REPORT
on the Free Movement of Workers in Germany in 2005

Rapporteur: Kay Hailbronner
University of Konstanz

September 2006

Abbreviations

ArGV	Verordnung über die Arbeitsgenehmigung für ausländische Arbeitnehmer (Arbeitsgenehmigungsverordnung; Labour Permit Regulation)
ASAV	Anwerbestoppausnahmeverordnung (Recruitment Stop Exceptions Regulation)
AufenthG	Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Federal law on the residence, employment and integration of foreigners in the federal territory)
AufenthV	Aufenthaltsverordnung (Residence Regulation)
AuslG	Ausländergesetz
Az	Aktenzeichen
AZRG	Ausländerzentralregistergesetz (Act on the registry of foreigners)
BaföG	Bundesausbildungsförderungsgesetz
BayVBl	Bayerische Verwaltungsblätter
Banz	Bundesanzeiger (Official Gazette)
BÄO	Bundesärzteordnung
BeschV	Beschäftigungsverordnung (Employment Regulation)
BeschVerfV	Beschäftigungsverfahrensordnung (Employment Procedure Regulation)
BFHE	Sammlung der Entscheidungen und Gutachten des Bundesfinanzhofs (Decisions of the Federal Tax Court)
BGBl.	Bundesgesetzblatt (Federal Law Gazette)
BKGG	Bundeskindergeldgesetz (Federal Law on Allowances in respect of Dependent Children)
BR-Drs.	Drucksachen des Bundesrates (Gazette of the Federal Council)
BRRG	Beamtenrechtsrahmengesetz
BSG	Bundessozialgericht (Federal Social Court)
BT-Drs.	Drucksachen des Deutschen Bundestages (Gazette of the Federal Parliamentary Assembly)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
BVerwGE	Collection of decisions of the Federal Administrative Court
DAR	Deutsches Autorecht
DVBl	Deutsches Verwaltungsblatt
DÖV	Die Öffentliche Verwaltung
ECJ	European Court of Justice
EFG	Entscheidungen der Finanzgerichte (Decisions of the Tax Courts)
EURAG	Europäisches Rechtsanwaltsgesetz
EuroAS	Europäisches Arbeits- und Sozialrecht
EZAR	Entscheidungssammlung zum Ausländer- und Asylrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EuGRZ	Europäische Grundrechte-Zeitschrift
FEV	Fahrerlaubnisverordnung
FreizügG/EU	Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Act on the general freedom of movement of EU citizens, Freedom of Movement Act/EU)
GBl	Gesetzblatt
GVBl	Gesetz- und Verordnungsblatt
HRG	Hochschulrechtsrahmengesetz
InfAuslR	Informationsbrief Ausländerrecht
IntV	Integrationskursverordung
MRRG	Melderechtsrahmengesetz
NJW	Neue Juristische Wochenschrift
NStZ-RR	Neue Zeitschrift für Strafrecht – Rechtsprechungsreport
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht, Rechtsprechungs-Report

NZV	Neue Zeitschrift für Verkehrsrecht
OVG	Oberverwaltungsgericht
SGB	Sozialgesetzbuch (Code of Social Law)
StAG	Staatsangehörigkeitsgesetz (Act on German Nationality)
VBlBW	Verwaltungsblätter für Baden-Württemberg
VD	Vorschriftendienst
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht

General Remarks

As part of the Immigration Act 2004 the Freedom of Movement Act regulating the rights of Union citizens and their family relatives entered into force on 1 January 2005 (see report 2004). The Freedom of Movement Act – unlike its predecessor – was intended as a comprehensive regulation of the rights of Union citizens. Therefore, the general provisions of the Immigration Act are not applicable anymore, unless the Freedom of Movement Act refers in special provisions to the provisions of the Residence Act (for details see report 2004).

Although the Freedom of Movement Act has already taken up some of the ideas and concepts of the Union Citizens' Directive 2004/38 of 29 April 2004,[1] with the entry into force of the Directive 2004/38 further changes to adapt the provisions of the Directive became necessary. A provisional draft of the federal government of 3 January 2006[2] to implement various EU-Directives including the Union Citizens' Directive 2004/38 has been submitted for comments to the Länder governments. Article 2 of the Bill suggests to change the Freedom of Movement Act[3] particularly by a number of new provisions on the definition of family relatives, extension of the right of permanent residence of Union citizens, special rules on the cessation of EU residence rights in case of return and the continuation of freedom of movement in case of death or return.

In particular, the Draft Bill provides for the following changes:

Definition of persons entitled to free movement

Among the list of Union citizens' rights the right of permanent residence is explicitly included. A new paragraph 3 of Section 2, regulating entry and residence, clarifies that freedom of movement does not cease if a worker begins a professional formation if he/she can show a connection between previous employment and professional training. The connection requirement is not necessary if the worker has become unemployed involuntarily. The Bill refers to the provisions of Art. 7 para. 3 lit. d of the Directive 2004/38 which reflects the ECJ's jurisprudence.

Paragraph 1 of Section 4 amends previous provisions requiring a visa for family relatives of Union citizens by adding a reference "according to generally applicable rules for third country nationals". The Bill intends to clarify that visa requirements apply according to general rules laid down in Sec. 4 and 6 of the Residence Act and in the Regulation 539/2001. Visa requirements as well as exceptions apply therefore for entry into Germany regardless of whether an external border or a Schengen border is crossed.

Finally, in implementation of Art. 5 para. 2 Directive 2004/38 a new clause is added in para. 4 stating that the possession of a valid residence certificate of another EU Member State dispenses from visa requirements.

A new para. 5 implements Art. 6 of the Directive 2004/38 stating that for residence of Union citizens up to three months it is sufficient to possess a valid ID-card or passport. Third country family relatives are equally entitled if they are in possession of a recognised or otherwise admitted surrogate passport provided that they accompany the Union citizen or exercise a right of family reunion. The Bill explains that EU Member States are obliged to issue to their nationals the documents as referred to in the new provision. Whether documents of third country nationals are "admitted" depends upon the relevant provisions of national law (Aufenthaltsverordnung).[4]

Continuation of residence right for third country family relatives

Section 3 of the Freedom of Movement Act implements Art. 12 para. 2 of the Directive 2004/38 providing for a continuation of residence rights for third country family relatives or Union citizens. A new para. 3 of Sec. 3 provides that third country family relatives remain in case of death of a Union citizens entitled to a residence right provided that they prove that they fulfil the requirements applicable to Union citizens laid down in Sec. 3 para. 2 no. 1-3 or no. 6 and that they have stayed before the death of a Union citizen at least one year as family relatives in Germany. Paragraph 3 excludes the

1 Cf. Abolition of the requirement of an EU residence permit; establishment of a permanent residence right.
2 See www.migrationsrecht.net/Ebooks/ebook-auslaenderrecht-entwurf-aenderungsgesetz.pdf.
3 See www.aufenthaltstitel.de/freizuegigkeitsgeu.html.
4 See www.aufenthaltstitel.de/aufenthaltsv.html.

application of provisions on family reunion as well as on protection against the loss of residence rights on reasons of public order. The Bill explains that according to Art. 12 para. 2 subpara. 3 of the Directive 2004/38 third country family relatives remain entitled to residence exclusively on a personal basis. This means in the words of the Bill that they are not to be treated in all respects like Union citizens. In particular, they are not entitled to the special protection of Union citizens against expulsion for reasons of public order and to the privileges of Union citizens with respect to family reunion. For that reason para. 3 sentence 2 excludes the application of these provisions for third country relatives.

A new paragraph 4 of Sec. 3 implements Art. 12 para. 3 of the Directive 2004/38. Paragraph 4 provides that the children of a Union citizen entitled to free movement according to Sec. 2 para. 1, and a parent exercising the right of parental care for the children remain entitled in spite of death or return of the Union citizen to a residence permit until they have completed a professional formation if the children are staying within Germany and are registered in an institution for the purpose of training or formation.[5]

A new paragraph 5 implements Art. 13 of Directive 2004/38. According to para. 5 third country national spouses remain entitled to residence in case of divorce or annulment proceeding if they fulfil the requirements for Union citizens according to Sec. 2 para. 2 N. 1-3 or 6 and if a number of further requirements, corresponding to Art. 13 of the Directive are fulfilled. The provision in the Directive that "such family members shall retain their right of residence exclusively on personal basis" is interpreted again in the Act by a clause whereby the provisions on family reunion (Sec. 3 para. 1 and 2) as well as the provisions on loss of the entitlement to entry and residence (Sec. 6) and requirement to leave the federal territory (Sec. 7) are not applicable.

Section 4 of the Freedom of Movement Act has restricted the right to family reunion of non-gainfully employed persons by a particular definition of the terms "dependents" who cohabit with a non-gainfully employed person. The Bill abolishes this restrictive definition of family relatives by stating that the Directive 2004/38 introduces a uniform definition of family relatives for all groups of Union citizens entitled to free movement – with the exception of students. Therefore, the more restrictive definition contained in the existing law cannot be maintained. It follows that children under 21 years of age as well as parents of a spouse of a Union citizen are entitled to free movement even if they are not entitled to maintenance, provided, however, that they have sufficient means of existence and adequate health insurance for all family members.

Permanent residence right

A new Sec. 4a regulates the right of permanent residence of Union citizens implementing Art. 16 and 18 of the Directive 2004/38. Section 4a provides that Union citizens, their spouses or partners in life and their family relatives who have resided legally for a continuous period of five years shall have the right of permanent residence regardless of the general provisions. Paragraph 2 of Sec. 4a provides a number of exceptions from the five-year continuous residence requirement. All Union citizens, if they have either

- stayed for three years permanently in Germany and have
  - reached at the time of their retirement the 65th year of age, or
  - terminated their employment in the framework of a special pre-retirement regulation after having been employed at least during the last 12 months, or
  - after having been employed for three continuous years in Germany and having been active in another Member State of the European Union while maintaining their residence in Germany and returning at least once a week in Germany;
- or gave up their employment as a result of a permanent ability to work, following an accident or a professional illness, establishing a right to a pension in Germany, or
- have spent at least two years continuously in Germany before they became unable to work,

are entitled to permanent residence. Times of employment in another EU Member State are recognised.

