# REPORT
## on the Free Movement of Workers in Belgium in 2004

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## List of Abbreviations

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| art. | article |
| C.D.E. | Cahiers de droit européen |
| C.D.S. | Chronique de droit social |
| CE | Conseil d'État (Council of State, Supreme administrative court in Belgium) |
| C.E.D.H. | Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales |
| C.J.C.E. | Cour de Justice des Communautés Européennes (= ECJ) |
| C.T. | Cour du Travail (Labour Appeal Court) |
| ECHR | European Convention of Human Rights |
| ECJ | European Court of Justice |
| J.T. | Journal des tribunaux |
| J.T.D.E. | Journal des tribunaux-droit européen |
| J.T.T. | Journal des tribunaux du travail |
| M.B. | Moniteur Belge |
| R.D.E. | Revue du droit des étrangers |
| R.D.C. | Revue de droit commercial |
| Rev. b. sec. soc. | Revue belge de sécurité sociale |
| Rec. | Recueil |
| Rev. not. b. | Revue du notariat belge |
| R.T.D.E | Revue trimestrielle de droit européen. |
| Rev. trim. dr. fam. | Revue trimestrielle de droit familial |
| Rev. trim. dr. eur. | Revue trimestrielle de droit européen |
| Rev. trim. D.H. | Revue trimestrielle des droits de l'homme |
| ss. | et suivant |
| T.T. | Tribunal du travail (First Instance Labour Court) |
| T.R.V. | Tijdschrift voor rechtspersonen en venootschap |
| T.V.R. | Tijdschrift vreemdelingen recht. |

# Introduction

Belgium has a long experience, reinforced by the presence of the European institutions in Brussels, in matters of free movement of European citizens and members of their family.

There are therefore many established rights ("*acquis communautaire*") that are not issues any more. This is not always the case in other countries. Therefore, to make comparison easier, some of the established rights are reminded at the beginning of the chapters.

You will find hereunder the summary of the main issues of this report.

### Summary of the Main Issues

*Three positive observations*

- Less formalities for entry and residence of EU citizens, and members of their family, and no reverse discrimination (I, A, 1).
- Broad application of the right to family reunification implementing *MRAX* case (IV and V).
- Broad application of *Grzelczyk*: social benefit for EU citizens (IX), but there are some limits (XI, E; citizenship).

*Two negative observations*

- The implementation of Garcia Avello by the new Belgian Code of Private International Law (art. 39) could be problematic on the question of the name. It could also have consequences on other civil rights like the right for same sex marriage (II, B and C).
- Difficulties in the equivalence of Diploma (X, C)

*One question*

- Is there legislation in Europe prescribing loss of nationality when a national has voluntary access to another nationality (XI, A)?

# Chapter I
# Entry, Residence, Departures and Remedies

No specific formality is required of an EC Member State citizen who is willing to enter or reside in Belgium. The EU citizen is automatically registered without taking any further step. Nor is any professional card required to exercise a professional activity. Free movement of persons is granted even for foreigners having applied for family reunification when their application is still pending. All foreigners, EU citizen as well as third country nationals, according to specific conditions, have the right to vote in municipal elections.

## Entry and Residence

### *1. Less formalities and no reverse discrimination*

The State Council (*Conseil d'Etat*) ruled by its judgment of 13 August 2004 that the administration had no power to withdraw a regular decision granting a Schengen visa to the husband of a Belgian woman (CE, 13 August 2004, judgement no. 134.292, *R.D.E.*, 2004, no. 129, p.415 – Annex no. 38). The withdrawal of the decision was solely based on a suspicious allegation of fraudulent marriage without any proof of the illegality of the decision. The State Council ruled that the foreign husband of the Belgian spouse is, according to art. 40, § 6 of the Belgian Law of 15 December 1980, assimilated to an EU citizen. The withdrawal of the decision that granted visa is construed as an interference with the family right protected in art. 8 ECHR. Such a separation of the couple is a violation of this fundamental right of Article 8, § 2 ECHR because it results in an obligation for the husband to be separated from his wife for an undetermined period of time. The State Council reminded on this occasion that refusing entry of foreigners, assimilated to EU citizens by the Belgian law, can only be decided for reasons of public order, public security or public health.

The State Council also ruled that, when authorities cannot prove that the family member – in this case, the wife – has personally endangered public order, an order of removal from the Belgian territory must be suspended even if her husband's behaviour is fraudulent, using false documents to obtain family grouping (CE, 8 September 2004, judgement no. 134.726, *R.D.E.*, 2004, no. 130, p. 583 – Annex 15). The administrative jurisdiction required that authorities prove the wife has, personally, used of fraudulent manoeuvres or knew that her husband used a false ID card to claim family grouping. When no fraudulent behaviour is alleged against the family member him- or herself, no order to leave the country should be delivered.

Like the *MRAX* case, these judgments reveal the importance, in Belgium, of the assimilation of Belgian family members to the EU, to avoid reverse discrimination.

Answering a Parliamentary question by J. Vandeurzen, the Home minister (question no. 227 of J. Vandeurzen of 30 March 2004 – Annex no. 17) declared on 26 May 2004 that an EU citizen willing to stay in Belgium has to present him- or herself at the municipality to be registered and obtain the residence permit. The EU citizen is automatically registered without taking any further steps. Of course, once he/she wants to stay, he/she has to prove that he/she is satisfying conditions provided by the EU directives.

This procedure is an anticipation of the system provided by Articles 9 and 11 of the 2004/38 Directive of 29 April 2004 relating to the right of citizens of the Union and their

family members to move and reside freely within the territory of the Member States (amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/ EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) since no preliminary registration is necessary to remain in Belgium. This is a major point of the Belgian administrative procedure regarding EU citizens willing to reside on the national territory. However, the position of Belgium in a pending case is slightly different (case C-408/03, see *infra* B, 1).

*2. Exemption from professional card for freelance workers*

The exemption provided by the Royal Decree of 3 February 2003 (*M.B.*, 4 March 2003) examined in the previous report is still applicable to certain categories of foreigners who plan to exercise a freelance professional activity. It provides for exemption from the professional card for a national of a Member State of the European Economic Area and his or her partner who settles with him or her, his or her spouse, his or her dependents or those of his or her spouse for whom they are responsible with the exception of the ascendants of a student or those of his or her spouse, the spouse of ascendants or descendants. This same exemption is applicable to nationals from the 10 new EU Member States as no transitional period is planned for workers exercising a freelance professional activity.

*3. Instructions for local governments*

Each year, instructions are sent to Belgian diplomatic and consulate posts in Casablanca (Morocco), Tunis (Tunisia), and Istanbul and Ankara (Turkey) to deliver a return visa, during summer holidays, to aliens who claimed family grouping as family members of a EU citizen and who went on holidays in their country of origin and who want to return to Belgium, where the family reunification application is still pending (Notice given to Mayors of the kingdom regarding particular cases of return visa delivered during the summer holidays 2004 to aliens who return to Belgium for proceeding a family reunification procedure based on Articles 10 and 40 of the 15 December 1980 law, dated 19 July 2004, *M.B.* 16 August 2004 – Annex no. 16). According to EU regulation, a D-Type Schengen visa is delivered to the spouse and dependent children, of Belgian or EU citizens, aged less than 21 years.

