pay the mandatory health insurance premium introduced further to the Health Insurance Act (ZWV) in 2006. In a number of cases this has led to a major change in the income status of retired workers living on this side of the border. Many cross-border workers saw a major drop in their monthly income. The Commission Frontier Workers recommends a temporary income compensation measure for these people. In February 2009 the State Secretary has refused to accept this recommendation (TK 26834, nr .21).

Specific schemes for frontier workers additional to Regulation 1408/71

There are five (voluntary) additional rules:

- There is a right to German child benefits when both parents reside in Germany and work in The Netherlands under the condition that there is no entitlement to Dutch child benefits any more.
- There is a right to Belgian child benefits when both parents reside in Belgium and work in The Netherlands under the condition that there is no entitlement to Dutch child benefits any more.
- There is an entitlement to Dutch child care allowance when both parents reside in The Netherlands and work in Germany or Belgium.
- Frontier workers who live in Belgium and work in The Netherlands, Germany or France build up an additional Belgium frontier workers pension
- There is a fiscal compensation rule for Dutch frontier workers, working in Belgium

In April 2009 Eures Maas Rijn has published six reports on mobility obstacles of frontier workers living and working in Belgium, Germany and The Netherlands.

Most problems are tax or social security related. See: http://www.euresemr.org/index.php?option=com_docman&task=cat_view&gid=73&Itemid=34

Renneberg Case C-527/06 of ECJ 16 October 2008

This is an important judgment for cross-border workers in particular. It is discussed in more detail in Chapter VII.

New tax Treaty between the Netherlands and the UK

On 26 September 2008 a new tax treaty between the Netherlands and the United Kingdom of Great Britain and Northern Ireland was signed (*Tractatenblad* 2008, no. 201). This new treaty may have consequences for employees who live in Great Britain and work in the Netherlands, or vice versa. Changes have been made, for example, in the area of allocation between the Netherlands and Great Britain of the right to levy tax on employees' and directors' remuneration packages. New rules have also been introduced with regard to pensions. The method of exchanging information on tax matters has also been modernized. The most important changes for cross-border workers compared with the present treaty are as follows. The reference period for the application of the 183-day rule has been changed. Under the present treaty it is not permitted to spend more than 183 days in the other country in any tax year in order to be eligible for the 183 day rule. Under the new treaty it is not permitted to spend more than 183 days in the other country in a time period of 12 months which begins or ends in the relevant tax year. The treaty has still to be approved by the parliament of both countries.¹

4.2. Sportsmen/sportswomen

General

See for more details the answers in the questionnaire on sports

The Dutch government wants to make an exception for *football* (but other sports as well) in relation to the free movement principle. It wants to protect the national football leagues. See memorandum http://www.minvws.nl/images/s-2808263b_tcm19-154391.pdf.

Ice-hockey: The Dutch ice-hockey association is trying to diminish the amount of foreign players in the highest division. At this moment half of all players have a non-Dutch nationality.

Field Hockey: In 2007 the clubs of the highest division concluded a gentlemen's agreement that their players list will contain a maximum of three foreign players. There is an ex-

¹ If, for example, an employer seconded employees living in the Netherlands to Great Britain to work and the Netherlands can tax the salary because the number of days the employee spent in Britain is less than 183 days during the British tax year (6 April - 5 April), then it has to be re-assessed whether the Netherlands may still levy tax under the new tax treaty. Under the new tax treaty it will now be necessary to check whether the employee did not spend more than 183 days in Great Britain in a 12 month period which begins or ends within the British tax year. The result could be different. This is also based on the assumption that the two other conditions of the 183-day rule are met (that the employer cannot be classified as a British material employer and that the employee does not work for a British permanent establishment). Under the new treaty a director's remuneration will be taxed in the country where the company is based in so far as the director also works in that country. The present treaty allocates the right to levy tax to the country where the company is based irrespective of where the work is carried out. This change may be particularly important for the tax position of the director of a Dutch company living in Great Britain. Finally, changes have been made in the area of pensions. One of the most obvious changes is that if an employee participates in a Dutch pension scheme where the employee contributions are deductible in the Netherlands, Great Britain will also allow a deduction.

ception for those players who have already played for three consecutive years in the highest division. In 2008 several clubs have terminated this agreement. There are now 53 men and 39 women with a foreign nationality playing in the highest hockey division.

Basket ball: For the season 2008/2009 a basket ball team in the highest division must contain at least five Dutch players. See http://www.basketball.nl/files/bestanden/Supplement_Heren_Eredivisie.pdf.

4.3. The Maritime sector

There were no developments in 2008 for this sector.

4.4. Researchers /artists

As of 1 January 2007 the Dutch withholding tax on performance fees for non-resident artistes and sportsmen has been removed, under the condition that these artistes and sportsmen reside in a country with which the Netherlands has concluded a tax treaty. A roundup shows that this includes 90 countries. See <http://www.allarts.nl/articles/2008/90%20countries%20-%202008-12-15.pdf>

Much has changed in artists and sportsman taxation over the last years after the decisions of the European Court of Justice (*Gerritse* (2003), *Scorpio* (2006) and *Centro Equestre* (2007)) and the change in the Commentary on Art. 17 of the OECD Model Treaty. Expenses should be deductible at source and normal tax returns should be possible after the year. See for the 2009 situation: <http://www.allarts.nl/articles/2009/Artist%20and%20Sportsman%20Tax%20Rules%20-%20EN%20-%202009%20-%20AA.pdf>.

Performing artists who tour to the Netherlands several times during a year only need to provide one E101 form for the Dutch authorities. It can be used to cover a number of appearances in different locations in the country during the same year, unlike other EU countries who require one E101 per performance.

National researchers from other EU countries are treated equally to Dutch researchers. Ph.D. researchers are workers. See chapter VII under *Raccanelli*-judgments.

4.5. Access to study grants

Since September 2007 the Dutch Study Finance Act makes it possible for students resident in the Netherlands to take their study grant with them to other countries. However, this is subject to the condition that the student must have resided legally in the Netherlands for at least three out of six years before the course abroad begins (Article 2.14 (2)(c) WSF). This residence clause seems not to be in line with Article 7(2) Regulation 1612/68, when it is applied to migrant workers, including frontier workers, and their family members. The European Commission has threatened The Netherlands in June 2009 with an infringement procedure if they do not change the law. See: <http://www.transfermagazine.nl:80/nieuws/onderwijs/meeneembare-studiefinanciering-op-drijfzand-door>.

THE NETHERLANDS

Migrant workers and their family members residing in The Netherlands have equal access to study grants as Dutch citizens. For EU citizens is a waiting period of five years allowed according to the ECJ in *Förster* (case C-158/07).

Chapter IV

Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68

The 2006 Health Insurance Act (*Zorgverzekeringswet*) falls within the material scope of Regulation 1408/71. Persons living in an EU Member State and working in the Netherlands or falling under the Dutch social insurance system are obligatory insured for the Dutch Health Insurance Act. They are entitled to the health care provided in the country they live in. Dutch pensioners living abroad challenged this obligatory nature of the insurance, finding it not compatible with Regulation 1408/71. According to a judgment of the District Court The Hague 31 March 2006, (www.rechtspraak.nl under LJN: AV7778), this is not the case. The District Court Amsterdam (31 January 2008, LJN: BC3432) confirmed the opinion of their colleagues in The Hague. An appeal is still pending.