Relatives of a deceased Union citizen who were living with him in Germany at the time of his death have a right to permanent residence if

5 "Und in einer Bildungseinrichtung zu Ausbildungszwecken eingeschrieben sind".

- the Union citizen at the time of his death had been staying for at least two years in Germany continuously,
- the Union citizen died as a result of an accident at work or an occupational disease or,
- the surviving spouse of the Union citizen is a German in the sense of Art. 116 of the Basic Law or has lost this status by marriage with a Union citizen until 31 March 1953.

Third country family members of a Union citizen who are entitled to a permanent residence card or who had acquired such right before his/her death are as well entitled to a permanent residence if they were living permanently with the Union citizen at the time when he/she became entitled to permanent residence.

Family members according to Sec. 3 para. 3-5 acquire a right to permanent residence if they have been staying for five years continuously in Germany. A continuity of residence in the sense of these provisions is not interrupted by

- absence abroad up to six months during one year or
- absence for military service or equivalent service or
- by one single absence of a maximum of twelve consecutive months for important reasons such as pregnancy and child birth, serious illness, study or vocational training or a professional posting.

The right of permanent residence is lost only though absence from Germany for a consecutive period of more than two years.

By and large, these provisions are partly a redrafting of the previous provisions of the Freedom of Movement Act, partly they adapt these provisions to the respective provisions of the Directive 2004/38. With respect to the loss of the right of permanent residence as a result of an absence for more than two years the Bill refers to Sec. 51 para. 1 No. 6 of the Residence Act whereby a residence title is only lost if the foreigner is absent for a reason which is not by its very nature only temporary. Therefore the Bill argues that in any case a Union citizen must leave Germany not only for temporary reasons. Whether absence is only of a temporary nature can be determined by criteria like giving-up a job and housing and departure with all property.

Residence documents

Section 5 implements primarily the provisions of Art. 8 para. 2, Art. 10 para. 1, Art. 11 and Art. 19 and 20 of the Directive 2004/38. Section 5 para. 2 provides for the issuance of a EU residence permit for third country family members. A certificate for the right to permanent residence may also be issued on application. The Bill points to the need to issue such a certificate (Art. 19 Directive 2004/38) in spite of the high administrative costs involved.

A new Sec. 5a on documents implements Art. 8 para. 3 and 5 as well as Art. 10 para. 2 of the Directive 2004/38. Section 5a provides that the competent aliens authority for the issuance of a certificate according to Sec. 5 may require from a Union citizens in addition to the valid identity card or passport only

- either a confirmation of engagement from the employer or certificate of employment or
- proof that they are self-employed persons or
- proof that they dispose of sufficient health insurance and means of subsistence.

Union citizens providing proof of enrolment at a university or other establishment for professional formation must only make credible that they dispose of sufficient means of subsistence.

Section 5a para. 2 describes the documents from family members which may be required in accordance with Art. 10 para. 2 of the Directive 2004/38.

Loss of residence right

Section 6 implements Art. 28 of the Directive. Paragraph 2 is basically a translation of Art. 28 para. 1. The provision in the Directive that an expulsion decision may not be taken against Union citizens unless based on "imperative grounds of security" is defined by the Bill as follows:

A loss of the right of entry and residence of Union citizens and their family members who have resided in Germany for the previous ten years and of minors may only be determined for imperative reasons of public security ("zwingende Gründen der öffentlichen Sicherheit"). With respect to minors

this requirement does not apply if the loss of the right of residence is in the best interests of the child. Cogent reasons of public security can be assumed particularly if

- the Union citizen has been sentenced for a crime to the maximum penalty,
- in case of a danger in the sense of para. 4 of the security of the Federal Republic of Germany is affected or
- the Union citizen constitutes a terrorist danger.

Requirement to leave

Section 7 deals with the requirement to leave the federal territory. The Bill points out that the existing provision in Sec. 7, whereby EU citizens shall be required to leave only if the foreigners authority has *indisputably* established that no entitlement to entry and residence exists, creates administrative problems. In case of a loss of the entitlement to entry and residence on grounds of public order administrative and judicial proceedings may take a long time until an expulsion decision can be in fact executed. According to the most recent jurisprudence of the Federal Administrative Court the time of the last judicial oral proceeding must be considered as decisive.[6] Therefore, new facts relevant for the existence of a danger justifying a loss of entitlement must be taken into account. A real and sufficiently serious danger affecting a fundamental interest of society may be difficult to prove in case of prolonged administrative and judicial proceedings during which the danger assumed by the alien authorities has not been realised.

The Bill explains that the Union Citizens Directive 2004/38 does not provide for an extended judicial protection. Particularly in case of "administrative expulsions" substantial financial costs result from the long administrative and judicial proceedings until the loss of entitlement is "unappealably" determined, since as a rule primarily persons are affected not disposing of sufficient means of existence. The Bill, therefore, provides for an important change by striking out the word "unappelably" in Sec. 7 para. 1. As a result the new Sec. 7 para. 1 provides for a requirement to leave if the foreigners authority has established that no entitlement to entry and residence exists. The same applies for dependents who are not EU citizens. They are required to leave the federal territory, if the foreigners authority has revoked or withdrawn the EU residence permit (previously *unappealably* revoked or withdrawn).

According to para. 7 sentence 4 the minimum deadline period of 15 days to depart is extended to one month, except in urgent cases. An additional sentence 5 provides that the immediate execution of a departure order according to Sec. 80 para. 2 no. 4 of the Administrative Court Procedure Act may only be ordered if the loss of the entitlement to entry and residence has been determined for imperative reasons ("zwingenden Gründen") according to Sec. 6 para. 5. This means that the determination of the loss of entitlement to entry and residence results in a requirement to leave the federal territory. Against this decision, however, judicial remedies may be taken which imply suspensive effect. The immediate execution of an administrative order may be ordered according to the general rules of the Administrative Court Procedure Act, however, according to the modification laid down in Sec. 7 para. 1 sentence 5 (reference to Sec. 6 para. 5, "cogent reasons of public order").

Further provisions in Sec. 7 deal with the implementation of Art. 32 para. 1 sentence 2 of the Directive 2004/38 (obligation to decide upon an application within a period of six months).

Identification papers

The changes in Sec. 8 provide for an adaption of the obligation to carry identification papers. Since such obligations are applicable for Germans in case of entry and departure, the new provisions contain a corresponding obligation for Union citizens.

Penal provisions

Section 9 amends the penal provisions. According to the amended provisions a Union citizen may also be punishable by entering or staying in the federal territory contrary to a prohibition to re-enter and stay enacted on the basis of the old law. Therefore, inclusion of the reference to the prohibitions to re-enter passed according to the old law is intended to close a gap which might otherwise have arisen.[7]

6 See below chapter I, 3.
7 See chapter I, 3.

Application of Residence Act to Union Citizens

Section 11 provides for a number of changes with respect to the application of the Residence Act to Union citizens. As expected, it has become necessary to extend the application of the Residence Act in a number of provisions in which the Freedom of Movement Act would either lead to unjustified privileges of Union citizens or would create a gap in the application of laws. One of the new references concerns the cooperation duties in Sec. 82 regulating the duty to cooperation in the collection of personal data, in particular the taking of pictures. A new provision of the Residence Act (Sec. 82 para. 5), which is also part of the Bill, has been declared applicable also for Union citizens and their family members (with the exclusion of finger-printing).

There are further references to the penal provisions of the Residence Act with respect to

- participation in secret organisations (new Sec. 95 para. 1 no. 8 Residence Act),
- violation of a prohibition to leave the federal territory (Sec. 46 para. 2 Residence Act),
- furnishing or using false or incomplete information in order to procure a residence title (Sec. 95 para. 2 n. 2 Residence Act),
- failure to submit to the border police in contravention of Sec. 13 para. 1 sentence 2 (Sec. 98 para. 2 no. 2 Residence Act, also punishable for Germans as an administrative offence),
- contracting self-employed third country nationals with the provision of services or works if the foreigner does not dispose of the necessary permit (Sec. 98 para. 2 no. 5 of the Amended Residence Act),
- entering or leaving the federal territory outside of an approved border-crossing point or outside the stipulated traffic hours or failure to carry a passport or passport substitute (Sec. 98 para. 3 no. 2 Residence Act), also punishable for Germans as an administrative offence. Since Germans according to the relevant legislation can only be punished with an administrative fine up to 2500.- Euro, the same applies for Union citizens, which is explicitly recognised by the Bill's reasoning. However, the reference to the provision in the Residence Act admits an administrative fine of up to 5000.- Euro,
- attempts to commit an administrative offence in case of acts according to para. 2 nor. 2 and para. 3 nor. 2 (Sec. 98 para. 4), also punishable for Germans according to the relevant passport legislation.

A special provision refers to the amended Sec. 82 para. 5 of the Residence Act (cooperation in the production of pictures), since Union citizens unlike their third country family members do not receive a uniform document to which a photo is attached. The obligation to cooperate in the production of photos is declared as applicable since the production of photos is required for the collection of personal data in the foreigners' registry (Sec. 65 of the Regulation implementing the Residence Act). According to the new provision the obligation to provide a picture or cooperate in the production of a picture is correspondingly applicable for Union citizens.

In July 2006 the Federal Ministry of Interior has submitted a report on the evaluation of the Immigration Act of 2004 with the aim to examine whether the provisions of the Immigration Act have achieved their purpose. The Evaluation Report on 256 pages[8] contains an extensive discussion of the Immigration Act as it has been implemented in the Länder. There are also on pages 233 – 241 useful comments on the application of the Freedom of Movement Act in the different Länder of the Federal Republic of Germany, concentrating upon

- facilitation of administrative procedures by abolition of EU residence permit and registration with the local authorities,
- security aspects,
- abuse of market freedoms.

Concerning the first aspect (procedure of registration) it is observed that the Länder have primarily introduced an exclusive or primary responsibility of the city administrations for registrations of Union citizens. Most EU citizens make use of the possibility of fulfil their duty of registration under the Freedom of Movement Act simultaneously with the general registration by taking up residence with the local city authorities. As a rule, therefore, EU citizens do not need to contact the alien authorities

8 See www.bmi.bund.de.

with the exception of cases in which the alien authorities require additional information or documents, or have doubts on the authenticity of documents.