In 2004, visas delivered to descendants aged more than 21 years, to ascendants of an EU or Belgian citizen as well as to ascendants of Turkish nationals are subject to preliminary consultation of the "*Office des étrangers*" (Federal Public Service for Foreigners) in Brussels.

If this notice is deemed to ease the workload of the Belgian diplomatic and consulate posts abroad, it is regretted that it was only published in the official journal at the end of the summer period, considering the beginning of the academic year is 1 September.

Relating to this circular on return visas, it is not possible to assume that it indicates the existence of an excessively long administrative procedure. Moreover, the measure is surely positive but can hide delays in treating requests. Here again, this is impossible to establish in the current situation and no case law has been found.

*4. Voting rights*

When the Constitution extended the right to vote for municipal elections to EU citizens, it made also possible an extension of this right to third country nationals by the law at specific majority (2/3) adopted on 19 March 2004 (*M.B.*, 23 April 2004, *R.D.E*, 2004, no. 127, p. 136 – Annex no. 40).

The new article 8 of the Belgian Constitution is now written as:

> "The title of Belgian is acquired, preserved and lost according to rules determined by civil law.
> The Constitution and the other laws relative to political rights, determine which are, apart from this title, the necessary conditions for the exercise of these rights.
> In derogation to paragraph 2, the law can organise voting rights for European Union citizens not having the Belgian nationality, according to international and supranational obligations of Belgium.
> The voting rights referred to in the previous paragraph can only be extended by a law to residents in Belgium who are not citizens of a Member State of the European Union in the conditions and depending on the rules determined by the mentioned law."

The law extends the voting right for municipal elections to foreigners who have established their residence on the Belgian territory for five years preceding the elections. They simply have to introduce a written application at the municipality of their residence, declaring they will respect the Belgian Constitution, Belgian laws and the European Convention on Human Rights.

**Removal of Community Nationals**

*1. Removal of European citizens*

Removal of European citizens is unusual. However, Belgium considers that this removal can occur automatically if the European citizen does not have the required documents (European residence card), proving that he or she meets the conditions set for his or her right to reside. This is the object of a case pending before the ECJ (C-408/03, *Com. v. Belgium*, see also *infra*, Ch. V, a judgment contra of the Court of Appeals of Liège, Annex no. 14).

*2. Belgian compliance with EC law*

The Belgian State distinguishes clearly the applicable regime for removal of Community nationals from that applicable to third country nationals. This position is confirmed by the law adopted on 1 September 2004 *(M.B.*, 12 October 2004 – Annex no. 7), which implements Directive 2001/40/CE relating to mutual recognition of removal decision towards third country nationals. The law inserts a new article 8*bis* within the national law dated 15 December 1980 relating to access to the territory, residence, establishment and removal of aliens.

According to article 8*bis* of the 15/12/1980 law, the competent Ministry can recognise a decision of removal taken against an alien by an administrative authority linked by the

Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.

The recognition of the decision occurs if (a) the decision is based on a serious and present threat to public order or to national security and safety, taken in the following cases:

- conviction of a third country national by the issuing Member State for an offence punishable by a penalty involving deprivation of liberty of at least one year,
- the existence of serious grounds for believing that a third country national has committed serious criminal offences or the existence of solid evidence of his intention to commit such offences within the territory of a Member State.

The same recognition occurs if a third country national is the subject of an expulsion decision based on failure to comply with national rules on the entry or residence of aliens in another Member State.

If the person concerned holds a residence permit issued by a Member State party to the Directive, or by another Member State, the enforcing state shall consult the state that issued the removal decision as well as, if necessary, the state that issued the residence permit. The existence of an expulsion decision taken under this point shall allow for the residence permit to be withdrawn if this is authorised by the national legislation of the state that issued the permit.

*3. Deadline (5 months)*

As explained in the previous report, in application of the *Antonissen* jurisprudence, although setting a six-month residence deadline, renewable once only, for an EC job-seeker, if the person in question can establish that he or she is looking for and has genuine chances of finding a job, Belgian authorities still require the production of these items (employment contract) within a period of five months.

*4. Statistics relating to removal measures taken against Community nationals*

The answer given to a parliamentary question asked by B. Laeremans on the expulsion of delinquent foreigners shows that there are no specific figures relating to the number of removal measures taken against EU citizens. No difference is made between foreigners who are under such a measure (question no. 134 by M. B. Laeremans of 7 January 2004, *R.D.E.*, 2004, no. 127, p. 151 – Annex no. 41). Recommendations from the prosecutor's services are requested in each case but their opinion is not decisive. The administration confirms, however, that treatment of foreigners is different when they are nationals from countries of EU, EEE or assimilated, or refugees.

**Doctrine**

J.-F. Delforge is a public servant at the *Office des étrangers* (Federal Public Service for foreigners). He wrote the two following publications with guidelines to help the public servants in the local administrations:

J.-F. Delforge, *Droit de séjour des ressortissants de l'U.E.: compétences, procédures et pratique administrative pour toutes les questions ne relevant pas du regroupement fa-*

*milial* (Right to stay of EU nationals : competences, procedures and administrative practice for all questions not regarding family reunification), January 2005, Vanden Broele Editions, 45 pp. – Annex no. 60.

J.-F. Delforge, *Etrangers: Le regroupement familial: articles 10 et 40 de la loi du 15/12/1980 – Compétences, procedure et pratique administrative* (Family reunification: articles 10 and 40 of the law dated 15/12/1980 – competences, procedures and administrative practice), September 2004, 56 pp. – Annex no. 59.

P. Robert, Observations under ECJ, 19 October 2004, Case C-200/02, *Chen c/Secretary of State for the Home Department*, in *R.D.E.*, 2004, no. 130, p. 645 – Annex no. 36.

# Chapter II
# Equal Treatment

There are no great problems reported regarding formal equality of treatment between nationals and EU citizens. Equality of treatment is in general guaranteed by the Belgian constitution (art. 191).

### Preliminary Notice (P.I.L.)

The new Belgian Code of Private International Law has been adopted by the Law dated 16 July 2004 (*M.B.*, 27 July 2004 – see www.dipr.be, Annex no. 21). It entered into force on 1 October 2004. This work is part of a larger procedure of codification through EU law.

Indeed, Title IV of the EC Treaty provides for matters relating to visas, asylum, immigration and other policies related to free movement of persons. In particular, Article 65 provides that measures in the field of judicial cooperation in cross-border civil matters, taken in accordance with Article 67 and as far as necessary for the proper functioning of the internal market, shall include promoting the compatibility of the rules applicable in the Member States concerning conflict of laws and jurisdiction and eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

The roots of this codification movement can be found in the EC Regulation, so-called Brussels I (Regulation CE 44/2001 of the Council dated 22 December 2000), Brussels II (Regulation CE 1347/2000 of the Council dated 29 May 2000) and Brussels II bis (Regulation CE 2201/2003 of the Council dated 27 November 2003 in force since 1 March 2005).

The Belgian Code of Private International Law provides in its article 2 that:

> "Subject to application of international treaties, European Union law or provisions contained in specific legislations, the present law rules, in an international situation, the competence of the Belgian jurisdictions, the determination of the applicable law and the conditions of the efficiency given in Belgium to foreign judiciary decisions and foreign official acts in civil and commercial matters."

The new codification is thus subject to any modification of the EU law in the primary legislation (the Treaty) as well as in the secondary law (EC Regulations or Directives).