There is still a disagreement between the Minister of Health and the European Commission regarding on which income the height of the premium for special health care insurance (AWBZ) has to be calculated. The Dutch system also includes foreign pensions for this calculation. But this seems not in line with the ECJ judgment in the *Nikula* case (C-50/05, 18 July 2006). The District Court of Breda (15 April 2008, AWB 06/743, LJN:BD1660) has ruled in the case of a German pensioner that on the basis of Article 33 Regulation 1408/71 the premium cannot be based on his German pension. An appeal on this issue is still pending (see TK 30918, no. 34).

Hendrix Case C-287/05 of ECJ 11 September 2007

Following the judgment of the ECJ, the Central Appeals Tribunal (*Centrale Raad van Beroep*), which asked for the preliminary ruling, came up with a decision on 7 February 2008 (LJN: BC5204). See for more details Chapter VII.

In July 2008 the Central Appeals Tribunal used the ‘disproportionality reasoning’ from the *Hendrix* case to justify the entitlement to a Social Assistance Benefit to two British citizens, residing in The Netherlands during the period they would visit a rehabilitation clinic in Scotland. Withdrawal of the benefit because of the residence clause of the Social Assistance Act during this period was seen as an unjustified obstacle to the free movement of services (Centrale Raad van Beroep 22 July 2008, LJN BD8764 and LJN BD8765).

Literature

G. Vonk, M. van Everdingen & M. Ydema-Gutjahr, Rechtspraakoverzicht internationaal en Europees socialezekerheidsrecht, *SMA*, oktober 2008, p. 405-413.

Chapter V

Employment in the Public Sector

1. ACCESS TO THE PUBLIC SECTOR

1.1. Nationality condition for access to positions in the public sector

The only statutory restriction of functions in the public sector has been under debate in 2008 was the requirement of Dutch nationality for the appointment as a notary.

In 2007 a Bill was introduced with the aim to abolish this requirement. The Bill is still pending in the Senate, several Senators having raised objections against the proposal. In a letter of 26 November 2008, the Secretary of State for Justice, Albayrak, provided information on the infringement proceedings started by the Commission against 17 Member States having a nationality requirement for the appointment of notaries in their national legislation and about the reactions of certain Member States on those infringement procedures (TK 30350 and 31040, L). During an extensive debate between the Senate's Justice Commission and the Secretary of State in December 2008, the latter strongly defended the proposal to drop the nationality requirement against opposition of several Senators. At the end of the debate, it was decided to wait for the outcome of the infringement procedures presently pending before the Court of Justice and continue the debate on the Bill after the Court's judgment (TK 30350 and 31040, M).

In answer to parliamentary questions on the suggestion in an article in a military review that the Dutch government should open up the possibilities for employment of nationals of other Member States in the Dutch army, the government replied that the current legislation only allows for the employment of non-nationals in exceptional cases, such as (danger of) war, that the Dutch legislation was in conformity with EC law, that some other Member States allow for the employment of nationals of other Member States in their army, but that there was no intention to change the Dutch legislation on this issue, Parl. Questions 2008-2009, no. 610).

The question whether persons with dual nationality, having Dutch nationality and the nationality of another state, can be appointed in certain political functions such as Minister or Secretary of State continued in 2008 but at a less prominent level. The discussion started in 2007 with the appointment of Ahmed Aboutaleb, presently mayor of Rotterdam, as Secretary for Social Affairs, who has both Dutch and Moroccan nationality, and Nebahat Albayrak, having Dutch and Turkish nationality, as Secretary of State for Justice.

1.2 Language requirement

Until recently, there were few if any explicit statutory requirements as to the knowledge of the Dutch language for appointment in posts in the public sector, although in practice for most public service jobs a good knowledge of the Dutch language will be required. The legislation implementing Directive 2005/36 provides some examples of that practice. The explanatory memoranda on the ministerial regulations on the recognition of professional qualifications of police officers and fire-brigade officers, referred to in par. 1.3 below, it is explic-

itly mentioned that the officers concerned have to have the knowledge of the Dutch language required for the job concerned and that such language knowledge is not tested during the procedure on the recognition of the qualifications acquired in another Member State but afterwards in the procedure on the appointment. Moreover, the ministerial regulation of the recognition of the professional qualifications of candidate notaries and candidate bailiffs it is stipulated that the aptitude test will be conducted in the Dutch language.

The Bill mentioned above in par. 1.1 proposes a provision requiring knowledge of the Dutch language as an explicit condition for appointment as a notary. Apparently, this language condition has been applied implicitly, without statutory basis, until now. The supposition was that the required of a Dutch law degree also guaranteed sufficient knowledge of the Dutch language.

1.3 Recognition of professional experience for access to the public sector

There are no special statutory rules on this issue in the Netherlands.

2. WORKING CONDITIONS

There are no separate rules providing special working conditions for persons without Dutch nationality employed in the public sector.

A few opinions published in 2008 by the National Ombudsman or by the Equal Treatment Commission relate to complaints on racial discrimination or negative effects of (pretended) insufficient knowledge of the Dutch language filed by non-Dutch citizens working in the public sector, but none of those complaints were filed by nationals of other Member States.

Chapter VI

Members of the Worker's Family and Treatment of Third Country Family Members

1. RESIDENCE RIGHTS: TRANSPOSITION OF DIRECTIVE 2004/38/EC

Most provisions of Directive 2004/38 on family members have been transposed in 2006 in the Article 8.7(2)-(4) Aliens Decree giving an exhaustive definition of all family members of EU nationals covered by the special privileged regime of free movement specified in the Articles 8.7-8.25 of the Aliens Decree (*Staatsblad* 2006, no. 215). This definition covers spouses, registered partners, unmarried partners durably living together, children under 21 years and ascendants of one of the spouses or partners and, finally, dependent children of 21 years and older, either entering the Netherlands together with the EU national or joining him later. The meaning of those provisions is explained and specified in chapter B10 of the Aliens Circular.

This transposition of the Directive has been supplemented by an extensive change of chapter B10 of the Aliens Circular in a Decision of the Secretary of State for Justice of 23 January 2009 (WBV 2009/1), *Staatscourant* 29 January 2009, no. 1380. The amendments that entered into force on 31 January 2009, relate to three subjects: the issue of visa to third-country family members, the requirements for admission of unmarried partners and the return of Dutch nationals having used their free movement rights. The amendments can be seen as reactions to the ECJ judgments in *Eind* and *Metock* and a desire to reduce abuse of free movement rights.