Concerning the experiences of the aliens authorities the enquiry has led to the conclusion that in most cases the new procedure has resulted in a simplification of the procedure. Some Länder have, however, reported that there were complications if the local authorities responsible for registering residence do not submit the necessary information to the alien authorities and if Union citizens cannot be reached under the address registered with the general city authorities. It is also sometimes noted that there is more administrative work involved if procedures become necessary to terminate a Union citizen's residence, since under the new procedure less information is usually available than under the previous law whereby alien authorities were collecting the necessary data. Some Länder have argued that a substantial simplification of the procedure requires also the abolition of issuing certificates for EU citizens. The government of Hessen has stated that only a total abolition of the registration with the alien authorities would qualify as a true simplification of the procedure.

The Report also indicates that the new procedure has required new skills by the staff of the city authorities on the legal status of EU citizens and on the necessary documents. In addition, in comparison to the alien authorities, these authorities as a rule do not dispose of the necessary technical equipment to examine documents and to collect the necessary data. In the Länder measures have been taken to improve the skills of the staff by detaching staff members to the alien authorities and training courses. In practice, staff members of the city authorities are instructed to contact the alien authorities or the police in order to make a more substantial examination. Generally, some of the problems which have arisen are due to a lack of coordination between city and alien authorities. The Report emphasises that the procedures of local authorities have to be improved by the legislation and administrative arrangements of the Länder.

The federal government will examine whether a total abolition of a certificate for EU citizens is compatible with EC law and whether it will be possible to issue such a certificate only on application.

Concerning security aspects the Report notes that the provision of Sec. 7 para. 1 Freedom of Movement Act, whereby expulsion cannot be executed unless the expulsion order is unappealable, has resulted in serious administrative difficulties. The Report notes that the pending bill on amending the Immigration Act will provide for a complete adoption to the Directive 2004/38, which does only exclude an execution of an expulsion order before a judicial decision in an interim protection procedure.

Concerning security aspects with third country national family relatives of Union citizens the government of Lower Saxony has noted that at the present moment it is not possible to receive security information with the relevant services for third country nationals of Union citizens. It is considered necessary for security reasons to establish a possibility for the alien authorities to contact the relevant services also with respect to security concerns for third country national family relatives of Union citizens.

Concerning the abuse of market freedoms[9] the Evaluation Report announces that the federal government in March 2005 established a task force on abuse of the freedom to provide services and freedom of establishment. The task force is to increase its activities on the basis of the coalition agreement of 11 November 2005. The Report notes that the task force has suggested some legislative changes (for instance by amending the Handwerksordnung) and by increasing controls by the competent authorities. In summary, the Report emphasises that the problem of abuse raises very complex problems which cannot be properly addressed only by legislative changes in the area of aliens legislation. Administrative measures are also required in the field of labour administration and particularly fighting against black labour. Since admission procedures, whereby the requirement for lawful exercise of the market freedoms, are not admissible under EU law, the Report emphasises that more control and administrative supervision is necessary. Finally, the Report indicates that a substantial facilitation for Union citizens and a simplification of procedures could be achieved by a complete abolition of the registration of EU citizens as aliens in the aliens central registry. This would mean that Union citizens would be treated in every respect as equal to German citizens and were only obliged to register with the city administration in taking up residence. On the other hand, the Report notes that a complete abolition of a central data collection for Union citizens would substantially aggravate the possibility of the alien authorities to enact and execute expulsion measures against EU citizens. In addition, the abolition of a central storage of data in the aliens central registry would impede the legitimate function of

9 See also chapter VIII.

the aliens police and judicial authorities in fulfilling their obligations since such authorities would have to collect the necessary information by other means.

Chapter I
Entry, residence, departure

Entry

The Administrative Appeal Court of Hessen in an important judgement of 29 December 2004 has decided for the first time that the Freedom of Movement Act is applicable for all Union citizens irrespective of whether they fulfil the requirements laid down in Sec. 2 and 4 of the Freedom of Movement Act.[10] The decision is remarkable insofar as the Freedom of Movement Act connects the entitlement to free movement to certain requirements like either the existence of an employment contract or the fulfilment of certain conditions for non-economically active Union citizens like health insurance and proof of sufficient means of subsistence. The Court, in the case of a Czech national who had been expelled from Germany, states that the applicability of the Freedom of Movement Act is exclusively dependent upon Union citizenship. This conclusion is reached by a reference to Sec. 11 of the Freedom of Movement Act providing that a Union citizen is not entitled anymore to rely upon free movement if in a formal procedure alien authorities have determined the non-existence or loss of the right to free movement. The Court argues that according to the systematic context of the law there is no distinction between Union citizens and Union citizens fulfilling the requirements of free movement. In addition, the Court refers to Art. 18 EC with the conclusion that Member States were only entitled to limit the existing right of free movement if the requirements under community law, particularly with respect to means of subsistence and health insurance are not met anymore. The Court in this connection refers to *Grcelczyk*.[11]

The Hessen Court in addition concludes from Sec. 1 para. 1 of the Freedom of Movement Act that Union citizens are only obliged to leave Germany if the aliens authority has *unappealably* determined that a right of entry and residence does not exist anymore. This provision is interpreted as excluding any administrative order of immediate execution of an order to leave the Federal Republic of Germany for a Union citizen. As a provision connected to Union citizens generally it was applicable to all Union citizens including those of the new Member States.

It should be mentioned that this jurisprudence has prompted the German legislation to amend the Freedom of Movement Act by striking out the word "unappealably".[12] According to the Hessen Court the amendment does not raise a question of compatibility with community law since the Court explicitly states that the legal status granted until now to Union citizens under the Freedom of Movement Act is not required by the rules of secondary community law laid down in the Directive 2004/38.

Literature

In an article on the freedom of movement of Union citizens Groß (Federal Ministry of Interior) gives a general survey about the Freedom of Movement Act which entered into force on 1 January 2005.[13] Groß reports the basic structure of the law and outlines the differences to the previous law on residence of nationals of the EEC. Groß points out that the basis for the free movement of Union citizens is Art. 18 para. 1 EC. The right, however, has not been granted unlimited. Therefore, the conditions for the residence right of a Union citizen were different according to the special category of persons to which a person belongs. Groß points to a number of questions, for instance the question whether with regard to new Union citizens the special right of permanent residence regulated in Sec. 5 para. 5 of the Freedom of Movement Act requires that the Union citizen has spent five years as a Union citizen on federal territory or whether a time of residence before the accession of the new Member States can be taken into account. Groß argues that the law requires only lawful residence. It follows that times of residence before the accession have to be taken into account. Therefore, it is only necessary that the

10 Judgement of 29 December 2004, 12 TG 3212/04, NVwZ 2005, 837.
11 ECJ of 20 September 2001, case C-184/99, *Grcelczyk,* ECR 2001, I-6193.
12 See previously General Remarks at p. 6.
13 Helene Groß, Das Gesetz über die allgemeine Freizügigkeit von Unionsbürgern, *ZAR* 2005, p. 83.

residence of a Union citizen at the date of completion of the five-year requirement is based upon the Freedom of Movement Act.

Groß also describes the effect of the new certificate for Union citizens entitled to free movement. It is clarified that the new certificate should not be interpreted as an EU residence permit under a new name. With respect to the obligation to register at the competent authorities, Groß points out that Union citizens do not need anymore to go to the alien authorities since the Freedom of Movement Act provides for the possibility to submit the necessary information at registry with the general registration authorities at the cities. The obligation to register at the general authorities arises for Germans as well as for Union citizens when a person moves into a new apartment or house.[14]

Concerning the expulsion of Union citizens Groß points out that Sec. 6 of the Freedom of Movement Act has introduced a new procedure based upon the determination of non-existence of the conditions for a right of free movement. The new structure of the law and the special provisions of the Freedom of Movement Act which exclude any recourse to the general provisions on expulsion of the Residence Act make sure that in future the problems which have given rise to various decisions of the European Court have been solved. Groß points out that only the administrative determination of a loss of the right of residence for reasons of public order and security results in a prohibition of entry according to Sec. 7 para. 2 of the Freedom of Movement Act. A mere determination that the conditions for free movement are not met does not result in any further consequences. Therefore, a Union citizen who at the time of an administrative decision was not entitled to free movement, for instance since he/she did not dispose of sufficient means of subsistence, may in spite of the administrative decision enter as tourist for a short-term visit to Germany or may be entitled to free movement as a recipient of services.

Finally, Groß refers to Sec. 11 para. 1 of the Freedom of Movement Act that Union citizens may participate at integration courses as far as additional resources are available. They are, however, not entitled to participate at such courses. A right to attend courses cannot be derived by the clause of Sec. 11 para. 1 sentence 3 providing for an application of the Residence Act if the Residence Act is more favourable than the Freedom of Movement Act. The legislator did intend to settle finally the question of integration courses for Union citizens by Sec. 11 para. 1. In addition, the provision on a right to attend integration courses cannot generally be considered as a more favourable provision since the right to attend integration courses must be seen in context with other provisions of the Residence Act. The attendance of integration courses is a requirement for a permanent residence permit for third country nationals while Union citizens acquire such right by the mere fact of having spent five years in Germany. Therefore, neither knowledge of the German language nor knowledge about the legal and social order and living conditions in Germany are required for Union citizens.