### Nationality/Combating Discrimination/Ban on Discrimination based on Nationality

Article 3 of this new Code of Private International Law provides that, in accordance with the Hague Convention of 12 April 1930, the nationality of a private person is ruled by the law of the State of which he or she is a national. Further, the new Code provides that any reference made in the present law to nationality of a private person who has two or more nationalities refers to the Belgian nationality, if it is one of his or her nationalities. Consequently, each Belgian citizen is considered as Belgian by the new Code even if he or she has another nationality and this is an obligation, not a possibility. It is an application of the nationality Code which is not in contradiction with the *Michelletti* judgment given by ECJ on 7 July

1992 (Case C-369/90; or the *Mesbah* case, C. 179/98, 11 Nov. 1999). But no indication is given by the new Code in case of a EU citizen having a double nationality of two Members States. According to the new Code, in application of Article 3, a bi-national having the Belgian nationality will be considered as Belgian even if he or she has the nationality of another Member state.

It is not certain that this application is in compliance with the ECJ recommendation made in the *Garcia Avello* case, where the Court insists on the fact that

> "Article 3 of the Hague Convention, on which the Kingdom of Belgium relies in recognising only the nationality of the forum where there are several nationalities, one of which is Belgian, does not impose an obligation but simply provides an option for the contracting parties to give priority to that nationality over any other". (ECJ, 2 October 2003, *Garcia Avello c. Belgian State*, C-148/02, §28)

Also relating to *Garcia Avello*, the new Article 39 of the Code relating to name modification can be pointed out.

Article 39 provides:

> "A judiciary or administrative foreign decision modifying the determination or the modification of the surname or first names of a person is not recognised in Belgium if, in addition to the existence of one of the reasons for refusal provided at article 25:
> 1o. in case of modification by voluntary act, this person was Belgian at the moment of the modification, unless the achieved name complies with the rules relating to the determination of the name applicable in the Member State of the European Union where the person is national; or
> 2o. the determination of the name or the first names does not comply with the Belgian law when this person was Belgian at the determination; or
> 3o. in the other cases, this determination or this modification is not recognised in the State of which this person is a national."

Although this provision was specifically amended to meet the *Garcia Avello* judgment, this article is not a correct implementation of the ECJ lessons. Indeed, according to the preliminary parliamentary debates, it was substantially amended by the Senate before its adoption.

This provision seems to automatically accept a name modification only if a judiciary or administrative modification has been achieved abroad. However, this was not the case for Mr. Garcia Avello. He never engaged in any procedure in Spain to modify his children's name. The children's name was already Garcia-Weber in Spain, without any procedure of name modification.

Mr. Garcia Avello only claimed in Belgium the right to allow their dual nationality children to use the same double name that Spanish law allows him to give to his children. He never pretended giving effect to a Spanish decision in Belgium.

However, the minister of Justice's interpretation of Article 39 seems to be that a name modification could not be recognised in Belgium if a procedure has not been achieved abroad.

The future practice made of case law and of the minister of Justice will be decisive to appreciate the conformity of this provision with the ECJ instructions found in the *Garcia Avello* case.

**Gender/Equal Treatment for Men and Women**

The new Belgian Code of Private International Law deals with the question of homosexual marriage. According to Article 46, the new Code allows same-sex marriage not only for people of Belgian nationality but also for those whose national law or law of the state of habitual residence allow it.

Article 46 reads as follows:

> "Subject to Article 47, the conditions of marriage validity are governed, for each of the spouses, by the law of the state whose nationality is held at the time the marriage is celebrated.
> The application of a clause in the law referred to by virtue of paragraph 1 is excluded if this clause prohibits marriage between people of the same sex if one of them is a national of a state or has his habitual residence on the territory of a state where the law allows such marriage."

Consequently, a European with his habitual residence in Belgium, in the Netherlands, or in Spain, may always enter into a same-sex marriage in Belgium, whatever the nationality and the residence of his partner.

This "positive public order provision" inserted in the new Code has the effect of making possible, for instance, a same-sex marriage between a French citizen and a Belgian. The same provision would allow any Belgian citizen or any EU citizen with a residence in Belgium to enter into marriage with any other EU citizen and with any third country national.

The question of a Belgian citizen in another EU Member State is not yet absolutely clear. However, in the light of the *Garcia Avello* case, it should be considered that a Belgian citizen is allowed to claim the application of the national law and to be authorised to enter into a same-sex marriage when the national law gives him or her a right denied in another EU Member State in accordance with its national law.

Consequently, this Belgian citizen should be entitled to enter into a same-sex marriage in any EU Member State. It is not certain that the ECJ intended to give such an effect to its decision, but the new Article 46 of the Code is clearly a new place to play the game of free movement of citizens with their national rights.

This is applied with retroactivity to all same-sex marriages since 1 June 2003.

In fact, before the code entered into force, a circular dated 23 January 2004 (*M.B.*, 27 January 2004, *R.D.E.*, 2004, no. 127, pp. 110-113, Annex no. 27 and 42) did give instructions to the registry public officer and general prosecutors at the court of appeals concerning same-sex marriages introduced in Belgium by the law dated 13 February 2003. This circular replaced a former circular dated 8 May 2003. According to this new circular, a provision of foreign law which would forbid same-sex marriages will be dismissed when one of them has the citizenship of, or his usual residence in, the territory of the state whose law admits this homosexual marriage. Consequently, a provision from another Member State that denies same-sex marriage is considered as discriminatory and in violation of the Belgian international public order.

A recourse in cancellation against the law dated 13 February 2003 opening same-sex marriages was introduced at the *Cour d'Arbitrage*, the Belgian Supreme Court, on 27 August 2003. The *Cour d'Arbitrage* gave its judgment on 20 October 2004, rejecting the demand on the merits (Extracts of the judgment no. 159/2004 given by the *Cour d'Arbitrage* (Supreme Arbitration Court) on 20 October 2004, *M.B.,* 29 October 2004 – Annex no. 4).

The Court argued that the will of Parliament was to consider, from now on, that marriage is an institution whose main objective is the creation, between two people, of a lasting life in common whose effects are ruled by the law. In such a conception of marriage, a difference of treatment between, on the one hand, people who are wishing to enter into a lasting life in common with someone of the other sex and, on the other hand, those who wish to live such a community with a person of the same sex, is not that "serious" that it is necessary to exclude the latter from the possibility of entering into marriage. In this view, family is not the only way to reproduce society any more (which was called in French: "*la pépinière de l'État*").

*2. Institute for Equality between Women and Men*

In March 2004, the creation of an independent public body, the Institute for Equality Between Women and Men, was the consequence of the adoption of the law of 16 December 2002 (M.B., 31 December 2002 – Annex no. 22). It led to the installation of the managing organs such as the board committee and the management team.

This Institute is in charge of preparing and implementing decisions taken by the government, the follow-up of European and international policies relating to equality between women and men. Its missions are under the control of the authority of the competent minister. However, the competent minister can only give positive injunctions to the Institute. The Institute is authorised to collect any opinion coming from the Communities, the Regions as well as provincial and local authorities and any other public body as necessary to achieve its missions (summary and extracts of the website of the Institute – Annex no. 5, 23, 24).

Each year, the Institute submits a detailed report on the execution of its mission to the competent minister who will transfer it to the federal legislative assemblies.