As a belated transposition of the last sentence of Article 5(2) of the directive it is provided that visa to third country family members should be provided by the consular officers and at the Dutch border as soon as possible and free of charge. The family member has to prove the family relationship. In case of unmarried partners without a registered partnership a new requirement is introduced, justified as a specification of Article 8.7(4) Aliens Decree: they have to prove that their relationship lasted for at least six months and that they have a common household; this requirement does not apply if a child has been born out of the relationship. The requirement does not apply to spouses and registered partners of EU nationals, A2/6.2.2.2 Aliens Circular.

In chapter B10 Aliens Circular is it specified that the unmarried partner of an EU national has a right to enter and reside in the Netherlands only if he or she has proven to fulfil the new requirement mentioned before (B10/1.7).

Immigration authorities are reminded that third-country family members are exempted from the requirement of having a visa for long term residence (B10/2.1).

With the application for a residence document the unmarried third-country partner of an EU national has to sign a special declaration on their cohabitation (*'samenwoningsverklaring'*), stating that they actually live together, have a common household, use the same address and are registered in the municipal population registration (GBA) at that address (B10/5). Moreover, the immigration officers are instructed to check that the family relationship with the EU national actually exists before they issue a residence document with the mention 'family member of a citizen of the Union' (B10/5.2.2 Aliens Circular).

Finally, the old requirement that a Dutch national who returns to the Netherlands after having used his free movement rights is entitled to be accompanied or joined by his third-country family member only if he is performing actual and real economic activities in the Netherlands, has been deleted from B10/5.3.2.1 of the Aliens Circular. The requirement was based on the *Surinder Singh* judgment and it was deleted with reference to the *Eind* judgment. That judgment was extensively commented in Dutch legal literature, see Venekamp 2008 below; further comments on that judgment appeared in *Jurisprudentie Vreemdelingenrecht* 2008/1 (Groenendijk), *European Human Rights Cases* 2008/31 (Woltjer), *Nederlandse Jurisprudentie* 2008/137 (Mok).

In a letter of 26 January 2009 the Secretary of State for Justice commented the December 2008 first report of the Commission on the application of Directive 2004/38 in Member States, on some of the comments made in that report with regard to the Netherlands and on the expected follow-up of that report (TK 19 637, no. 1252).

1.1. Situation of family members of job-seekers

The situation of family members of job-seekers is not explicitly dealt with in the Aliens Act or the Aliens Decree. The Aliens Circular mentions third-country family members of job-seeking EU nationals in B10/3.1, where it is stated that those family members are treated under the general rules for family members if the job-seeker finds a job or if he has sufficient means to support himself and his family. In other situations, those family members are allowed to stay for three months in the Netherlands if they have a valid passport and a visa if required (B10/5.2.2 Aliens Circular).

1.2 Application of Metock judgment

The *Metock* judgment has made it clear that two intentions of the Dutch government to introduce new requirements for the admission of third-country family members of EU nationals can no longer be realised. Firstly, during the parliamentary debate on the introduction of the so-called integration exam abroad in 2005 the government expressed its intention to introduce that requirement for third-country family members of EU migrants. It interpreted the *Akrich* judgment as allowing for the introduction of that requirement. However, it decided to postpone the introduction pending the decision of the *Jia* case (C-1/05). Secondly, in the Explanatory Memorandum on the 2006 Royal Decree amending the Aliens Decree in order to transpose Directive 2004/38 in Dutch legislation there was an extensive discussion of the possibility to introduce the obligation of third-country family members accompanying or joining an EU migrant to obtain a long term residence visa (*'machtiging tot voorlopig verblijf'*) before entry in the Netherlands. Again, the *Akrich* judgment was mentioned as a justification for that requirement, *Staatsblad* 2006, no. 215, p. 16-18). The abovementioned 2009 amendments of the Aliens Circular illustrate that the government has realized that after the *Metock* judgment the introduction of both measures is no longer possible.

The *Metock* judgment has been commented in the Dutch legal literature in *Jurisprudentie Vreemdelingenrecht* 2008/291 by Groenendijk, in *Nederlandse Jurisprudentie* 2008, no. 574 by Mok, in *EHRC* 2008, 120 by Woltjer, in *Administratiefrechtelijke Beslissingen* 2009, 1 by Battjes, in *Nederlands Tijdschrift voor Europees Recht* 2009, p. 84 by Venekamp and in

NJCM Bulletin 2009, p. 92-104 by De Vries and Hilbrink. The judgment was subject of debate in the Second Chamber at the occasion of reports of the government on JHA Council meetings since September 2008 (TK 23490, no. 517, 518, 523, 524, 532 and 533) and on the issue of abuse of free movement rights.

1.3 How are the problems of abuse of rights (marriages of convenience) tackled?

(Article 35 of Directive 2004/38)

The issue of abuse of free movement rights was raised since November 2008 by MP's at the occasion of the debate on the budgets of the Ministry of Justice and of the Ministry of Housing and Integration, during the general debate on migration policy and after the publication of the abovementioned amendments of the Aliens Circular in January 2009. Both the *Metock* judgment and the issue of abuse was debated in the press as well. In the public debate on the issue the term 'Belgium route' gradually has been replaced by the more general terms 'Europe route' or 'U-turn' (Parl. Questions, TK 2008-2009 no. 552). This issue was subject of debate in the Second Chamber on 27 January 2009, see *Handelingen* TK 2008-2009, p. 4007-4026.

In answer the repeated question why the Dutch government did not react in the same vociferous manner as the Danish government against the *Metock* judgment, the Secretary of State for Justice Albayrak answered that the Dutch legislation was in line with that judgment (*Hand.* TK 5 November 2008, p. 1490).

Four different approaches to the issue of abuse of free movement rights are visible in the Netherlands. A first approach was the introduction of the special declaration and checks before issuing residence documents to unmarried not-registered partners of EU nationals discussed in par. 1 of this chapter. For an early example of the application of this new practice, see the judgment of the District Court The Hague of 4 February 2009 regarding a Uruguayan partner of a Dutch national who lived in Spain, in par. 4 below.

Secondly, the Secretary of State for Justice in several letters to the Second Chamber referred to pilot projects of certain regional police forces and the Immigration and Naturalisation Service (IND) focussing on applications for residence documents of certain categories of third-country family members. In a letter of 23 January 2009 she provides information on a pilot project of the IND and the police of The Hague concerning 'fake relationships between third-country nationals and EU migrants'. Between July and December 2008 a total of 65 applications for documents of migrant partners with such relationship were received. Half of those were considered 'suspected' of being related a fake relationship and in 10 of those cases the issue of residence documents had been refused so far (TK 30573, no. 33). Other pilot projects are mentioned in a letter of 27 January 2009 (TK 19637, no. 1247). In that letter a third approach is mentioned as well: a study by the research department of the Ministry of Justice of all cases where residence documents recently have been issued by the IND to third-country partners of EU nationals. This study may give a better picture of the actual scope of the abuse in reality. It is to be completed before the Summer of 2009.

The fourth approach was mentioned by the Secretary of State in the Second Chamber for the first time in October 2008 and later in a letter of 20.1.2009 mentioning the possibility of introducing a system of registration and notification between Member States as an additional instrument in combating fraud and misuse as mentioned in Article 35 of Directive 2004/38 (TK 19637, no. 1246). During the debate in October 2008 she specified that this would be

system where a Member State, suddenly receiving a large number of applications for residence documents by nationals of another Member State or observing another unusual development, would notify the other Member States concerned about this development. The Netherlands government would advocate the introduction of such a system within the EU (TK 30573, no. 14, p. 31/32).