Residence

Questions of withdrawal of a driver's licence of EU citizens permanently or temporarily resident in Germany have been a major subject of administrative appeal court decisions following the *Kapper*-jurisprudence of the European Court.[15] According to the German regulations a driver's licence issued in another EU Member State is in principle a valid driver's licence in Germany.[16] According to Sec. 28 para. 4 no. 2 Fahrerlaubnisverordnung (FeV) the right to drive does not apply to those persons in possession of an EU driver's licence who at the time of issuance of the driver's licence were ordinarily resident in Germany. There are exceptions for students.[17]

The Administrative Appeal Court of Lower Saxony in a case of a Czech driver's licence issued to a person resident in Germany has decided that the relevant German provisions are inapplicable due to a violation of community law and the judgement of the European Court in the *Kapper*-case.[18] The Appeal Court also refers in this connection to a "uniform opinion" in the administrative jurisprudence

14 See Sec. 11 para. 1 Melderechtsrahmengesetz – law on the registry of persons.
15 ECJ of 29 April 2004, case C-476/01, *Kapper*.
16 See Sec. 28 para. 1 FeV implementing the Directive 91/439 of 29 July 1991, Official Journal No. L 137 of 24 August 1991.
17 For the requirement of residence in Germany see *Otte/Kühner*, *NZV* 2004, 321, 325.
18 Decision of 11 October 2005, 12 ME 288/05, *DVBl* 2006, 192, 193.

and the literature on the incompatibility of the German provisions with community law.[19] The Court argues that the *Kapper*-judgement of the European Court attributes to the Member State issuing a driver's licence the exclusive responsibility for limiting or withdrawing the validity of the driver's licence. Only the issuing state were therefore entitled to take measures with respect to those driver's licences which have been issued in violation of the residence requirement. Concerning the provision in the German regulations that the validity of a driver's licence can be suspended if the right to drive within Germany has been suspended or withdrawn by a court or with immediate effect by an administrative authority[20] the Court argues that an exception from the principle of mutual recognition of driver's licences must be interpreted restrictively. Therefore, a Member State could not rely upon Art. 8 para. 4 of the Driver's Licence Directive in order to refuse the recognition of a driver's licence which had been issued in another Member State subsequent to a withdrawal of a driver's licence issued previously in the second Member State.

The effect of the European Court's jurisprudence in the *Kapper*-case for the German provisions on re-acquisition of a driver's licence is highly controversial in the jurisprudence of administrative courts and in the literature. Generally speaking, one unsolved problem seems to be the abuse of issuing driver's licences to non-resident nationals of other Member States contrary to the relevant EU provisions on the subject. The Administrative Appeal Court of Baden-Württemberg[21] takes the view that under the Directive 91/439[22] a Member State may refuse the recognition of an EU driver's licence acquired in another Member State with respect to such facts and circumstances which have arisen already before the issuance of this driver's licence. Therefore, Art. 8 para. 2 covers the case that upon the issuance of a driver's licence in one EU Member State in another Member State a situation arises which justifies the withdrawal of the driver's licence (e.g. drug offences). The Administrative Appeal Court of Lower Saxony comes to the same conclusion that the administrative authorities may withdraw a Czech driver's licence which as such must be considered as valid in Germany if the person in possession of the driver's licence becomes seriously ill or unable to drive due to abuse of drugs. The Court states that community law (Art. 8 para. 2 of the Driver's Licence Directive) does not restrict national authorities to apply their national requirements on the ability to drive a car to those persons who become subsequently unable to drive a car. The question is only whether such decisions can also be based upon facts or a situation which have arisen before the driver's licence had been issued in another Member State.[23] Somewhat similarly the Administrative Appeal of North-Rhine-Westphalia[24] has held in an interim protection procedure that at the present time it cannot be ascertained with sufficient certainty whether in the light of the ECJ's jurisprudence the withdrawal of a driver's licence issued in another Member State is legally admissible if it affects a person having his/her habitual residence in Germany whose German driver's licence had been withdrawn previous to receiving a foreign driver's licence due to serious incapability to drive cars. The Court comes to a somewhat sibyllinic conclusion that the decision on taking interim measures must take into account the interests of the safety of traffic as well as the interests of a person being entitled to use his/her freedom of movement.

Literature

Lüdke analyses the Freedom of Movement Act in an article describing in particular the rules on termination of residence rights of Union citizens.[25] Lüdke – contrary to Groß and the decision of the Hessen Administrative Appeal Court – argues that in case of an administrative decision on the non-existence

19 See Administrative Appeal Court of 21 June 2004, 19 S 308/04, *NJW* 2004, 482; Civil Appeal Court of Saarbrücken of 4 November 2004, Ss 1604, *NStZ-RR* 2005, 50; *Otte/Kühner*, op. cit. p. 326; *Kalus*, *VD* 2004, 147, 148; *Weibrecht*, *VD* 2004, 153, 154; *Ludovisy*, *DAR* 2005, 7, 9; *Brenner*, DAR 2005, 363, 364; *Hentschel*, Straßenverkehrsrecht, 38. ed., § 38 FeV, no. 5; *Hentschel*, *NJW* 2005, 641, 644.

20 Sec. 28 para. 5 FeV; see also Art. 8 para. 4 of the Driver's Licence Directive 91/439.

21 Decision of 19 September 2005, 10 S 1194/05, *DVBl* 2006, 188, 191.

22 Art. 8 para. 4.

23 Affirmative Administrative Appeal Court of Lower Saxony of 11 October 2005, *DVBl* 2006, 192, 195; *Kalus*, *VD* 2004, 147, 148, 151; *Weibrecht*, *VD* 2004, 154; Administrative Appeal Court of Rhineland-Palatinate, decision of 15 August 2005, 7 B 11021/05, Die öffentliche Verwaltung 2005, 1009; undecided Civil Appeal Court Saarbrücken of 4 November 2004, Ss 16/04, *NStZ-RR* 2005, 50, 52.

24 Decision of 4 November 2005, 16 B 736/05, *Nordrhein-westfälische Verwaltungsblätter* 2006, 103.

25 Hendrick Lüdke, Die Irrungen und Wirrungen des neuen Freizügigkeitsgesetz/EU, *InfAuslR* 2005, 177.

of a right of free movement, a Union citizen in case of violations of public order may be expelled according to the provisions of the Residence Act. The expulsion – contrary also to the view stated by Jakober – is admissible in the author's view if the Union citizen could not make credible a right of free movement upon request according to Sec. 5 para. 3 of the Freedom of Movement Act. In addition, Lüdke analyses some provisions of the Freedom of Movement Act, in particular the legal effect of a determination according to Sec. 6 of the Freedom of Movement Act and the issue of legal effects of expulsions taken before the Freedom of Movement Act entered into force.

Departure

The Administrative Appeal Court of Baden-Württemberg by decision of 22 March 2004[26] has quashed a decision of the Administrative Court of Stuttgart of 20 November 2001[27] asking for a preliminary ruling of the European Court on the interpretation of Art. 9 para. 1 of the Directive 64/221. The Administrative Court of Stuttgart has asked the European Court whether a national provision excluding an administrative appeal procedure on the question of expulsion of a foreigner if no independent institution competent for examining an administrative appeal has been instituted, is violating Art. 9 para. 1 of the Directive 64/221. A similar issue has been raised by the Administrative Appeal Court of Austria in a request for a preliminary ruling of 18 March 2003. The Baden-Württemberg Administrative Appeal Court has quashed the decision of the Stuttgart Court since a preliminary ruling by the European Court to these questions could not be considered as relevant for the decision in the pending procedure. The Court relies upon Art. 8 and 9 of the Directive 64/221 arguing that Art. 9 of the Directive 64/221 admits that a previous appeal procedure is not necessary in "urgent cases". In the pending case the alien authorities, however, had already assumed that there is an urgent case in which an expulsion decision can be executed even before the completion of the main judicial proceedings. The question whether the conditions for an "urgent case" in the sense of Art. 9 para. 1 of the Directive 64/221 were in fact met, would rest exclusively within the competence of the alien authorities. Therefore, in the Administrative Appeal Court's view the procedure according to Art. 9 of the Directive 64/221 does not allow the administrative courts to examine whether there is in fact an "urgent case" which allows the administrative authorities to execute an expulsion decision. The Administrative Appeal Court relies in this context to a statement of the European Court in the judgement of 5 March 1980.[28] From the European Court's jurisprudence it follows according to the Administrative Court that the fact that a court on the basis of an ex-post examination comes to a different conclusion as to the urgency of an expulsion measure as the alien authorities does not justify the conclusion that it would have been necessary to provide for an appeal proceeding which as a rule is obligatory under Art. 9 of the Directive 64/221.

By decision of 3 August 2004[29] the Federal Administrative Court has passed a number of decisions on expulsion of Union citizens entitled to free movement. Implementing the ECJ jurisprudence in the cases *Orfanopoulos* and *Oliveri*[30] the Court has obliged all lower courts to apply the principles of *Orfanopoulos* in all pending expulsion procedures against Union citizens who had been expelled in application of Sec. 47 para. 1 and 2 of the Aliens Act of 1990 (which in the meantime has been replaced by the Residence Act 2004). Subsequently, administrative as well as administrative appeal courts have dealt in a number of cases with the consequences of the *Orfanopoulos* jurisprudence and the conclusions drawn by the Federal Administrative Court in the judgement of 3 August 2004.[31]

The judgement of the Administrative Appeal Court of Hessen[32] concerns the expulsion of a Union citizen without a limitation of the effects of an expulsion for future entry (blocking effect). The Administrative Appeal Court states that the expulsion in exceptional cases can be justified without a limitation of the effects of the expulsion in the decision if due to reasons of special prevention the

26 13 S 585/04, *AuAS* 2004, p. 149.
27 6 K 101307/01, *InfAuslR* 2002, p. 66.
28 Case 98/79, ECR 1980, 619.
29 1 C 29/02; 30/02.
30 ECJ of 29 April 2004, case C-482/01 and C/493/01, *DVBl* 2004, p. 876; see also Observatory Report 2004, at p. 11 f.
31 See also chapter VI.
32 Decision of 2 September 2004 – 12 TG 1986/04, *AuAS* 2005, p. 14.

limitation of the effects of an expulsion is deferred to a later date. The Court argues that the expulsion order is in accordance with community law by stating that the expulsion does not exclude a Union citizen in principle entitled to free movement permanently, but only in consideration of the gravity of the offence, the expulsion purpose and the personal circumstances of the case. Therefore, although the order did not prescribe any limitation, it did recognise the necessity in principle to enact at a later stage a date for limiting the effects for the decision. The Court as well takes the view that the *Orfanopoulos* decision does not exclude a deferral of the decision to limit the effects of an expulsion order to a later stage.