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In 2004, the Institute collected a vast documentation database on equality between women and men (Institut pour l'égalité des femmes et des hommes, *Documentation de base*, Janvier 2004 – Annex no. 25). Published as a folder, this collection is a legal database on the problem of equal opportunities in work. Mainly, it contains legal and regulatory texts as well as case law, in EC law and Belgian law. The folder is accompanied by an important bibliography on the matter. It is downloadable totally free of charge from the website of the Institute at the following address: http://www.meta.fgov.be/pa/paa/framesetfrcg00.htm.

Two recommendations risen in 2004 and adopted by the Council for equal opportunities between men and women (*Conseil de l'égalité des Chances entre Hommes et Femmes*) can be pointed out: Recommendation no. 73 dated 20 March 2003 relating to the European Constitution, approved by the Council on 10 April 2003, and Recommendation no. 76 dated 17 October 2003 relating to a balanced representation of men and women for the social elections in 2004.

**Other Discrimination Criteria**

As mentioned in the previous report, a law has been passed with a view to banning all forms of direct or indirect discrimination (Law of 25 February 2003 intended to combat discrimination and amending the law of 15 February 1993 creating a centre for equal opportunities and combating racism, M.B., 17 March 2003, Appendix no. 8, report 2003). An independent body is responsible for providing assistance to the victims of discrimination: the Centre for Equal Opportunities and Combating Racism.

The abovementioned Centre has a specialised service for non-racial discrimination. The annual report of the Centre contains specific figures relating to the claims it received based on the new law (Extracts of the annual report of the Centre for Equal Opportunities and Combating Racism, published on the website www.diversite.be – Annex no. 6).

The annual report shows that the Centre dealt with 267 claims since the law entered into force on 27 March 2003. In particular, 30.5% of these claims were founded on discrimination of disabled persons, 13.1% on sexual orientation and 6% on religious or philosophical convictions; 19.5% of the claims were rejected on the merits either because the Centre was not competent or because the discrimination had taken place before the law entered into force.

Other criteria of discrimination are analysed at their own place in the report, this explains why discrimination of disabled persons is examined above.

Further, considering Article 13 EC Treaty and secondary legislations in EU law, it becomes interesting to analyse whether other criteria of discrimination have the effect of limiting free movement of people within the EU Member States although Article 13 has no direct effect.

According to the Centre, 20% of the total amount of the claims are well founded on the new law. Three judicial actions were introduced which are still pending. To solve the problems, the Centre recommends a median solution consisting of developing collaboration and cooperation with other associations, institutions, public bodies or trade unions. It emphasised meetings and collaborations with local and regional administrations as well as with NGOs and the associative sector. It also participated in several exhibitions, symposia, and cultural events as it developed specific training and campaigning in the related fields.

In appendix to the annual report of the Centre relating its activities, there is also a summary and a criticism of the new law after one year of experience.

From this publication, it can be seen that, as mentioned in the previous report, the application of the new law is far from easy because certain kinds of cases do not match the field of application of the law. The federal situation of Belgium does not make things easier since in the respective matters of competences, Regions and Communities have to implement the EU directives (Directive 2000/43 and Directive 2000/78) implemented at the federal state level in the 25 February 2003 law. In the Walloon Region, only a project of Decree has been written but has not yet been approved by the regional Government. The same situation is found in the Brussels-Capital Region. However, the Flemish Region had already adopted a Decree on 8 May 2002 relating to proportional participation in the labour market.

The new law adopted on 25 February 2003 could also be in opposition with other fundamental rights or general principles of law such as freedom of speech or freedom of contracting. The Centre advocates an action in suspension as found in consumer law or environmental law. It insists also on the reversal of the burden of proof installed by the new law,

explaining that the impact of this provision is far from correctly construed by the jurisdictions as well as by the authors.

A symposium was held on 29 and 30 April 2004 in Louvain-la-Neuve on the subject of discrimination against all forms of disabilities. Proceedings will be published by Bruylant. The documents can be accessed at www.drt.ucl.ac.be/DH (Program of the symposium – Annex no. 26).

In the previous report, another point underlined a judgment by the Court of Appeal of Liège regarding a young woman willing to wear a headscarf on her identity photograph. This judgment was commented in a legal review (see *infra*, Doctrine, Banneux).

Contrary to France, this situation does not cause much debate and is not so much subject to controversial positions. However, it results from press and media that several young French women have come to study in Belgium, using their free movement in the EU Member States.

**Doctrine**

J.-L. Renchon, L'ordre juridique belge: compétent universel? (Belgian judicial order ; universal competent?) observations following the publication of the circular dated 8 May 2003 regarding the law of 13 February 2003 opening marriage to people of the same sex and modifying certain provisions of the civil code), *Rev. trim. Dr. fam.*, 1/2004, p. 253 – Annex no. 27.

J.-L. Renchon, L'avènement du mariage homosexuel dans le Code civil belge, (the advent of the homosexual marriage in the Belgian civil Code) *Revue de droit international et de droit comparé*, 2004, p. 169 – Annex no. 28.

J. Jacqmain, La loi anti-discrimination après l'arrêt de la Cour d'Arbitrage: et le droit européen?, (the anti-discrimination law after the Court of Arbitration judgement : and European Law ?), *Journal du Droit des Jeunes*, no. 239, Novembre 2004, p. 3 et 4 – Annex no. 13.

N. Banneux, Voile islamique et droit subjectif au renouvellement de sa carte d'identité (Islamic headscarf and subjective right to renewal of the ID Card), observations under Liège, 5 January 2004, in *Faculty of Liège Law Review*, 2004, p. 172 – Annex no. 3.

J. Jacqmain, Et omnia discrimination, *Journal du Droit des Jeunes*, 2003, no. 227, p. 18.

# Chapter III
# Employment in the Public Sector

## General Remarks

Generally, Europeans in Belgium do not meet any difficulty for access to employment in the public sector, except sometimes because of the requirement of the knowledge of Dutch, one of the lesser known national languages.

By a law dated 11 March 2004 (M.B. 11 March 2004, *R.D.E.*, 2004, no. 127, p. 131 – Annex no. 43), the Brussels-Capital Region enlarged conditions of nationality for access to employment in the municipal civil service and in administrations depending from several municipalities. This law allows non-Belgian and non-EU citizens to be employed as far as civil service does not include any participation, direct or indirect, in exercising public powers and duties that involve protection of general interest of the state or of any other public bodies.

In relation to the nationality condition for access to public sector employment, different authorities (Foreign Office, Ministry of Justice and Ministry of Finance) have been questioned about their practices and their answers have not yet arrived.

The same questions have been asked to the Brussels local authorities, but based on the mother tongue requirement in job offers.

From the analysed case law of the State Council, no discrimination seems to appear for the period under revision.

There does not seem to be any problem in Belgium for the access of EU citizens to employment as Captain in the merchant navy. No specific case law has been found relating to nationality conditions for access to posts of masters of ships flying the Belgian flag.

## Doctrine

J. Jacqmain, Libre circulation des travailleurs dans le secteur public, *Chroniques de droit social*, no. 3, mars 2004, p. 121 – Annex no. 44.

# Chapter IV
# Family Members

## General Remarks

Several decisions in the case law reveal a broad interpretation of the requirement to prove family ties.