2. ACCESS TO WORK

The Annex to the Implementing Regulation of the Aliens Employment Act, that lists the categories of non-Dutch nationals exempted from that act and, hence, having free access to all employment, mentions under point 1 the nationals of the EU Member States and their family members to whom Article 23 of Directive 2004/38/EC applies. Point 2 of that Annex confirms the exemption of the nationals of the EEA States and their family members covered by Article 7 of the EEA Agreement or by Article 23 of Directive 2004/38/EC.

In 2008 point 39 has been added to the list in that Annex mentioning a similar exemption for Swiss nationals and their family members referring to Article 4 and Article 7(e) of the EC-Switzerland Agreement on Free Movement of Persons, Decision Minister of Social Affairs of 27 June 2008, *Staatscourant* 25 June 2008, no. 120, p.11.

Two examples of practical problems confronting third-country family members wanting to work in the Netherlands are to be found in the case law reported in par. 4 below.

3. OTHER ISSUES CONCERNING EQUAL TREATMENT (SOCIAL AND TAX ADVANTAGES)

In the ongoing debate on the integration of Polish workers in the Netherlands, the government in 2008 for the first time has explicitly stated that the municipal authorities can offer language and integration courses to EU-nationals on the same conditions that apply for migrants with Dutch nationality and certain categories of third country nationals (see Chapter VIII, par. 3.6). The migrant who accepts the offer has to sign a contract with the municipal authorities on his participation in the course and pay 275 euro for the course (TK 29407, no. 95 and Aanh. Hand. TK 2007-2008, no. 3384). However, it was not explicitly mentioned that this advantage is extended to third-country family members. EU, EEA and Swiss nationals and their third-country family member are explicitly exempted from the obligation to participate in integration courses and pass the integration exam under the Integration Act that entered into force on 1 January 2007 (Article 5(2)(a) and (b) of the Act of 30 November 2006, *Staatsblad* 2006, no. 625). The Regulation on voluntary integration for residents in smaller municipalities mentions explicitly that the costs of integration courses offered by those municipalities a.o. to lawfully resident family members of EU nationals will be paid from public funds, Article 1(h) *Regeling vrijwillige inburgering niet-G31*, 2007.

4. JURISPRUDENCE

- A woman with the nationality of Venezuela married a Dutch national also having the Spanish nationality (dual nationality). The wife was refused an EC residence document

- because the Dutch national was living in the Netherlands and had not used his free movement rights with reference to the *Morson and Jhanjan* judgment. Referring to the judgments in *Avello*, *Chen* and *Micheletti*, it was held that the fact that the husband was a Spanish national living in the Netherlands constituted sufficient link with community law allowing his third-country wife to exercise free movement rights, Judicial Division of the State Council 15 July 2008, LJN: BD8585 and *Jurisprudentie Vreemdelingenrecht* 2008/356 with comments by Groenendijk.
- The Turkish partner of a Polish national employed in the Netherlands is detained with a view to deportation. It was held that the Polish partner does not have a right to ask for review of the decision on the detention of his Turkish partner. Since the partners do not have a registered partnership but only concluded a contract on living together, the Turkish partner is not a family member as defined in Article 2(2) and does not have a residence right under Directive 2004/38. Article 3(2)(b) of the directive only obliges a Member State to facilitate the entry and residence of a partner once a durable relationship has been proven. Hence, such partners do not have a residence right under the Directive but can only rely on the national law of the Member State. The relevant Dutch law requires that the relationship is duly proven and the third-country national has a valid passport. The IND contended that the extension of the validity of the passport is false. The detention was held to be lawful, Judicial Division of the State Council 17 September 2008, LJN: BF3060 and *Jurisprudentie Vreemdelingenrecht* 2008/399. Boeles in his critical comments on this judgment points to the judgment in *Reed* which may be the basis for a residence right under EC law and to the fact that the Turkish partner a few days after the judgment of the State Council was acquitted by a court of the criminal charges concerning the contended fraud with his passport.
 - The Iraqi spouse of an EU national living in Sweden was stopped behind the Dutch-German border and taken into custody by the frontier police. The Schengen Border Code does not infringe on free movement rights. However, Directive 2004/38 only grants the right to enter with the EU spouse or join that spouse in the Netherlands. Neither circumstance is present in this case. Since the spouse only presents a valid Iraqi passport but no Swedish residence permit, he does not have a right to circulate under Article 21 Schengen Implementing Agreement. Since the man has no lawful residence in the Netherlands he could be detained with a view to expulsion, Judicial Division of the State Council 22 February 2008, LJN: BC5224 and *Jurisprudentie Vreemdelingenrecht* 2008/142.
 - An EC residence card is refused to the partner with the nationality of Uruguay of a Dutch national who returns to the Netherlands after a stay in Spain and in Belgium. It is held that the claim of the IND that it is up to the Spanish authorities to judge whether the partners have lived together in Spain and whether the Uruguayan partner has a residence right under the EC Treaty is not correct. The case is not identical with the *Metock* case, because the family relationship is disputed by the Dutch authorities. The letters produced by the partners do not constitute sufficient prove of a durable relationship in the sense of Article 3 of Directive, since from the letters it appears that they have lived together in Spain but were domiciled at different addresses at that time, District Court The Hague, Aliens Chamber Middelburg 4 February 2009, LJN: BH2718.
 - A Belgian-Peruvian couple arrives at Schiphol airport and asks the border police to issue a visa for the spouse with the nationality of Peru because the couple wants to spend a few days as tourists in the Netherlands. At 17.30 p.m. the couple asks for administrative review of the refusal of the visa and the refusal of entry. At the same time, they ask the

judge on duty at the airport to issue an interim injunction. The same day at 21.00 p.m. the judge held that since the Belgian national has a right to enter and stay in the Netherlands under Articles 5 and 6 of Directive 2004/38, his third-country wife has the right to apply for a visa under Article 5 of the Directive and the *MRAX* judgment. It is ordered that a visa should be granted and entry should be permitted unless there are grounds for refusal under the Schengen Border Code, District Court The Hague, Aliens Chamber Haarlem 8 May 2008, *Jurisprudentie Vreemdelingenrecht* 2008/261.