The expulsion of Union citizens is dealt with in decisions of the Administrative Appeal Court of North-Rhine-Westphalia of 29 January 2005 and of the Administrative Appeal Court of Baden-Württemberg of 14 December 2005.[33] The Administrative Appeal Court of Münster (North-Rhine-Westphalia) deals with the protection against expulsion of a Turkish national in analogy to community law. The Court somewhat in contradiction to the Federal Court's jurisprudence argues that in expulsion proceedings the legal situation at the time of an administrative appeal decision should be considered as relevant rather than the time of oral judicial proceedings. Therefore, new facts could only be taken into account in a subsequent decision to limit the effects of an expulsion order. The Court in that connection confirms the jurisprudence of the Federal Administrative Court that a subsequent decision to limit the effects of an expulsion order is not dependent upon the departure of a person entitled to free movement.

The expulsion of a Union citizen on the basis of a serious criminal offence (murder) is the subject of a decision of the Administrative Appeal Court of Baden-Württemberg. The Administrative Court's reasoning does take account of the rules imposed by the ECJ's jurisprudence in the *Orfanopoulos*-case. Therefore, the fact that a very serious offence had been committed could not be considered as sufficient to justify an expulsion order. It is necessary to examine on the basis of an individual examination of all circumstances of the case whether there is in fact a danger of repeated offences. Therefore, the lower court's decision is quashed since the lower court had concluded from the legal presumption in Sec. 48 para. 1 sentence 2 of the Aliens Act 1990 that there is a concrete danger for the public order without examining all individual circumstances of a case. The Appeal Court also has criticised the statement of the lower court that in case of very serious offences the requirements for showing a concrete danger should be considered as low.

The decision deals with the interpretation of Art. 9 para. 1 of Directive 64/221 of the Federal Administrative Court of 13 September 2005.[34] The Court had to decide on the expulsion of a Turkish national entitled to the rights under the Association Agreement EEC/Turkey. The Court took the case as an occasion to clarify the controversial issue of the effects of the European Court's jurisprudence in the cases *Orfanopoulos* and *Oliveri*, *Dör* and *Ünal*.[35] The Federal Administrative Court held that an expulsion is to be considered as illegal if the expulsion order has not been examined by a second independent administrative agency unless there is an "urgent" case. An "urgent case" in the sense of Art. 9 para. 1 of the Directive 64/221 according to the Court requires a special public interest that the expulsion order is to be executed immediately without waiting for the outcome of the main judicial proceedings, in order to meet an immediate concrete and intolerable danger for the public order by the expelled foreigner. The Federal Court makes clear that the exceptional immediate execution of an expulsion order is only admissible under exceptional circumstances as a restriction of the free movement of workers. An urgent case, therefore, cannot be inferred already from the danger of a public order required for any expulsion order but has to be justified with special circumstances leading to the concluding that weighing all circumstances of the case a suspension of the expulsion order is not acceptable in order to protect the general public. An urgent case, therefore, can only be assumed if there is the well-reasoned assumption that the danger emanating from the foreigner may become real even before the judicial proceedings are finished. Only in this case a further examination by a second administrative authority is not reasonable. The Federal Administrative Court in that respect reminds lower courts to the conditions set up under constitutional principles by the Federal Constitutional Court with respect to the requirement of immediate execution of an expulsion order according to Sec. 80 para. 2

33 Case 18 A 1279/02 and case 11 S 2791/04, both decisions available under www.jurisweb.de/jurisweb/cgi/bin/j2000cgi.

34 1 C 7/04.

35 See ECJ of 2 June 2005, case C-136/03, *Dör and Ünal*, *InfAuslR* 2005, 289.

no. 4 of the Administrative Court Procedure Act.[36] The Federal Court in this connection also refers to the conclusions of Advocate-General Stix-Hackl of 2 June 2005 in the case C 441/02, as well as to the statement of the European Commission to the German federal government of 24 July 2000 in an infringement procedure. It follows that an urgent case in the sense of Art. 9 cannot be justified by simply arguing that an appeal of a foreigner against an expulsion order is most likely unsuccessful. If there are only minor chances of success, the immediate execution of an expulsion order requires evidence of a concrete danger of the public order and a balancing decision in which all public and private interests are taken into consideration.

There are controversial decisions of Germans courts about the effect of expulsion decisions concerning the blocking function (prohibition of entry) of expulsion orders taken before the entry into force of the Freedom of Movement Act of 30 July 2004. While the Administrative Appeal Court of Hessen has decided that unappealable expulsion orders taken before the entry into force of the Freedom of Movement Act (1 January 2005) lost their blocking effect,[37] the Administrative Appeal Court of Hamburg[38] has decided that expulsion orders which have become unappealable are also effective with respect to Union citizens relying upon freedom of movement. The Hessen Appeal Court relies upon the abolition of the previous law on residence permits for Union citizens by the Freedom of Movement Act. The Hessen Appeal Court argues that the legal basis for expulsion orders has been abolished by the Freedom of Movement Act and therefore these expulsion orders against Union citizens have lost their blocking effect. The Hamburg Appeal Court on the contrary states that already before the entry into force of the Aliens Act 1990 expulsion orders against Union citizens were considered as valid even though they had been taken on the legal basis of the previous law. Therefore, the fact that Sec. 11 of the Freedom of Movement Act does not contain a special reference to transitory rules like Sec. 102 of the Residence Act, does not necessarily mean that expulsion orders have lost their effect upon entry into force of the Freedom of Movement Act. Such an effect was not required by community law. An automatic suspension of all expulsion orders would be contrary to the principle that even upon entry into force of the Freedom of Movement Act the residence of Union citizens could be restricted in case of serious and concrete dangers of the public order. Therefore, the Hamburg Court comes to the conclusion that freedom of movement in case of an expelled Union citizen does not entitle to an unlimited right to entry. The same principle applies according to the Court if an expelled third country national is married to a Union citizen. The European Court's jurisprudence in the *Mrax*-case[39] could not be quoted in favour of an opposite interpretation. Community law did not provide for an entitlement of an expelled Union citizen to enter the respective host state as long as his application for termination of the blocking effect connected with an expulsion order is still examined.[40] The Hamburg Appeal Court in this connection also refers to Art. 32 para. 2 of the Directive 2004/38 on free movement of Union citizens.[41]

Increasingly administrative courts also deal with the impact of Directive 2004/38 on measures against EU citizens taken before the date of implementation of the Union citizens Directive (29 April 2006). The Administrative Court of Gießen has quashed an expulsion order against an Italian citizen who had been sentenced to imprisonment of four years and nine months, and who has been considered as potentially dangerous. In spite of the fact that probably the expulsion order could have been justified on the basis of the existing provisions of the Freedom of Movement Act, the judge has applied a very high threshold by interpreting the existing provisions in accordance with Art. 28 para. 3a of the Directive 2004/38. Quoting a decision of the Federal Civil Court, the Court argues that it was obliged to apply the existing law in conformity with community law. The Court in this connection refers to the provisional draft Bill for the implementation of EU directives.[42] In this draft Bill Art. 28 para. 3 had been interpreted as a requirement of imperative reasons of public security. Such imperative reasons

36 Cf. Constitutional Court decision of 13 May 2005, 2 BvR 485/05, *NVwZ* 2005, 1053; also previously Federal Constitutional Court of 4 March 1985, 2 BvR 1642, 83, vol. 69, 220, 227.

37 Administrative Appeal Court of Hessen of 29 December 2004, 12 TG 3212/04, *NVwZ* 2005, 837; see also Administrative Court of Berlin of 28 October 2005, *InfAuslR* 2006, 16.

38 Judgement of 22 March 2005, 3 Bf 294/04.

39 ECJ of 30 May 1991, case C-68/89, ECR 1991, I-2637; ECJ of 27 July 2002, case C-459/99, *InfAuslR* 2002, 417; *Mrax*.

40 ECJ of 18 May 1982, *Adoui and Cornuaille*, ECR 1982, I-1665.

41 See also judgement of 27 January 2005, Administrative Appeal Court of Hamburg, 3 Bs 458/04.

42 See General Remarks.

could only be assumed if the foreigner had been punished to the maximum sentence for a crime or if the security of the state were affected or if the foreigner could be considered as a terrorist danger. Since none of these requirements was fulfilled in the case the expulsion decision was quashed by the Court. The Court although mentioning that there is no obligation to take this interpretation into account considers it appropriate to apply these principles since there is only a few weeks left until the date of implementation and since it were unlikely that the necessary legislative acts were adopted by Parliament by that time.[43] It should be mentioned that the application of the principle of interpretation in conformity to EU law comes very close to a disregard of existing law on somewhat doubtful premises.[44]

According to the decision of the Administrative Appeal Court of Hessen[45] the principles laid down in the Union Citizens Directive 2004/38 reflect only the existing standard of protection of freedom of movement rights. Therefore, the considerations in the preamble of the Directive (no. 24) as well as the provisions of Art. 28 para. 3 of the Directive, limiting the expulsion of Union citizens with a lawful residence of at least ten years are already applicable regardless of the fact that the Directive, cannot be considered as directly applicable at the present time.

The Administrative Court of Hamburg in a decision of 16 February 2005[46] has decided that the new jurisprudence on expulsion of Union citizens following the European Court's jurisprudence in the *Orfanopoulos*-case must be considered as a new situation justifying a resumption of an expulsion proceeding. The right to a correct discretionary decision of the aliens authorities can be enforced by an interim injunction of the administrative court.

Literature

In recent legal literature in an Article on the expulsion of Union citizens Jakober, a former judge at the Administrative Appeal Court of Baden-Württemberg, deals with the question whether it is still possible to expel Union citizens.[47] Jakober in his introductory sentence comes to the conclusion that an expulsion of Union citizens according to German law is not possible anymore since the entry into force of the Freedom of Movement Act on 1 January 2005. He argues with the wording of the Freedom of Movement Act which requires that the loss of the entitlement to free movement must be determined by an administrative order. The Freedom of Movement Act, however, does not refer any more to the relevant provisions of the Residence Act on expulsion. Jakober concludes that the determination that the conditions for free movement by administrative order are not met anymore cannot be considered as equivalent to an expulsion order. The withdrawal of the certificate on free movement also does not have the same effect as an expulsion order. Therefore it is argued that the administrative decision, that the conditions for free movement are not existing anymore respectively have never existed, results (only) in the obligation to leave the federal territory. The administrative decision, however, must, in his view, be distinguished from an expulsion order. Although in some respects the administrative order on non-existence of the entitlement to free movement had the same consequences as an expulsion order,[48] in other respects there were differences between the administrative determination on non-existence of free movement rights and an expulsion order. Particularly with regard to the procedure different rules were applicable.