The right to family reunification was applied by the *Conseil d'État* (State Council) to an adopted child. The State Council, in a judgment of 28 January 2004, decided that the administration should analyse the effects of an adoption agreement between a Malian child and his French mother, holder of a residence permit in Belgium as a EU citizen, on the merits of an establishment application rather than on its admissibility. The supreme administrative court considered that the proof of family tie was sufficient, as the adoption agreement seems valid in its form, whatever the effects of this adoption. The administration did refuse the admissibility of the request for a right to reside, arguing that the judgment of adoption, made in Mali, was just a "protection adoption" and not a "filiation adoption", so that this judgment was not sufficient proof that the adopted child is a descendant. The State Council cancelled this administrative decision considering that the proof is a matter of substance and not of admissibility (C.E., 28 January 2004, judgment no. 127.540, *R.D.E.*, 2004, no. 127, p.30 – Annex no. 45).

The State Council acknowledged the lack of provision in the current law concerning proof of family ties for a foreigner claiming establishment as member of the family of a EU citizen. In this respect, testimonies from the embassy attesting the destruction of legal documents should be construed as beginning of evidence for proving the family ties between the persons (C.E., 5 May 2004, judgment no. 131.100, *R.D.E.*, 2004, no. 128, p.202 – Annex no. 46)

In its recommendation dated 24 February 2004, the Consultative Commission for Foreigners, an appeal body, applied the *MRAX* case (CJEC, 24 July 2004, case no. C-459/99) when it decided that lack of visa could not be used as a basis for refusing establishment of a non-EU citizen married to a Belgian woman. In this recommendation, the same Commission had to construe the extent of the words "are dependants" used in Article 10 of Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. According to the *Lebon* case, the Consultative Commission for Foreigners ruled that the condition of "dependant" must be appreciated *in concreto* without taking into consideration the origin of the incomes of the worker or the reason why it is necessary to use this support (Recommendation no. 4.496.157 of 24 February 2004, *R.D.E.*, 2004, no. 129 p. 429 – Annex no. 47).

This is not the position of the Belgian State in the pending case C-408/03 (*infra*, XI, E).

## Doctrine

J. Lejeune, La directive 2003/86/CE du Conseil du 22 septembre 2003 relative au droit au regroupement familial, *Journal du Droit des Jeunes*, no. 236, juin 2004, p.13 – Annex no. 29.

R. Plender, Quo Vadis ? Nouvelle orientation des règles sur la libre circulation des personnes suivant l'affaire Akrich, *Cahier de droit européen*, 2004, no. 1-2, p. 261 – Annex no. 30.

P-F. Docquir, Droit à la vie privée et familiale des ressortissants étrangers: vers une mise au point d'une protection floue du droit au séjour (on the ECHR case law about art. 8 ECHR), *Revue trimestrielle des droits de l'homme*, 6/2004, p. 921.

# Chapter V
# Influence of Recent Judgments of the European Court of Justice

A judgement of the Court of Appeal of Liège dated 4 May 2004 made application of the *MRAX* case given by ECJ on 25 July 2002 (*Cour d'appel de Liège*, 4 mai 2004, RG no. 2003/909 – Annex no. 14)

The first interest of the decision resides in the declaration of the Court of Appeals that an EU citizen who cannot prove his or her identity other than with a driver's licence has a distinctive interest to claim a judiciary action rather than introducing an administrative recourse.

The Court of Appeal says that the alien has "a specific interest" to continue a judiciary procedure even if an administrative procedure is still pending because both procedures have a significantly different object. The administrative procedure aims at recognising his right to remain whereas the judiciary procedure aims at receiving a document attesting that the alien has this right to remain.

The second interest of the judgement is that it applied the *MRAX* judgment when the alien is in the impossibility to prove his or her identity.

The position of the Belgian state is to refuse the right to stay to any alien who cannot prove his or her identity. Basing its point of view on points 1 and 2 of the European judgment, the Court of Appeal considers that the ECJ has taken into consideration the situation of an alien, spouse of an EU citizen, who is on the Member State territory without documents or with expired documents. In this case, it is a fact that the alien cannot prove his or her identity. This proof can be made by any means other than an ID card or a passport since the ECJ postulates that the alien is not in possession of an ID card or passport.

In this case, the alien proves his identity with a driver's licence which is not alleged to be false. The Mayor married them without doubting his identity, the act of marriage is an official proof and the Belgian state in its administrative file has a certified copy of the birth certificate of the alien delivered in 2001 which corresponds to the alien's declarations.

Consequently, the Court of Appeal condemns the Belgian state to deliver the document attesting that the alien, spouse of the EU citizen, has the right to stay as he should be entitled to be allowed to prove his identity in any way he can.

# Chapter VI
# Policies of a General Nature with Possible Repercussions on the Free Movement of EU Citizens

No specific question is mentioned here as the questions regarding for example equality of sex or same-sex marriage are explained in the different chapters of the report.

# Chapter VII
# EU Enlargement

### General Remarks

A law was adopted on 16 January 2004 (M.B. 15 April 2004 – Annex no. 31) by the federal Parliament to ratify both the EU Treaty between EU Member States and the 10 new European candidate states, and the Final Act signed in Athens on 16 April 2003. The Treaty and the final Act themselves were published in the *Moniteur belge*, the official Belgian journal, on 26 April 2004.

The same Treaty was ratified by the French Community who adopted a Decree on 5 December 2003 (M.B. 3 May 2004 – Annex no. 32 and 35), by the German Community who adopted a Decree on 19 January 2004 (M.B. 07 April 2004 – Annex no. 33) and by the Flemish Community who adopted a Decree on 5 March 2004 (M.B. 8 April 2004 – Annex no. 34) as provided by Article 77 of the Belgian Constitution.

The Belgian government decided to apply a 2-year transitory period as provided by the Treaty on EU enlargement with the 10 new European countries and the Final Act signed in Athens on 16 April 2003.

Accordingly, Belgium decided to modify the generic Royal Decree of 8 October 1981 on access to the territory by a new Royal Decree dated 25 April 2004 (M.B. 17 May 2004 – Annex no. 18 and 19) to implement the transitory period starting on 1 May 2004 and expiring on 30 April 2006. Workers of the 8 new Member States (Malta and Cyprus are excluded) are still subordinated to the national regulation relating to access to the Belgian territory. They still have to produce a residence permit delivered at the Belgian embassy or consulate in their country of origin. According to the current regulation, they must have a work permit to obtain a professional visa from the embassy. This work permit is delivered by the competent regional authorities based on the seat of the employer (Walloon, Flemish, or Brussels Capital Region). The work permit is delivered to an alien only if, in the relevant labour market, no Belgian citizen can be found to do the job.

The Royal Decree dated 25 April includes a facility for those workers who, at the date of 1 May 2004, are already legally employed for a non-interruptive period of at least 12 months and are holder of an unlimited authorisation of stay in Belgium at the same date. Such workers are entitled to stay on the Belgian territory without being obliged to go back to their country to request a residence permit through the embassy.

This Royal Decree was completed by a very long administrative circular dated 30 April 2004 (M.B., 17 May 2004 – Annex no. 48) explaining the general context of enlargement and distinguishing citizens of new Member States and their family members willing to remain in Belgium after 1 May 2004, and those who were already living in Belgium before this date.