- The Chinese fiancée of a Dutch national entered the Netherlands with a tourist visa. On the day of their marriage they moved to Belgium, where they were issued EC residence documents in the municipality of their domicile. The Dutch aliens police had withdrawn the visa and retained the passport of the Chinese spouse and refused for more than four months to return the passport to him. The National Ombudsman held that the aliens police was not sufficiently aware either of the right of the Dutch woman having used her right to free movement or the rights of her Chinese spouse under the free movement rules on family reunification. With reference to the *Metock* judgment the Ombudsman held there was no indication of a sham marriage or a fictive domicile in Belgium. The passport was retained by the police far too long and the Ombudsman recommended that the police would compensate the costs of the lawyer of the spouses. Report 2008 no. 319 of 29 December 2008.
- The family member of an EU national was issued a EC residence card mentioning free access to the labour market. It was held that the fact that the card entered into force in June 2007 did not imply that the family member did not have a residence right and a right to work in the Netherlands before that date. The IND should have checked whether the family member had already a right to reside and work on the basis of the EC Treaty before, President District Court Amsterdam 23 January 2009, *Migratieweb* ve09000131.
- The Iranian father of a minor daughter with Latvian nationality received an EC residence document mentioning ‘employment not permitted’. Because of that restriction the Centre for Work and Income (the official employment agency) refused to register the father as looking for employment. With reference to the *Chen* judgment, it was held that since the father actually takes care of his daughter and receives sufficient means for that end from his family, he has a residence right based on the EC Treaty. Taken into consideration Article 10 EC Treaty, the Centre for Work and Income should have consulted the IND before refusing the registration as jobseeker on the basis of the information provided by him. After the judgment the IND issued a new residence card mentioning ‘free access to employment’ to the father. District Court Rotterdam 27 October 2008, LJN: BH4732 and *Migratieweb* ve08001796.

Literature

- K. Vanvoorden, Betekenen de arresten *Jia* en *Eind* het einde van de België-route?, *Migrantenrecht* 2008, p. 84-93.
- A. Venekamp, Het arrest *Eind*, Het vrije verkeer: een begin zonder eind?, *Nederlands Tijdschrift voor Europees Recht* 2008, p. 130-137.
- K.M. de Vries, Inburgering in binnen- en buitenland: een overzicht van recente ontwikkelingen, *Migrantenrecht* 2008, p. 198-203.

Chapter VII

Relevance/Influence/Follow-up of recent Court of Justice Judgments

INTRODUCTION

Hendrix (C-287/05)

This case is about a Dutch frontier worker who worked and lived in the Netherlands. While continuing to work in the Netherlands, he transferred his residence to Belgium. Before his removal he was entitled to a benefit for handicapped people according to the Disablement Assistance Act for Handicapped Young Persons of 24 April 1997 (Wajong), which is listed in Annex IIa of Regulation 1408/71 as a non-exportable special non-contributory benefit. Therefore, once Mr Hendrix had left the country, the Dutch competent institution stopped paying that benefit applying the said provisions of Regulation 1408/71. However, as Mr Hendrix continued to be active as a worker in the Netherlands, the ECJ was asked whether the withdrawal of the benefit is not contrary to Article 39 or Article 18 EC Treaty.

The ECJ stated that Article 39 EC and Article 7 of Regulation 1612/68 must be interpreted as not precluding national legislation, meaning that a special non-contributory benefit listed in Annex IIa to Regulation No 1408/71 may be granted only to persons who are resident in the national territory. However, implementation of that legislation must not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings which goes beyond what is required to achieve the legitimate objective pursued by the national legislation.

Following the judgment of the ECJ, the Central Appeals Tribunal (Centrale Raad van Beroep-CRvB), which asked for the preliminary ruling, came up with a decision on 7 February 2008 (LJN: BC5204).

The CRvB cannot apply the ‘unacceptable degree of unfairness’-clause as suggested by the ECJ in this case because this provision was only introduced in the Wajong in 2001, while the issue at stake was situated in 1999.

However, the circumstances in this particular case do not fulfil the condition of paras 54-56 of the ECJ judgment that the legislation must not entail an infringement of rights, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. The CRvB referred to the fact that Mr Hendrix stayed employed in the Netherlands after he moved to Belgium and the close relation between his working activities and receiving the Wajong benefit. So therefore the appeal is granted.

In July 2008 the Central Appeals Tribunal used the ‘disproportionality reasoning’ from the *Hendrix* case to justify the entitlement to a Social Assistance Benefit to two British citizens, residing in The Netherlands during the period they would visit a rehabilitation clinic in Scotland. Withdrawal of the benefit because of the residence clause of the Social Assistance Act during this period was seen as an unjustified obstacle to the free movement of services. (Centrale Raad van Beroep 22 July 2008, LJN BD8764 and LJN BD8765).

See also Chapter IV.

Renneberg (C-527/06)

This is an important judgment for cross-border workers in particular. It concerns a Dutch citizen, who is a Belgian resident, who works in the Netherlands and wishes to make use of the mortgage interest deduction for his income tax. The European Court of Justice has ruled that Mr Renneberg may indeed claim a mortgage interest deduction in the Netherlands provided that he (essentially) only works in the Netherlands. In the Netherlands it is already possible for non-residents to claim a mortgage interest deduction but, based on the present Dutch rules, this can only be done if a ‘right of option’ (resident taxpayer status or not) is exercised. This ‘right of option’ has a number of drawbacks. Based on the above ruling it would appear that people who are non-resident (but who are also EU residents) in the Netherlands can claim a mortgage interest deduction without making use of a ‘right of option’ or rather by exercising a right of option but without all the drawbacks. The Supreme Court, who asked for the preliminary ruling, still has to issue a final judgment in this case.

Answering parliamentary questions the State Secretary of Finance informed Parliament on 9 December 2008 that the consequences of this ECJ judgement are still subject of further investigation (TK, 2008–2009, Aanhangel 1897).

See also Chapter IV.

Raccanelli (C-94/07)

The case concerned Mr Raccanelli who was a student at the Max Planck Institute for Radio Astronomy, part of the Max-Planck-Gesellschaft zur Förderung der Wissenschaften in Germany. Mr Raccanelli was funded by a doctoral grant given by the Institute. Under this grant Mr Raccanelli was not placed under an obligation to work for the Institute, and could if he so desired devote his entire time to this thesis. Researchers formally employed by the Institute were required to work during normal working hours for the Institute, and could only work on their theses outside of these normal working hours. Grant funded researchers, like Mr Raccanelli, were exempt from income tax and were not affiliated to the social security system. Employed researchers were liable to pay income tax and social security contributions. Mr Raccanelli was Italian, and complained to the Arbeitsgericht Bonn (comparing himself to German employees of the Institute) that he was being discriminated on the basis of his nationality in a working relationship, contrary to Article 7 of Council Regulation 1612/68 on freedom of movement for workers within the Community. The Arbeitsgericht Bonn referred various questions to the ECJ, including whether Mr Raccanelli was a worker. The ECJ said, *inter alia* “ a researcher preparing a doctoral thesis on the basis of a grant contract... must be regarded as a worker within the meaning of Article 39 EC only if his activities are performed for a certain period of time under the direction of an institute... if, in return for those activities, he receives remuneration”.

The judgment of the Dutch Supreme Dutch Court (Hoge Raad) in the case of a Dutch Ph.D. student working on a grant rather than an employment contract like his co-workers seems in accordance with this ruling of the EC Court of Justice. In its judgment of 14 April 2006 (case no. C04/352HR and C05/043HR [LJN: AU9722] the Supreme Court decided that Ph.D. students working on a grant should be considered as working on a labour contract according to the Civil Code. Three elements are decisive: work, remuneration and authority. Ph.D. research is part of the core business of a university and should therefore be considered

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as work. The Supreme Court qualifies a study grant as remuneration and according to Article 7:610a Civil Code (BW) the relationship should be considered as based on a labour contract when the work continues during three consecutive months weekly or for at least twenty hours a month.