Gutmann comments on the decision of the Federal Administrative Court of 3 August 2004 changing the previous expulsion practices and ordering new proceeding for all expulsion cases pending before the courts until 31 January 2005 in compliance with the obligation to decide on a discretionary basis on expulsion of Union citizens.[49] Gutmann criticises the idea that administrative authorities could be granted discretion in deciding on the expulsion of Union citizens. He argues that the Freedom of Movement Act in accordance with community law does not admit any interim solution as suggested by the Federal Administrative Court with respect to pending expulsion proceedings. There-

43 Verwaltungsgericht Gießen of 15 March 2006, No. E 2786/02.
44 Cf. Administrative Appeal Court of Baden-Württemberg of 12 May 2005, 3 S 358/05.
45 Decision of 2 May 2005, 12 TG 1205/05, *InfAuslR* 2005, 295.
46 6 E 421/05, *InfAuslR* 2005, 186.
47 Hans Jakober, Ausweisung von Unionsbürgern?, *VwBlBW* 2006, 15.
48 Cf. blocking effect according to Sec. 11 para. 2 of the Freedom of Movement Act.
49 Rolf Gutmann, Die verborgene Altfallregelung für ausgewiesene Unionsbürger, *InfAuslR* 2005, 125.

fore, in the author's view expulsion proceedings taken before 1 January 2005 cannot be executed anymore, but must be cancelled as illegal. Therefore, expelled Union citizens were entitled to free movement as a result of the entry into force of the Freedom of Movement Act.[50]

50 It should be mentioned that most German administrative courts are not accepting this view.

Chapter II
Access to employment

The Federal Civil Court by a judgement of 13 October 2005 had to decide about the right of a Union citizen to a temporary exercise of a medical profession in Germany according to Sec. 3 para. 3 of the Federal Regulation for the exercise of the medical profession, respectively Sec. 1 para. 2 of the Federal Regulation for the exercise of the dental medical profession.[51] In a criminal proceeding a German national upon having completed a study of medicine and dental medicine had been admitted as a medical doctor in Germany. He worked from 1947 until 1979 as a doctor in a university clinic. In 1978 he established himself in Belgium as self-employed medical doctor and took his residence in Belgium. Since 1981 he was also practising in Germany. By administrative act of 190 August 2000 the competent authorities determined cancellation of his licence to practice medicine (Approbation) due to violation of his duties. He was subsequently prosecuted for having exercised illegally the medical profession in Germany. The question, therefore, arose whether he was still entitled to temporary practice as a doctor in Germany on the basis of his admission in Belgium. The Federal Civil Court decided that German authorities according to the relevant provisions of the Federal Regulation on medical profession (BÄO) may not restrict the exercise of a medical doctor practising on the basis of his admission in Belgium if the exercise of medical profession is only of a temporary nature. The only possibility to restrict the exercise of the medical profession based upon a violation of duties of a medical doctor would consist in the immediate information of the competent Belgium authorities in order to induce them to withdraw the licence to practice the medical profession.

In Baden-Württemberg the Parliament (Landtag) has passed on 30 November 2005 an amendment of the University Law[52] whereby working persons without a high school diploma are entitled to an access to a study at a university in their professional field, provided that

- their main residence is since at least one year in the Federal Republic of Germany,
- they have been professionally active in Germany since at least one year and
- they have passed a master craftsmen examination (Meisterprüfung) or an equivalent professional training according to the Berufsbildungsgesetz or to the Handwerksordnung,[53] or
- they have passed a specialised technical school according to Sec. 14 of the Baden-Württemberg Schulgesetz.[54]

Since these requirements may be difficult to fulfil by Union citizens, questions may arise as to the compatibility of these provisions with the principle of non-discrimination according to nationality.

By a regulation of 17 December 2005[55], the agreement between the government of the Federal Republic of Germany and the government of the Republic of Austria on cooperation in professional training and on mutual recognition of professional certificates of 27 November 1989 has been enacted. The regulation in detail contains a list which determines the Austrian certificates and the equivalent German certificates in 20 professions, ranging from electricians to mechanics.

The recognition of diplomas issued by public and private universities in other EU Member States has also become a controversial issue before German courts and in the debates before German ministries for science, research and education. There are increasing cooperations in the university sector between public universities and private university-like institutions. Frequently, there is a substantial commercial activity with issuing "recognised bachelor or master degrees" on the basis of a distant learning programme. The conference of the ministries of culture in Germany has repeatedly dealt with the activities of foreign private institutions on German territory, inquiring into the numerous forms of cooperation of private institutions with public or private universities in other EU Member States. A

51 BGH of 13 October 2005, 3 StR 385/04, NSWBÄO § 3.
52 Landeshochschulgesetz of 1 January 2005, *Gesetzblatt* p. 1.
53 Law regulating the conduct of craft and trades.
54 See law on amending the University law of 1 December 2005, *Gesetzblatt* of 8 December 2005, No. 17, p. 706.
55 5. Verordnung zur Änderung der Verordnung zur Gleichstellung österreichischer Prüfungszeugnisse mit Zeugnissen über das Bestehen der Abschlussprüfung oder Gesellenprüfung in anerkannten Ausbildungsberufen.

concrete case has been the recognition of a master of business administration issued by the University of Wales in cooperation with a private commercial education institution in a distant learning programme to which the University of Wales seems to have contributed only the degree by the Bavarian Administrative Appeal Court based upon the argument that according to the European Court's jurisprudence all degrees granted by an officially recognised university in another Member State must be recognised in Germany on a purely formal level without the possibility to examine whether the conditions for equivalence of such diploma with comparable German diploma are met.[56]

56 Judgement of 28 October 2005, 7 B 05.75.

Chapter III
Equality of treatment on the basis of nationality

The Federal Administrative Court in a judgement of 3 November 2005[57] has held that the principle of free movement of workers obliges the public administration to grant a yearly special loyalty allowance also to a civil servant who has entered into public service to another EU Member State in the following year before the crucial date of 31 March. Normally, the applicable rules exclude those civil servants who quit service before 31 March of the following year.

Two Polish law students upon successful completion of their law studies in Poland have tried to apply in Germany for admission to the trainee status (Referendardienst), which according to the German provisions is a requirement for the second state examination (Assessorexamen), which is a prerequisite for entering the judiciary, higher civil service and advocacy. The two applicants have relied upon the *Morgenbesser*-decision of the European Court.[58] Their application has been unsuccessful since the Baden-Württemberg authorities have argued that the applicants did not fulfil the requirements of German law.[59] According to these provisions persons can only be admitted who have passed the first state examination. The Administrative Appeal Court of Baden-Württemberg in a judgement of 7 July 2005[60] has upheld the administrative decision. According to the Administrative Appeal Court the *Morgenbesser* and *Vlassopoulou*-decisions[61] do not imply a general recognition of legal diploma without a comparative examination of whether the skills required and examined correspond each other. If there is only a partial correspondence the competent national authorities may decide that additional skills have to be proven either by an additional course or practical experience. This view is challenged in an article for the Neue Juristische Wochenschrift[62] It is argued that "undoubtedly" the German practice is in violation of community law. The authors argue that at least a professional experience like working for a German attorney or master studies should be considered as sufficient to prove the equivalence of the Polish degree. The Administrative Appeal Court's decision, however, is supported by a judge at a civil appeal court and former head of the department for legal education in Bavaria.[63]

57 2 C 9.05.
58 Judgement of 13 November 2003, case C-313/01, *EuZW* 2004, 61.
59 See Act on the Education of Jurists of 16 July 2003, *Official Gazette of Baden-Württemberg*, p. 354.
60 4 S 901/05, *VwBl* 2005, 439.
61 European Court of 7 May 1991, case C-340/98, ECR I-1991, 2357.
62 Timm/Kempter, Diskriminierung beim Zugang zum Referendardienst in Deutschland – Schein oder Sein?, *NJW* 2005, p. 2826.
63 Lechner, *NJW-Aktuell*, No. 47/2002, at p. XVIII.

Chapter IV
Employment in the public sector

In connection with the general debate on restructuring the federal order in Germany, there is an ongoing debate on a uniform federal legislation for the legal status of notaries. There are four different types of notaries in Germany, depending on the legislation of each Land. While in some Länder notaries are employed as civil servants,[64] other Länder combine the services of a notary public with the self-employed activity of an attorney. Another group of Länder have established the notary as an independent self-employed profession, which need not be connected with the profession of a practising lawyer.[65] Although there is growing recognition of the desirability of changing Art. 138 of the Basic Law, which contains a constitutional guarantee of the existing system of notaries in Bavaria and Baden-Württemberg, and of arriving at a uniform institution of a notary as a self-employed profession, it is largely undisputed that notaries, in whatever function they perform services whether as employed or self-employed persons, exercise public functions and therefore may be reserved to German nationals contrary to the view of the European Commission.[66]

64 See Verstyl, in von Münch/Kunig (eds.), *Grundgesetz Kommentar*, vol. 3, 5th ed., 2003, Art. 138 at No. 11.

65 Section 5 (1) Bundesnotarordnung provides that only a German national can be entrusted with the task of a notary public.

66 For details see Verstyl, in von Münch/Kunig (ed.), *Grundgesetz Kommentar*, Art. 138 at No. 20 et seq.

Chapter V
Members of the family

The Administrative Appeal Court of Hamburg has dealt in a decision of 27 January 2005[67] with the right of a third country national who has married a Union citizen following an unappealable expulsion order and deportation. The Appeal Court decided that a third country spouse is not entitled to enter Germany together with the expelled Union citizen as long as an application for examining the legality of a prohibition to enter is still under examination. The Court in this connection refers to the fact that even for Union citizens there is no right under community law to re-enter into the EU Member State as long as an application to repeal the blocking force of the expulsion order is under examination.