A facility has been given to all persons authorised to stay at the date of 1 May 2004 or authorised to an unlimited stay at the same date. Consequently, the Royal Decree provides that in granting of a work permit, the national labour market is not taken into consideration for those workers who, on 1 May 2004, were already legally working in Belgium and were already admitted on the national labour market for a period of 12 months or for those workers who, after 1 May 2004, are admitted to the national labour market for a period of 12 months. The same regime is applicable to the family members of the abovementioned work-

ers considering the spouse, descendants aged less than 21 years and dependants provided they come to live with this worker.

Some problems have occurred since 1 May 2004, relating to citizen from new Member States who were willing to establish in Belgium. A sort of ping-pong game took place when they applied for a residence permit. Indeed, the municipal administration of their residence in Belgium sent them back to their country of origin, arguing that they have to apply for the residence at the Belgian embassy in their country of origin. Back in their country, the Belgian consulate or embassy refused their application for residence, arguing that they can have the benefit of free movement since 1 May 2004 without any further steps before leaving the country.

According to the information collected from the "*Office des Etrangers*" (Federal public service dealing with foreigners), the general provisions from the Belgian law on access to the territory (Law of 15 December 1980) are applied to these citizens from the new Member States, during the transitional period (until April 30, 2006). Consequently, they are subject to Article 9 of this law and should in principle apply for residence authorisation from the Belgian embassy in their national state. However, exemption is applicable to citizens from new Member states who did have a work permit for 12 months during the year before 1 May 2004 and who already stayed legally in Belgium at this moment. But an exemption is also possible if the worker has exceptional motives to introduce the request in Belgium (for instance because he is already in Belgium as a student or has family members in Belgium).

Clear new information contained in a circular coming from the Foreign Minister (Public Federal Service Foreign Matters) was sent to the Belgian consulates and embassies localised in the 8 new Member States concerned (TC 181 – Annex no. 58).

This circular reminds diplomatic posts established in the ten new States member of the main principles applicable to citizen coming from these countries.

1. Short stay of maximum three months is allowed without restriction provided a valid passport or ID card.
2. Cyprus and Malta citizens are considered as former EU citizens and workers without any restriction from 1 May 2004. All the rules applicable to EU citizens will be automatically applicable for them and they are entitled to have the right to establishment according to the family reunification law (art. 40 of the Belgian law 15/12/1980.
3. Renters, students and retired people coming from the eight other new Member States have the right to free movement of persons without restrictions, as Malta and Cyprus citizens.
4. During the transitional period applicable in Belgium until 30 April 2006, salaried workers can meet some restrictions in their right to stay as they would only be allowed to work and to stay in Belgium under the condition of holding a work permit.
5. After 12 months of uninterrupted and regular period of working, these workers will be eligible to claim a right to establish. It is unclear if these workers will be authorised to claim establishment from the local administration of their residence or whether they will be obliged to introduce the request from the Belgian diplomatic post in their country of origin.
6. A dispense of work permit is given to workers who provide services in Belgium through an enterprise. The work permit would be considered here as an obstacle incompatible with the provisions of the Treaty relating to free movement of services and in contradiction with the case law of the ECJ. By the way, these workers are dispensed of provi-

sional authorisation of stay. They only have to declare their arrival at the local administration.

Up to now, no relevant figures are given on the numbers of citizens from new Member States arrived in Belgium since 1 May 2004 (see *infra*, statistics).

**Doctrine**

N. Bouziane, La libre circulation des personnes dans l'Union européenne élargie, *R.D.E.*, 2004, no. 127, pp. 90-102. (Annex no. 53)

# Chapter VIII
# Statistics

Except for the figures given by the Centre for Equal Opportunities and Combating Racism, no specific figures regarding EU citizens in Belgium seem to be available.

The figures of the Centre for Equal Opportunities give an idea of the complexity of the population in Belgium.

On 1 January 2002, 68.1% of the foreign population in Belgium are EU citizens. The total amount of aliens in Belgium is 8.21% of the whole population. The three major non-EU citizens represented in Belgium are from Morocco, Turkey and Congo (*Aperçu statistique*, Centre pour l'égalité des chances et la lutte contre le racisme, site web www.diversite.be – Annex no. 6). The statistical figures joined in appendix, considering their volume, will remain joined to the report except the figures concerned. They reveal that there are 564,172 EU citizens in Belgium (5.48% of the total population), all three regions together. In relative figures, they are divided into 25.2% in the Brussels Region, 30.3% in the Flemish Region and 44.5% in the Walloon Region.

Specific statistics relating to the number of aliens present on the territory are available from the following website: www.statbel.fgov.be/figures/d21_fr.asp#3.

Figures such as the foreign population by sex and age are available from the year 1999 until 2004.

Two specific documents are also published on the website of the National Institute of Statistics of the Federal government. They contain a huge number of pages and no mentioned figures are relevant for the present report. Only main extracts such as the statistics of the foreign population in Belgium on 1 January 2004 classified to nationality (EU and non-EU citizen), sex, and marital status and province criteria, are joined in the Appendix.

Only general statistics on foreign population in Belgium are given (National statistics by nationality, sex and marital status, Annex no.56) and the general statistics based on the distribution of this foreign population by region (Brussels-Capital Region, Flemish Region and Walloon Region, Annex no. 57).

The whole documents are available from the following website address under "population" link: http://www.statbel.fgov.be/pub/home_fr.asp#2.

Other statistics relating to general incomes of Belgian families are also available but are not relevant for the present report, as these figures are not classified by nationality. It is not, so far, possible to identify any relation between the 2004 statistics on incomes and arrival of citizens from the 10 new counties due to the enlargement of the EU.

The answer given to the question asked through F.-X. de Donnéa, MP, to the Home Minister was that for the years 2001, 2002 and the 6 first months of 2003, 7616 visas were delivered on the basis of article 40, which concerns family members of Belgian or EEA Member States citizens (question no. 103 of F.-X. de Donnéa of 18 November 2003, *R.D.E.,* 2004, no.127 p. 144 – Annex no. 37). In the mentioned period, the majority of persons concerned by these visas were nationals of Morocco (5763 cases) and Turkey (2925 cases).

# Chapter IX
# Social Security

## General Remarks

In an important decision, the "*Cour d'Arbitrage*" (Supreme Court in Belgium) made an extension of the *Grzelczyk* case considering that each EU citizen has a right to social benefit. This Court declared void a provision (art. 3, 3o) of the law granting social integration allowance to anyone (*Revenu d'insertion sociale*, RIS, ex-minimex) (Law of 26 May 2002 regarding the right to social integration – M.B. 31 July 2002), as the law set the right for foreigners citizens of EU Member States under the condition that they enter under the application of Regulation no. 1612/68 of the Council dated 15 October 1968. According to the *Grzelczyk* judgment of the ECJ (ECJ, 20 September 2001, *Grzelczyk*, C-184-99), the *Cour d'Arbitrage* says that a provision that bases the right to social integration for all citizens of a EU Member State on the condition that they be covered by the EU Regulation no. 1612/68 is contrary to Articles 12 and 17 of the EC Treaty (C.A., 14 January 2004, judgement no. 5/2004, M.B., 27 February 2004; *R.D.E.*, 2004, no. 127, p.12-19 – Annex no. 49).