The ruling of the EC Court of Justice and the judgment of the Supreme Court seem to prevent the intentions of the universities to attract in the future (foreign) Ph.D. students only on study grants (see Gerard Mols, rector Maastricht University in the university magazine *Observant*, 26 June 2008).

In its decision 2008-106 the Equal Treatment Committee (Commissie Gelijke Behandeling) used the *Raccanelli* judgment to establish a labour relationship in a situation in which a labour contract according to civil law was lacking.

Literature

Bep Waayenberg & Donald Pechler, Opening van zaken. Europees Hof: buitenlandse beurspromovendi worden mogelijk gediscrimineerd, *VaWoVisie* 2008, no. 4.

Chapter VIII

Application of Transitional Measures

1. GENERAL INFORMATION

During 2008, immigration of citizens from the EU-8 and EU-2 Member States and employment of workers from those countries have been the subject of series of often alarming articles in the press, much concern of local authorities in certain municipalities and repeated debates in Parliament. In June 2008 municipal authorities of the four major cities and of a group of smaller municipalities organised a meeting in Rotterdam to discuss the practical problems caused by the presence of workers from the EU-8 and EU-2 Member States. This meeting, popularly referred to as the 'Polen Top' (Polish Summit) received a lot of attention in the press (see also TK debate 17 June 2008, p. 6824-6827). The municipality of Rotterdam published a white paper on their policy measures regarding EU-10 nationals entitled 'Migration in good order: Central and East Europeans in Rotterdam' (*Migratie in goede banen: Midden- en Oost-Europeanen in Rotterdam*).

The number of registered immigrants from those countries clearly increased over the last years, primarily due to the relatively low unemployment (4%) and the high demand for labour in certain sectors. The total number of workers from those ten Member States employed in the Netherlands is estimated between 100,000 and 150,000. The total number of workers from those ten States registered with the national social security agency UWV in 2008 was approximately 75,000. The great majority of those workers were Polish nationals (86%); nationals of Rumania made up 3% and Bulgarian nationals only 1.4% (Heyma a.o. 2008).

The number of work permits granted for workers from the EU-2 increased slightly: for Rumanian workers 2,974 work permits were issued in 2008 (2,659 permits in 2007) and for Bulgarian workers 1,085 work permits were issued in 2008 (995 in 2007). Most of the permits were issued for employment in horticulture and agriculture: 73% of the permits for Rumanian workers and 60% of the permits for Bulgarian workers were issued for jobs in that sector; 10% of the permits for workers from Bulgaria were for jobs as a dancer or a waiter. The refusal rate for applications filed by Bulgarian workers was considerably higher than for workers from Rumania.

In July 2008, a motion by opposition parties asking to continue the transitional regime for the EU-2 was voted down in the Second Chamber (TK 29407, no. 86 and Hand. TK, p. 7597). But in November 2008 the government in a letter to the Second Chamber announced its decision to extend the transitional regime for workers from those two Member States after 2008. The main reasons given were the economic crisis, the expectation that neighbouring Member States would take the same position and the wish to avoid that the Netherlands would become more attractive for workers from Bulgaria and Rumania (TK 29407, no. 98). In that letter mention was made of a study on the possibility of abolishing the labour market test for the issue of work permits for workers from the EU-2 in certain sectors. But that idea was severely criticised in the Second Chamber (TK 29407, no. 100).

Most of the practical problems mentioned in par. 3 below were discussed in the media or in Parliament with regard to workers from Poland, but workers from Bulgaria and Rumania are confronted with the same problems.

2. CURRENT LEGISLATION

The Aliens Act 2000 (Article 17) and the Aliens Circular B10/1.2 stipulate that EU-2 nationals are exempted from the visa obligation.

The Aliens Regulation provides that on the residence permit granted to nationals from those two countries it should be mentioned that reliance on public assistance could result in loss of the residence right (Article 3.1(4) Aliens Regulation) and that employment is allowed only with a work permit (Article 3.2a Aliens Regulation).

The rights and obligations of workers from Bulgaria and Rumania under the transitional rules are explained in detail in the Aliens Circular in section B10/8 and in section B11/7 it is explicitly remarked that the Association Agreements with those two states are no longer in force.

Under points 37 and 38 of the Annex to the Ministerial Decision Implementing the Aliens Employment Act (*Wet arbeid vreemdelingen*) it is confirmed that workers from Bulgaria and Rumania are exempted from the work permit requirement after they have lawfully worked for 12 months in the Netherlands.

3. PRACTICAL PROBLEMS

3.1. Non-registration in the municipal population registration

In the Netherlands persons who intend to stay for less than four months within a period of six months are exempted from the obligation to register their residence with the municipal authorities of their place of residence. Since many workers from EU-8 and EU-2 Member States work in temporary or seasonal jobs only, they do not register with the municipality. Moreover, EU-2 workers who are employed without the required work permit normally will not register with public authorities at all. The result is that in certain municipalities there is a large and visible presence of workers from EU-10 countries, many of whom will only stay for temporary jobs, but the municipal authorities lack reliable information about numbers, places and length of their presence. This makes planning for housing and other facilities for these workers difficult.

In order to solve this non-registration problem the government instructed the tax-authorities, with whom the EU-10 workers usually apply for a social-fiscal number, and the authorities who deal with the applications for work permits for EU-2 workers, to forward information on those applicants to the municipal authorities (TK 29407, nos. 76 and 81).

3.2. Substandard housing

The issue of the substandard housing of seasonal workers from the EU-10 received a lot of attention in the political and media debate in 2008. Municipal authorities have repeatedly complained in the press about the poor housing conditions of EU-10 workers. One of the complaints is that they lack information and powers to improve the situation. According to the Aliens Employment Act, the Minister of Social Affairs has the competence to refuse a work permit on the ground of lack of appropriate housing. However, after 1 May 2007 this applies only with regard to Bulgarian and Rumanian workers. In practice this power is rarely

used. In the relevant policy documents the government repeatedly wrote about the ‘moral obligation’ of employers to provide for suitable housing. Moreover, in certain collective labour agreements it is provided that the employer is responsible for providing suitable accommodation for foreign workers. The actual implementation of such provision is left to the trade unions.

In practice the private employment agencies that play an important role as intermediary between EU-10 workers and their employers, sometimes provide accommodation for the workers they have contracted. Moreover, in several places the local authorities have promoted the establishment of special hostels or portable cabins or empty cloister, holiday parcs or former reception centre for asylum seekers for the accommodation of EU-10 workers (Hand. TK 30 September 2008, p. 396/7). However, reports in the press on overcrowded and dangerous housing, especially in low rent housing in big cities or in rural areas during the harvest season continue to appear. The Inspectorate of the Ministry of Housing (VROM) has opened a special facility where complaints about substandard housing can be filed. Until October 2008 200 reports were received, of which 30 about ‘potential housing abuses’ (TK 29407, no. 81, p. 8 and no. 98, p. 9).