The Administrative Appeal Court of Hamburg in a judgement of 22 March 2005 deals in detail with the rights of third country nationals of free movement married to a Union citizen. The Court heavily relying upon the European Court's jurisprudence had to decide about the spouse of a Union citizen who had been expelled previously. The Court requires that a third country national in order to rely upon free movement in order to change his regular residence from one Member State to another Member State must have been lawfully in the Member State of departure. Since the plaintiff in question had been previously in the United Kingdom for a short-term visit the Appeal Court considers it doubtful whether a mere reception of minor services at the occasion of a stay in an EU Member State is already covered by the freedom to provide and receive services. The Court, although referring to the relevant European Court's jurisprudence in the *Luisi* and *Carbone*-case[68] argues that it would seem doubtful whether a Union citizen is already covered by the freedom to receive services if he, during a visit receives services which are necessarily connected to every person in order to satisfy elementary needs. If this is the case, the Court argues, everybody were falling under the freedom to receive services. In that case it would not have been necessary to adopt the Directive 90/364. In addition, the Court points out that a right of free movement of Union citizens and their family relatives, unless they are economically active, requires the proof of sufficient means of subsistence and health insurance. With respect to health insurance, the Court again refers to the European Court's jurisprudence in the cases *Baumbast* and *Trojani*[69] that this requirement must be interpreted in accordance with the principle of proportionality. Therefore, it would have been unreasonable to refuse free movement in case of a temporary residence due to the fact that the insurance does not cover medical services for rehabilitation and pregnancy. With regard to sufficient means of subsistence the Court refers to the *Grcelczyk*-decision,[70] which according to the Court's interpretation has confirmed in principle a right of Member States to determine that a Union citizen does not fulfil anymore the conditions for a residence right. The Appeal Court argues that the danger that the Union citizen will be arrested and be put in prison in order to serve a prison sentence cannot be considered as a sufficient reason to deny a right of free movement.

Literature

Various articles deal with family reunion rights of third country nationals. Fischer-Lescano[71] examines the family reunion right of third country family relatives of German nationals according to the Freedom of Movement Act, which entered into force on 1 January 2005. The report analyses critically the intention of the Act to enforce the right of family relatives particularly by providing for secure residence rights and amend the rules on termination of residence in accordance with the jurisprudence of the European Court. The conclusion of the author is that Sec. 1 of the Freedom of Movement Act defining the scope of applicability of the Act to non-German Union citizens and their relatives is not in accordance with community law. The author argues that the German legislator violated the Treaty

67 3 Bs 458/04.
68 ECJ of 31 January 1984, ECR 1984, I-377.
69 ECJ of 7 September 2004, case 456/02, *Trojani*, *InfAuslR* 2004, 417, 419; ECJ of 17 September 2002, *Baumbast*, *NJW* 2002, 3610 f.
70 ECJ of 20 September 2001, case C-184/99, *InfAuslR* 2001, 481, 483.
71 Nachzugsrechte von drittstaatsangehörigen Familienmitgliedern deutscher Unionsbürger, *ZAR* 2005, 288.

by declaring applicable the provisions of the Residence Act to third country spouses of German citizens rather than declaring applicable the Freedom of Movement Act.

This criticism seems justified insofar as Sec. 1 of the Freedom of Movement Act explicitly provides for an application of the Act only for the entry and residence of nationals of *other* EU Member States (Union citizens) and their relatives. Since on the other hand *German nationals* and their third country relatives are entitled to rely upon free movement provided that they are exercising a right of free movement (for instance by moving from another EU Member State), the application of the provisions of the Residence Act – unless interpreted in conformity with community law – entails the risk of less favourable treatment as Union citizens and their family relatives are entitled to claim. The author examines in detail in a comparative perspective the rights of third country family relatives under the Freedom of Movement Act and under the Residence Act and describes differences:

- under the Residence Act the right of entry and residence is not merely declaratory, but constitutive,
- the category of family relatives of Union citizens from other Member States entitled to free movement is wider than the provisions of the Residence Act for family relatives of German nationals entitled to family reunion.[72]

The author, therefore, comes to the conclusion that the different treatment violates the principles laid down by the European Court in the cases *Singh*[73] and *Carpenter*.[74] According to the author it follows from the European Court's decision in the *Carpenter*-case that reliance upon free movement and family protection does not require a previous exercise of the right to freely move within the Community. Therefore, free movement is applicable as well in the case of a third country family relative of a German national making use of his freedom to move freely within the European Union in order to live with the Union citizen. The author concludes therefore that the Freedom of Movement Act must be interpreted in conformity with community law requirements. Since Sec. 1, however, requires explicitly nationality of another EU Member State, an interpretation in compliance with community law would seem hardly possible.

Borrmann describes the rights of third county spouses of migrant Union citizens with particular consideration of the problem of sham marriages.[75] The author discusses in particular the problems of sham marriages and the implications of the decisions of the European Court in the *Akrich*-case.[76] Referring to the conclusion of the Council of the European Union of 4 December 1997 on measures against sham marriages[77] the author describes problems arising in the practice of alien authorities to determine sham marriages. Referring to various decisions of the European Court on the legal status of third country spouses of Union citizens, the author concludes that the Court, particularly in the *Akrich*-decision has implicitly confirmed that a marriage concluded exclusively for the purpose of securing a residence permit does not imply a right to free movement. In addition, the author states that third country spouses are only entitled to freely move within the Union. Therefore, a third country national must have been previously in another EU Member State in order to make use of free movement within the European Union. An abuse of the entitlement to free movement had to be acknowledged only if community law for migrant workers is relied upon only in order to circumvent existing provisions on entry and residence for third country nationals. Therefore, two requirements have to be met in order to assume an abuse of community rights. The first condition means that in spite of a formal compliance with the conditions set under community law, the aim of a community regulation cannot be achieved. The second condition concerns the intention of the person to achieve an advantage foreseen in community law by an arbitrary establishment of respective conditions.[78] Whether these statements are sufficient to clarify the term "abuse of community rights" may be somewhat doubtful. Finally, the author deals with the legal status of third country spouses of Union citizens moving from outside the Europe-

72 See Sec. 28 para. 4, 36 Residence Act requiring for a family reunion of other family relatives the proof of an exceptional hardship.
73 C-370/90, ECR 1992, I-4265,
74 C-60/00, ECR I-6279.
75 Rechte drittstaatsangehöriger Ehegatten wandernder Unionsbürger – unter besonderer Berücksichtigung des Problem der Scheinehe, *ZAR* 2004, 61; the author is civil servant at an alien authority.
76 Case C-109/01, *Hacene Akrich*, ECJ of 23 September 2003,
77 Official Journal C-382, p. 1.
78 Referring to ECJ or 14 December 2000, case C-110/99, *Emsland-Stärke*, ECR 2000, I-11569.

an Union to a Member State in order to join a Union citizen. Community law and free movement according to the author of the article is not applicable in this case since free movement rights only arise in the context of movement within the European Union. Therefore, the principles of the *Mrax*-case could not be applied in such a situation.[79] Finally, the author discusses the extension of the scope of applicability of free movement in the *Carpenter*-case, which is criticised as effacing the border between the applicability of national aliens law and community law.

79 Case C-459/99, *Mrax*, judgement of 25 July 2002.

Chapter VI
Relevance/influence/follow-up of recent Court of Justice Judgements

Various administrative court decisions deal with the effects of the *Orfanopoulos* and *Oliveri* jurisprudence on unappealable expulsion decisions taken on the basis of the pre-*Orfanopoulos* jurisprudence. The Administrative Appeal Court of Mannheim in a decision of 9 November 2004[80] has held that alien authorities are regularly obliged to re-examine unappealable expulsion decisions against Union citizens taken upon the previous legal basis of applying provisions of obligatory expulsion without undertaking a sufficient examination of discretionary considerations. The alien, however, is obliged to ask for a re-examination within a due time frame following the publication of the relevant decision of the Federal Administrative Court.

In reaction to the Anker-decision of the European Court of 30 September 2003 a couple of regulations have been amended, in particular the "Schiffsbesetzungsverordnung" and the "Schiffsoffizierausbildungsverordnung" by Art. 2 and 3 of the Regulation on the amendment of regulations on the training of the seafaring profession (Verordnung über die Änderung seefahrtsbezogender Ausbildungsverordnungen vom 4 August 2004, BGBl I, p. 2062 ff.). The relevant amendments are in Art. 2 and 3 stating that the certificate of a naval officer, which is required under Art. 3 of the Schiffsbesetzungsverordnung, may be acquired by nationals of a Member State of the European Union provided that they fulfil certain requirements under Sec. 7 para. 1 of the Schiffsoffizierausbildungsverordnung.

In addition, Sec. 2 para. 2 of the Schiffsbesetzungsverordnung of 26 August 1998 (BGBl I, p. 2577) has been changed by the following provisions (Art. 2 and 3 of the attached provision).

In my understanding the relevant provisions say that

- independent of how big a ship is the captain must be a German national and in possession of a valid German captain's certificate,
- concerning officers of the nautical of technical services Union citizens are treated equal to Germans in the following paragraphs 2-4 by including a clause that one resp. two officers must be either German nationals or Union citizens in possession of a recognised equivalent certificate.

80 11 S 2771/03.

Chapter VII
Policies, texts and/or practices of a general nature with repercussions on free movement of workers

See General Remarks on the Draft Bill for amending the Immigration Act of 2004.

Chapter VIII
EU enlargement

The Civil Appeal Court of Celle[81] has decided that expulsion orders taken before 1 May 2004 against Union citizens from the new acceded EU Member States can be executed after accession. The Court argues that in spite of Poland's accession in 2004 to the European Union at the time of the expulsion order and the final decision of the Administrative Appeal Court the law of the European Community was not applicable in relationship to Poland. Therefore, the alien authorities were justified to deport the Polish citizen on the basis of an unappealable expulsion order. In a comment of this decision it is referred to the European Court's decision of 29 April 1999 in the *Ciola*-case[82] whereby an administrative order taken before the accession of Austria may not be executed anymore after accession. Therefore, some authors take the view that expulsion orders which after accession were not admissible anymore could not be executed against citizens of the new acceding EU Member States.[83]

The Administrative Appeal Court of Baden-Württemberg has decided in a decision of 9 September 2004[84] about the applicability of community law and the Act on Residence of nationals of the EEC (predecessor of the Freedom of Movement Act) to nationals of the new EU Member States. In the case of expulsion of Hungarian nationals the Appeal Court states that with the accession of Hungary to the European Union during the expulsion procedure the legal situation had been changed. Since the Hungarian national had been admitted for at least 12 months to the labour market he was entitled to free movement upon entry into force of the Accession Treaty since 1 May 2004. Therefore, community law were applicable.