About health and care in Belgium, the Minister of Social Affairs and Public Health admitted that there was no current harmonisation of the prices of medications so that there is still a variation of price through Member States territories. Refund of medication given in another Member States can be obtained in Belgium on the same basis as the Belgian health care insurance. Calculation of this basis is made either on the public price applicable abroad if this is less or equal to the Belgian price, or on the Belgian public price if the price abroad is higher than the price charged in Belgium. This new possibility of refund results from the *Kholl and Decker* judgment as part of Article 22 of EEC Regulation no. 1408/71. The Minister in charge acknowledged these judgements as based on the principle of free movement of medicine but declared it to be a long evolution far from being finalised (question no. 112 of J. Vandeurzen of 23 January 2004, *R.D.E.,* 2004, no. 127, p.160 – Annex no. 50).

## Social Security Benefits

In a case ruled by the Labour Tribunal on 8 September 2004, three preliminary rulings were requested from the ECJ according to article 234 EC Treaty.

A case related to unemployment social benefit allowance paid by the Belgian authorities (ONEm, Office National de l'Emploi) to Mr. De Cuyper, born in 1942 and who received unemployment allowance from 19 March 1997. He was also exempted from municipal control. In 2000, during his audition by the control services, he admitted that he was living almost exclusively in France, on a boat, with his retired partner.
The ONEm consequently took a decision excluding Mr. De Cuyper from any unemployment allowance from 1 January 1999 and asking him to reimburse the allowances unduly received for a total of amount of 12 452.78 euros.

The Tribunal questioned the compatibility of the obligation of effective residence in Belgium regarding provisions of the EC law such as Article 69 of Regulation 1408/71 or Article 1 of Directive 90/364.

According to Mr. De Cuyper, such an obligation violates the right to free movement granted to him by the Treaty, since it is an obstacle to his right to free movement. Based on

the *Martinez Sala* and *Elsen* judgements of the ECJ combined with Articles 12, 17 and 18 of the EC Treaty, the Tribunal addresses 3 questions to the ECJ:

> 1. Does the obligation to actually reside in Belgium, which under Article 66 of the Royal Decree of 25 November 1991 regulating unemployment is a condition for the award of benefits, apply to an unemployed person aged over 50 who enjoys an exemption under Article 89 of that Royal Decree from the requirement to sign on, which entails dispensation from the requirement to be available for work, amount to a restraint on the freedom of movement and residence of all European citizens under Articles 17 and 18 of the Treaty establishing the European Community?
>
> 2. Does the obligation of residence in the State competent to award unemployment benefits, justified in domestic law by the needs of monitoring compliance with the statutory requirements for the payment of benefits to unemployed persons, satisfy the requirement of proportionality which must be observed in the pursuit of that objective of general interest in that it constitutes a limitation on the freedom of movement and residence of all European citizens under Articles 17 and 18 of the Treaty establishing the European Community?
>
> 3. Does that residence requirement not have the effect of discriminating between European citizens who are nationals of a Member State competent to award unemployment benefits by affording that entitlement to those who do not exercise the right to freedom of movement and residence of all European citizens under Articles 17 and 18 of the Treaty, whilst denying it to those who do seek to exercise that right, by the deterrent effect which that restriction entails? (*Tribunal du Travail de Bruxelles*, Brussels Labour Tribunal, 8 September 2004, RG no. 1203/01 and 1810/01 – Annex no. 20, ECJ, C-406/04)

**Doctrine**

Ph. Versailles, Le revenu d'intégration sociale à l'épreuve de la Cour d'Arbitrage, *Journal du Droit des Jeunes*, 2004, p. 13.

D. Roulive, Evolution récente de la jurisprudence en matière de chômage, Examen des arrêts principaux rendus par la Cour de cassation, la Cour de Justice des Communautés européennes et la Cour d'Arbitrage de 1998 à 293, *Journal des Tribunaux du Travail*, 20 mars 2004, no. 882, p. 159 – Annex no. 51.

Y. Jorens, De nieuwe EG-Verordening 1408/71 inzake de sociale zekerheid van migrerende personen : naar een vereenvoudiging en modernisering?, *Droit social,* 1/2004, p. 193.

A-C. Simon, L'accès aux soins de santé transfrontaliers dans l'Union européenne, *Journal des Tribunaux Droit Européen,* Janvier 2005, p. 12 – Annex no. 52.

M. Dumont (dir.), *Actualités de la sécurité sociale. Evolution législative et jurisprudentielle*, Bruxelles, Larcier 2004.

F. van Overmeijren, *Kohll* en *Decker* anders bekeken : de mobiliteit van gezondheidsmedewerkers in de Europese Unie (*Kohll* and *Decker* Judgement, other point of view : the mobility of the health collaborator in the EU), *Tijdschrift voor Sociaal Recht – Revue de Droit Social* (Social Law Review), 2004, p. 335.

J.-P. Kepenne & S. van Raepenbusch, Les principaux développements de la jurisprudence de la Cour de Justice des Communautés européennes et du Tribunal de Première Instance, Année 2003 (1ère partie) (Main developments of the case law from the ECJ and FIT, Year 2003, First Part), *Cahier de droit européen*, 2004, no. 3-4, pp. 437-510.

# Chapter X
# Establishment, Provision of Services, Students

## Establishment

See *supra*, Ch I, A, 2, on the exemption from professional card for freelance workers.

## Provision of Services

Workers citizens of the ten new Member States in the context of provision of services in Belgium by a company based in EU Member States (ancient or new) are allowed to work and are exempted from a work permit in Belgium. Indeed, the transitory period aiming to limit free provision of services involving a temporary circulation of workers, acted in the membership Treaty concerned only Austria and Germany and not the Belgian state (Circular 30 April 2004, M.B. 17 May 2004 - Annex no. 48).

## Students

*Equivalence of diploma*
A case, arisen in a law firm, could be subject to difficulties depending on the accuracy of the information given by the Belgian authorities (French Community). A young French girl willing to start medical studies in Belgium after finishing her secondary school in France claims the equivalence of her French "BAC" diploma.

She introduced her complete file on 12 July 2004. The deadline fixed by the authorities was 15 July 2004 for students wishing to start their studies the following academic year (2004-2005).

All the documents were introduced except one: the proof of payment of her administrative fees. In September, the administration refused to examine her file since no payment had been made before the deadline of 15 July 2004. As soon as she received the letter, she made the payment and she wrote back to the administration with the proof of her payment. The Belgian authorities refused to give her the equivalence arguing that the file was incomplete on the ultimate date so they could not analyse the file.

Through her lawyer, she explained that she did not know that the payment had to be made before the ultimate date, that in any case, the file was now complete, and that she had made steps to start her academic year of study. Indeed, in the meantime, she had rented a room at the university in July to be on time to have one, she had started to attend classes till the ultimate date to enrol in the university as she still had not her equivalence.
The lawyer argued that such a regulation seems to be an obstacle to free movement of students in the light of the *Kraus* case and taking into consideration the excessive formalities required. The French Community, competent in that matter, answered that its administrative regulation was submitted to the European Commission who made no criticism against the system. The authorities also argued that payment before the deadline is called for to prevent last minute requests, for reasons of good management of the public service.

The question is if the French Community really did notify the Commission of its regulation on equivalence. In this case, is it in compliance with the *Kraus* case that the authority

imposes such a payment to grant an equivalence of diploma? Further, setting a deadline for payment seems to be an excess of formalities which, combined with the obligation of a payment, could be construed as an excessive obstacle for students to study abroad.