3.3. Substandard wages and labour conditions

In reaction to repeated reports in the press and parliamentary questions about substandard wages and labour conditions of Polish and EU-2 workers, the government decided to intensify both the distribution of information about wages and labour standards and the control on the compliance by employers.

In 2008 the Labour Inspectorate received 82 complaints about substandard pay to EU-10 workers. During the first three months of 2008 a total of 665 employers have been checked by the Labour Inspectorate covering wage payments to 5,600 workers, among them 2,000 from EU-10 Member States. With regard to 310 workers wage payment below the statutory level of the Minimum Wage Act was detected; 188 of those were EU-10 workers, among those 34 workers from Bulgaria or Rumania. Until September 2008 a total of 24 employers were fined; the fines together totalled 750,000. The Labour Inspectorate also imposes a fine if the worker is paid the minimum wage, but the number of hours is structurally higher than is usual in that sector (TK 29407, no. 81, p. 7 and no. 98, p. 6).

3.4. Private employment agencies

Many Bulgarian, Rumanian and EU-8 workers are employed with the assistance of private employment agencies. This applies for the EU-2 workers lawfully employed as well as for those working without the required work permit. Again this issue is exploited and misrepresented by MP’s. In July a motion was adopted in the Second Chamber requesting the government to act firmly against ‘the estimated 6,000 mala fide employment agencies’ (TK 29407, no. 93). In reality the total number of employment agencies amounts to 2,000.

There are two professional organisations of employment agencies: the ABU and the VIA.

The ABU is the traditional branch organisation that has started a certification procedure to flag the bona fide agencies and weed out the weak brothers (TK 17050, no. 358 and Parl.

Questions, TK 2007-2008, no. 1466). The ABU established a special office that checks whether employment agencies comply with the collective trade agreement for this sector. That office receives a monthly average of thirty complaints about substandard pay and unlawfully long working hours. In 2007 the offices conducted 85 focussed checks. In half of the cases the employer had seriously violated the collective trade agreement. 42 employers were fined with fines ranging from € 5,000 to € 100,000; the fines totalled € 1.6 million; the total material damages were estimated at € 10.2 million (Van den Berg a.o. 2008, p. 35).

The VIA has around 30 member agencies that act as intermediaries for 40,000 to 50,000 foreign workers, primarily from EU-10, but from other Member States as well (see Boom a.o. 2008, p. 109). The VIA tried to conclude a separate collective labour agreement with an internet trade union that was supposed to represent EU-10 workers. According to the VIA the terms of that agreement were specially adapted to meet the needs of foreign workers, but normal trade unions voiced their concerns on the conditions. In the end no agreement was signed, because of the lacking membership of the internet trade union. The Minister of Social Affairs announced in June 2008 that a bill is being prepared that would support the campaign against mala fide employment agencies (TK 29407, no. 94, p. 7). The Bill has been introduced in Parliament in December 2008 (TK 31833). For parliamentary questions on a mala fide agency 'assisting' EU-10 workers, that went bankrupt, see Aanhangsel Handelingen TK 2008-2009 no. 1270.

A study conducted in 2008 revealed that only 1% of the 255 private employment agencies reported to have employed Bulgarian and Rumanian workers during 2007 (Van den Berg a.o. 2008, p. 10).

3.5. Undocumented employment

The Labour Inspectorate in 2007 detected a total of 2,894 foreign workers employed without the required work permit, out which 574 workers had Bulgarian nationality and 67 were nationals of Rumania (Boom a.o. 2008, p. 36). Considering that the number of work permits granted for Rumanian workers is almost three times as high as the number of permits issued for Bulgarian workers, this may be an indication that Bulgarian workers tend to be employed relatively often without the required work permit. EU-8 workers have free access to employment since May 2007.

3.6. Use of and contribution to Dutch social security system

In 2008 both in the press and in Parliament the issue of the 'abuse' of unemployment benefits and social assistance by Polish and other EU-10 nationals was raised repeatedly (Hand. TK 24 June 2008, p. 7084-7086, TK 30573, no. 25 and Parl. Questions 2007-2008, no. 2781). In July 2008 a motion introduced by MP's of the two main coalition parties was adopted by the Second Chamber, asking the government to take measures to reduce the dependency of EU-10 workers on unemployment benefits or to end their residence rights in the Netherlands (TK 29407, no. 88). The Minister of Social Affairs informed the Parliament that at the end of 2007 a total of 432 nationals of EU-10 Member States were receiving unemployment benefits and 350 EU-10 nationals were receiving social assistance (TK 29407, no. 96, p. 2). The percentage of those receiving unemployment benefits is equal to that of in-

digenous Dutch nationals, according to special study of the issue. That study also revealed that the contribution of EU-10 nationals to the Dutch social security system (with approximately 75,000 EU-10 workers registered with the national social security agency and thus paying social contributions) is by far greater than the costs of their use of that system (Heyma a.o. 2008). Since the large majority of these workers are employed for short periods up to three or six months only, most of them do not fulfil the conditions on the length of previous employment in order to qualify for unemployment benefits. Possibly some workers could have relied on the rules on aggregation in Article 67 of Regulation 1408/71. It is doubtful whether the workers and the agencies concerned are aware of this possibility. This information does not appear to prevent journalists and MP's to use EU-10 as scapegoats for playing on prejudices against foreign workers generally.

3.7. Integration courses

Like in previous years, several MPs asked the government to oblige EU-10 migrants to participate in the statutory integration courses. A motion proposed by MP's of the two main parties of the coalition asking the government to study the possibilities to oblige certain categories of EU-10 migrants to participate in the integration courses was adopted by the Second Chamber in July 2008 (TK 29407, no. 90) The government in a letter of September 2009 responded that obligatory participation in integration courses was prohibited by EC law (TK 29407, no. 95). Actually, EU nationals were explicitly exempted from the Integration Act that entered into force on 1 January 2007 (Article 5(2)(a) of the Act of 30 November 2006, *Staatsblad* 2006, no. 625). The government stated that the municipal authorities could offer language and integration course to EU-nationals on the same conditions that apply for migrants with Dutch nationality and certain categories of third country nationals. The migrant who accepts the offer has to sign a contract with the municipal authorities on his participation in the course and pay 275 euro for the course. The DVD entitled 'To the Netherlands' is being translated into Polish, Bulgarian and Rumanian and will probably be available in Spring 2009 (TK 29407, 95). In 2007 municipalities offered the integration course to 127 nationals and in 2008 to 306 nationals of EU-10 Member States (TK 29407, no. 98, p. 11). In Rotterdam in the Summer of 2008 a total of 115 EU-10 nationals had applied for participation in an integration course, among them 53 nationals of Poland, 14 Lithuanian nationals, 6 Latvian nationals and 5 Hungarian nationals.

3.8. Education of migrant children

In a letter of 20 December 2007 the Minister of Housing, Neighbourhoods and Integration informed the Parliament that approximately 7,000 children with an EU-10 nationality were attending a primary school, out of total of 1.6 million primary school pupils in the Netherlands. On the basis of the general funding rules, a school with more than 4 pupils from EU-10 countries who are not yet one year resident in the Netherlands, receives 4,600 euro extra staff costs and an additional 1,200 euro per pupil. The Minister of Education in March 2008 established a central information point in order to support schools with pupils from EU-10 countries and send a questionnaire to schools with many EU-10 pupils in order to survey the problems (TK 29407, no 81). In April 2008 a total of 184 pupils of EU-10 Member States

were enrolled at a primary school in Rotterdam; the largest groups were from Poland (129), Bulgaria (65) and Lithuania (28).

3.9. Health service

In the 2008 report of the municipality of Rotterdam the presence of approximately 40 nationals with drug or alcohol addiction are mentioned. Most of those persons do not have a domicile in the Netherlands and are not covered by a health insurance. The municipality has urged the government to take the initiative for an agreement among EU Member States on the voluntary or involuntary repatriation of those patients

4. JURISPRUDENCE

In 2008 more than 30 judgments of the Judicial Division of the State Council deciding the appeals of Dutch persons and companies that had been imposed high administrative fines by labour inspectors for having employed EU-10 workers without the required labour permit. Most of the cases concerned Polish nationals employed before the termination of the transitional measures with Poland in 2007. The persons and companies concerned contended that they had concluded a contract for services with a Polish firm that employed the workers and hence no labour permit was required or the Polish national was a self employed person. In most cases their appeals were rejected and the appeals of the Minister of Social Affairs against District Court judgment, that were critical of the use of this new power by the Minister, were allowed. See for instance Judicial Division of the State Council 23 April 2008, *Jurisprudentie Vreemdelingenrecht* 2008/248 with comments by Tjebbes and Judicial Division of the State Council 2 July 2008, *Jurisprudentie Vreemdelingenrecht* 2008/332 with comments by Oosterom-Staples. For a critical review of this case law, see Klap and De Lange 2008 and Tjebbes 2008 (cited below).

The application for a residence permit of a Turkish national who claims to be the partner of a Bulgarian national resident in the Netherlands and the father of a common child of Bulgarian nationality was refused and the applicant was detained with a view to expulsion. He asked for an interim injunction against the expulsion. In court he presents some documents in Bulgarian language and an apostille. It was held that the applicant could present translations of those documents in the appeal procedure in order to substantiate his claim that he is the partner and the father of a Union citizen and the Minister will be able to react to that claim. The expulsion was forbidden pending the appeal against the refusal of the residence permit, President of the District Court The Hague (Aliens Chamber Haarlem) 30 October 2008, LJN: BG8567.

In the case of a person who was convicted for smuggling two Bulgarian nationals into the Netherlands the Hoge Raad (Supreme Court) held that the crime of smuggling requires that the victims are not lawfully in the Netherlands. Since the two Bulgarian nationals had both applied for a residence permit with the aim of establishing themselves as self-employed persons, there residence in the Netherlands was lawful pending the decision on those applications. Hence, the conviction was annulled, Hoge Raad 15 January 2008, LJN: BA8499.

Literature

- N. van den Berg, *De grenzen verlegd, Evaluatie flankerend beleid vrije verkeer van werknemers MOE-landen*, Amsterdam: Regioplan 2008.
- J. de Boom et al., *Oost-Europeanen in Nederland, Een verkenning van de maatschappelijke positie van migranten uit Oost-Europa en van migranten uit voormalig Joegoslavië*, Rotterdam: RISBO 2008.
- A. Heyma et al., *De economische impact van arbeidsmigratie uit de MOE-landen, Bulgarije en Roemenië: een studie naar omvang, aard en economische effecten van arbeidsmigratie*, Amsterdam: SEO 2008.
- A.P. Klap & T. de Lange, Marktordening via het werkgeversbegrip van de Wet arbeid vreemdelingen, *Sociaal Maanblad Arbeid* 2008, p. 390-395.
- M. Tjebbes, De kruistocht tegen werkgevers van illegalen, De boete bij overtreding van de Wet arbeid vreemdelingen, *Migrantenrecht* 2008, p. 274-287.

Chapter IX Miscellaneous

Recognition of Diplomas

In 2008 a series of Ministerial Regulations concerning the recognition of professional qualifications acquired in another Member State, based on the general act implementing Directive 2005/36 in the Netherlands have been adopted. Several of those regulations relate to functions or professions that are primarily or to a large extent in the public sector. The main relevant regulations are those concerning functions in the judiciary (Regulation of the Minister of Justice of 8 December 2008, *Staatscourant* 24 december 2008, no. 2460), police officers (Regulation of the Minister of Interior 14 August 2008, *Staatscourant* 19 August 2008, no. 159, p. 7) candidate-notaries (Regulation of the Secretary of State for Justice of 12 December 2008, *Staatscourant* 24 December 2008, no. 2452), candidate-bailiffs (Regulation of the Secretary of State for Justice of 12 December 2008, *Staatscourant* 24 December 2008, no. 2459), fire-brigade officers (Regulation of the Minister for Interior of 30 June 2008, *Staatscourant* 11 July 2008, no. 132, p. 14) and jobs in the educational sector (Regulation of the Minister for Education and Culture of 16 January 2008, *Staatscourant* 30 January 2008, no. 21, p. 25).

Conference Celebrating 40 years of Free Movement of Workers : Old Problems and New Issues

One of the activities of the Network on Free Movement within the European Union is the organization of a conference to achieve a wider and more comprehensive understanding of the right of free movement of workers. This conference was organized in 2008 in Rotterdam on 14 and 15 November under the title: *Celebrating 40 years of Free Movement of Workers: Old Problems and New Issues*.

The conference was well attended with over 135 participants and very well received. Part of the contributions for this conference will be published in: Paul Minderhoud & Nicos Trimikliniotis (eds.), *Rethinking the free movement of workers: the European challenges ahead*, Nijmegen: Wolf Legal Publishers 2009.

This book will be presented at the second annual conference on Free Movement of Workers in Cyprus, 9-10 October 2009.

Teaching activities

Prof. Groenendijk has taught with prof. Guild and others on Directive 2004/38 special courses for judges on 13 May, 9 June and 6 October 2008 and given in house courses on European Migration law at the courts of 's-Hertogenbosch (22 May) and Zutphen (18 December). Directive 2004/38 was also taught in courses for lawyers and other legal specialists in courses organised by the Radboud University Nijmegen (18 June and 4 September)

Dissertations

- S. Claessens, *Free Movement of Lawyers in the European Union*, Nijmegen: Wolf Legal Publishers 2008, ISBN 978-90-5850-397-8.
- M. Olfers, *Sport en mededingsrecht, An interesting twosome*, Kluwer: Deventer 2009, ISBN 978-90-13-06271-7.
- H.C.F.J.A. de Waele, *Rechterlijk activisme en het Europees Hof van Justitie*, Den Haag: Boom Juridische uitgevers 2009, ISBN 978-90-8974-111-0.