From the moment the payment is made, the authority should not refuse to analyse the file. Indeed, in other matters as judiciary procedure in front of civil jurisdictions or State Council, the moment of the payment required does not influence the validity of the step taken previously in the procedure.

**Doctrine**

J. Pertek, L'action communautaire en matière d'éducation et le processus de Bologne, *Journal des Tribunaux Droit Européen*, mars 2004, p. 65 – Annex no. 12.

# Chapter XI
# Miscellaneous

## Nationality

Belgian law on nationality used to be one of the lightest in Europe. Indeed, when compared with other EU Member States, the Belgian Code is quite permissive.

For example, after three years of unlimited stay in Belgium, any foreigner is entitled to introduce an application to the Naturalisation Commission of Parliament.

Moreover, after seven years of residence in Belgium, any foreigner holder of an unlimited stay in Belgium can make a declaration to the Public Officer of the Municipality to claim Belgian nationality. On 16 January 2004, the *Cour de cassation* (Supreme judiciary jurisdiction) ruled that, to be taken into consideration, the seven-year period does not need to be covered by a right of residence. Thus, even an irregular stay in Belgium could be taken into consideration in calculating the seven years, since the construction given was that the applicant has to prove seven years of principal residence in Belgium with an unlimited right of residence at the moment of the declaration.

Through a parliamentary question, the Minister of Justice answered that this construction resulting from the 16 January 2004 case was in complete opposition with the will of the legislator when adopting the law (Question asked by Jo Vandeurzen on 3 June 2004, *R.D.E.*, 2004, no. 130, p. 708-709 – Annex no. 2). Consequently, the Minister of Justice proposed a new text that was adopted in a general Programme law dated 27 December 2004 (M.B., 31 December 2004 – Annex no. 1). According to this new version of article 12*bis* of the Belgian nationality Code, this article "is construed as it only applies to aliens who can prove seven years of principal legal stay".

No one knows if the construction is valid from the adoption of the law or before, as the name of the provision is "interpretative provision" of article 12*bis* § 1, alinea 1, 3o of the Belgian Nationality Code. It is, however, not possible that an interpretative provision could modify the substance of the provision itself.

The actual regulation to access to Belgian nationality has been seriously restricted by this new provision whatever its impact, interpretative or modifying.

Today, the Nationality Code also says that a Belgian who has voluntary access to another nationality will lose his Belgian nationality (art. 22). There are propositions to suppress this article. An updating of the comparison in the Nascimbene (Ed.) book on nationality in Europe could be interesting on this point (*Nationality Laws in the European Union*, Butterworths, Giuffrè, 1996). Is there other legislation in the EU providing loss of nationality when one has voluntary access to another nationality?

The idea behind the question of the loss of nationality is the intention to raise the issue whether the automatic loss of nationality of an EU Member State might be a violation of free movement rights, except in cases where the person acquires the nationality of another Member State.

The question is the risk of loss of rights when the loss of nationality to acquire the nationality of a third state includes automatically the loss of the nationality of the Member State. This is the main risk. But further, the risk of losing rights attached to the EU citizenship is to be considered as well when the EU citizen acquires the nationality of another EU Member State.

Considering the teaching of the *Garcia Avello* case, the right given to Spanish citizens to have a double name or the right to marry for homosexual Belgian citizens could be affected by the loss of this nationality. This is the reason why it is important for the other Member States to answer the question.

The work of Bruno Nascimbene on nationality in EU Members State is now outdated and cannot answer the question properly anymore.

**Switzerland**

From 1 June 2004, Swiss citizens can obtain residence in Belgium without a work permit. Previously, a 2-year transitional period beginning on 1 June 2002 and ending on 31 May 2004 forced Swiss workers to be holder of a work permit A or B by the end of the fifth month after introducing an application for establishment. Priority to nationals and EU citizens was given on the labour market based on the EC and Member States Agreement with the Swiss Confederation on free movement of persons and its Appendix I, II, III, its Protocols and the Final Act signed in Luxembourg on 21 June 1999.

At the present time, it is sufficient to produce the employer's certificate in accordance with appendix no. 19*bis* of Royal Decree of 8 October 1981 if they wish to exercise a salaried activity in Belgium (Recommendation dated 18 June 2004 relating conditions of stay for Swiss citizens and members of their family, M.B. 18/06/2004 – Annex no. 39).

**Cooperation and Association Agreements**

The Labour Court of Brussels asked two preliminary questions to the *Cour d'Arbitrage* (Constitutional Court) by a judgment dated 17 March 2004 regarding polygamy and the General Convention on social security between the Kingdom of Belgium and the Kingdom of Morocco, signed in Rabat on 24 June 1968 and approved by Belgian law on 20 July 1970 (Labour Court of Brussels, 17 March 2004, judgement no. 39.684 – Annex no. 54) *RDE*, 128, p. 212. The questions aim to identify any difference of treatment between men and women in the case of two survival spouses of a worker in Belgium when attributing the widow pension

In application of the Convention, half of the pension is attributed to each widow. One of the widows said that this was a discrimination and claimed full pension for each widow. We will not make you wait until our following report, as the Cour d'Arbitrage did answer recently by a judgement of 4 May 2005 (84/2005). The court did refuse to answer the question, arguing that the discrimination – if it were – was not in the Belgian law but in the law of Morocco, applicable as national law through the Convention. This seems an easy theoretical answer.

**Citizenship**

Since the *Grzelczyk* case, the citizenship as "fundamental status" is linked to the question of sufficient resources. The *Chen* case seems to leave the origin of the resources open.

According to the information collected from the *Office des Etrangers*, regarding the C-408/03 case (*Commission v. Belgium*), pending before the ECJ, Belgian authorities confirm their position. The Belgian state has a strict interpretation of the tie the EU citizen must prove he has with the person that supplies for him/her sufficient financial resources. The EU citizen should have sufficient resources by him- or herself, or demonstrate that he or she has a legal tie, strong and precise enough, with the person that supplies these sufficient resources. Belgian authorities accept these resources only if the third person is resident in Belgium for an undetermined period or possesses a foreign identity card. This was not the position of the Commission consultative des étrangers (see *supra*, IV, A and Annex 47).

**Doctrine**

For commentaries on the *Chen* case, regarding specifically a Belgian point of view, see P. Robert, observations under ECJ, 19 October 2004, Case C-200/02, *Chen c/Secretary of State for the Home Department*, in *R.D.E.*, 2004, no. 130, p. 645, and also P. Lagarde in the *Revue critique de droit international privé* (Critical Review of Private International Law), 2004, p. 192, and to A. Iliopoulou in the *Revue trimestrielle de droit européen* (Quarterly Review of European Law), 2004, p. 565.

J-Y Carlier, La libre circulation des personnes dans l'Union européenne (1er janvier – 31 décembre 2003), *Journal des Tribunaux Droit Européen*, 2004, p. 74 – Annex no. 11.

J-Y Carlier, La libre circulation des personnes dans l'Union européenne (1er janvier – 31 décembre 2004), *Journal des Tribunaux Droit Européen*, 2005, p. 71 – Annex no. 55.

L. Defalque & P. Nihoul, Chronique semestrielle de droit communautaire (1er août 2003 - 31 décembre 2003), *Journal des Tribunaux*, 2004, p. 393 – Annex no. 8.

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