The federal government has declared that it will continue to apply restrictions for the admission of Union citizens from the new Member States to the German labour market. The federal government, based upon the experiences of the past two years, considers it necessary to maintain the control of admission of migrant workers according to the needs of the labour market.

Some changes in the legal status of Union citizens from the new Member States, however, result from the passage of time. Thus, according to the Accession Treaty, family relatives who do not have a lawful residence at the time of accession with a Union citizens are only entitled for a restricted access to the labour market by national rules up to a maximum of 18 months after taking lawful residence with the migrant worker from a new Member State. However, since the third year after accession starting 1 May 2006 there is unlimited access to the labour market of family relatives.

With the adoption and entry into force of the law on amending the immigration law,[85] which is destined to implement the new Union Citizens Directive, there will be further changes in the status of Union citizens and their family relatives which includes Union citizens from the new Member States. Some of the provisions of the draft legislation, in particular in the area of social benefits, were also prompted by the intention to prevent unwanted immigration into the social system of Germany. The Bill provides that according to the legal situation since 1 January 2005 all foreigners who are in principle available for the German labour market respectively who are entitled to take up employment or could receive a labour permit may claim social benefits according to the new Social Code II replacing the previous system of unemployment assistance. It is noted that Union citizens of the new Member States may also claim such benefits in spite of the interim restrictions for admission to the labour market. The Bill, therefore, has introduced a new provision whereby foreigners, who do not enjoy as migrant workers or self-employed persons or family relatives of such persons free movement, are excluded for the first three months of their stay in Germany from social benefits according to the Social Code II.[86]

By an administrative circular the Federal Ministry of Interior has informed the interior ministries on the outcome of a conference of the interior ministries in October 2005. In principle, the existing laws and administrative practices on the legal status on EU citizens from the new Member States and

81 Decision of 20 January 2005, 16 W 182/04, *InfAuslR* 2005, 149.
82 Case C-224/97, EZAR 812, Nr. 9.
83 Cf. *Westphal/Stoppa*, *InfAuslR* 2004, 133; see also chapter I, C.
84 13 S 1738/04.
85 See general remarks.
86 Official Records of the Bundestag, No. 550.05 at p. 3.

on the issuance of labour permits remain in force. According to Sec. 5 of the Freedom of Movement Act, Union citizens of the new Member States as well as their family relatives who are as well Union citizens receive *ex officio* a declaration on their residence rights. It is presumed that the requirements for free movement are fulfilled if a Union citizens declares that he is entitled to free movement and that there are no doubts concerning the correctness of this declaration.

Union citizens from the new Member States, however, need a labour permit/EU in order to take up employment. The declaration according to Sec. 5 of the Freedom of Movement Act therefore has to be complemented by an additional sentence stating that in order to take up employment an additional labour permit/EU is needed. Every declaration for new EU citizens will contain this additional information independent of whether in a concrete case a labour permit is in fact necessary to take up a particular type of employment. The declaratory certificate, therefore, is issued only if an EU labour permit has been granted.

The need to be in possession of an EU labour permit to take up employment with employers residing in Germany follows from Sec. 184 SGB III in connection with Sec. 39 para. 6 of the Residence Act concerning qualified employment. For EU citizens working as unqualified employees the provisions of the Recruitment Stop Exceptions Regulation[87] and of the Labour Permit Regulation[88] are still applicable. It follows that the authorities have to examine whether a new Union citizen arrives in Germany for the purpose of taking up employment or whether he is legally within Germany for any other reason. In the first case, the alien authorities will have to check whether the particular employment is exempt from the requirement of a labour permit. Unless an exemption applies, the labour permit can only be granted if the requirements for an exceptional labour permit under the previously mentioned regulations are fulfilled. These requirements are not applicable for new Union citizens having already their permanent residence within Germany; in this case a labour permit may be granted according to the new Employment Regulation of 22 November 2004[89] and the Labour Permit Regulation.[90] A new Union citizen who had entered Germany for some other purposes as taking up employment must, as a rule, have had his/her residence in Germany in case of a change of purpose of stay before the more favourable provisions of the new Employment Regulations in connection with the Labour Permit Regulation are applicable.

With regard to Union citizens from new EU Member States taking up employment with employers from the new Member States, Sec. 284 SGB III in connection with the Accession Treaty's provisions on restrictions on the freedom to provide services[91] apply in the framework of the freedom to provide services, with the exception of the construction industry inclusive related industries like cleaning of buildings, interior decoration etc., dispatched workers from the new Member States do not need a labour permit/EU. Only those workers working in the restricted branches need a labour permit/EU. A labour permit may be granted provided that the provision of services has been allowed in the framework of a bilateral agreement between Germany and the respective Member States. Such agreements have been concluded with Poland, Hungary, Czech Republic, Slovak Republic, Slovenia and Lithuania.

There has been information in the media that many new Member States' citizens use provision of services to escape transitional measures restrictions. A report of the Federal Ministry of Interior on the evaluation of the 2004 Immigration Law of July 2006 describes the situation as follows (my translation):

> It has been observed increasingly since the EU enlargement of 1 May 2004 that provision of services and establishment are used to employ poorly paid workers from the new Member States in Germany. There is a danger that detached workers of eastern European enterprises and persons acting as seemingly self-employed are replaced in the traditional labour staff of German en-

87 Anwerbestoppausnahmeverordnung, see Hailbronner, *Ausländer- und Asylrecht*, 2005, C 1.4; www.aufenthaltstitel.de.

88 Arbeitsgenehmigungsverordnung, see Hailbronner, *Ausländer- und Asylrecht*, 2005, C 1.3; www.aufenthaltstitel.de.

89 Beschäftigungsverordnung, see Hailbronner, op. cit., C 1.1; www.aufenthaltstitel.de.

90 Arbeitsgenehmigungsverordnung; www.aufenthaltstitel.de.

91 Letter of the Federal Ministry and Economy and Labour to the Commission of 27 April 2004, Official Gazette of 20 October 2004, No. 199, p. 22231.

terprises. To draw a borderline between the legitimate use of the freedom to provide services and the freedom of establishment and abuse of such rights may be a difficult task.[92]

92 Report on Evaluation of the Immigration Act, July 2006, at p. 237; http://www.bmi.bund.de.

Chapter IX
Statistics

Labour permits for seasonal workers

Country	**2000**	**2001**	**2002**	**2003**	**2004**
Bulgaria	540	971	1.492	1.434	1.249
Croatia	4.855	5.310	5.826	4.969	4.680
Poland	**192.204**	**212.984**	**252.902**	**265.414**	**286.623**
Rumania	843	13.996	20.612	22.681	27.190
Slovak Republic	**6.430**	**8.118**	**10.260**	**9.260**	**8.995**
Slovenia	**292**	**288**	**252**	**219**	**195**
Czech Republic	**2.146**	**2.301**	**2.676**	**2.130**	**1.974**
Hungary	**3.025**	**4.159**	**4.082**	**3.361**	**2.784**
Total	218.958	248.614	298.102	309.468	333.690

Source: Federal Agency for Employment

Unemployment according to different nationalities from EU Member States (in comparison to Turkey)

year	persons from Turkey		persons from Greece		persons from Italy	
	total	in %*	total	in %	total	in %
January 2004	181 712	26.1	24 650	19.1	49 136	20.7
February 2004	182 909	26.3	24 615	19.1	48 722	20.6
March 2004	181 998	26.1	24 400	19.0	47 199	19.9
April 2004	180 466	25.9	24 283	18.9	45 510	19.2
May 2004	175 158	25.9	23 666	19.1	43 942	19.2
June 2004	170 719	25.3	23 003	18.5	43 053	18.8
July 2004	169 242	25.1	23 114	18.6	43 396	19.0
August 2004	166 386	24.7	22 452	18.2	42 934	18.9
September 2004	168 205	25.0	22 713	18.4	42 926	18.9
October 2004	168 663	25.0	22 789	18.5	43 683	19.2
November 2004	165 782	24.6	22 366	18.1	43 967	19.3
December 2004	172 298	25.5	22 890	18.5	45 988	20.1
January 2005	197 382	29.3	24 988	20.2	50 508	22.2
February 2005	216 092	32.1	26 495	21.5	52 839	23.2
March 2005	219 332	32.0	26 715	21.4	52 480	23.1
April 2005	216 799	32.1	26 355	21.5	50 689	23.2
May 2005	213 495	31.7	25 814	20.9	49 563	21.8
June 2005	211 506	32.6	25 447	21.6	48 848	22.3
July 2005	210 821	32.5	25 493	21.6	49 147	22.5
August 2005**	207 707	32.1	24 996	21.2	48 851	22.3

Source: Federal Agency for Employment

* percentage on the basis of data concerning employed persons subject to the obligation of social insurance plus unemployed persons

** no further data available

year	persons from former Yugoslavia		persons from Portugal		persons from Spain	
	total	in %*	total	in %	total	in %
January 2004	40 121	18.6	9 044	16.8	6 384	14.1
February 2004	40 459	18.7	8 886	16.5	6 407	14.1
March 2004	39 164	18.1	8 391	15.6	6 259	13.8
April 2004	37 381	17.3	8 085	15.0	6 142	13.5
May 2004	35 810	17.8	7 683	14.8	5 959	13.6
June 2004	34 428	17.2	7 420	14.3	5 823	13.3
July 2004	34 456	17.2	7 428	14.3	5 946	13.6
August 2004	33 970	17.0	7 202	14.0	5 844	13.5
September 2004	34 191	17.2	7 299	14.2	5 743	13.2
October 2004	34 342	17.2	7 385	14.4	5 730	13.2
November 2004	35 253	17.7	7 435	14.5	5 691	13.1
December 2004	38 104	19.1	8 134	15.7	5 761	13.2
January 2005	44 256	22.2	9 173	17.8	6 288	14.5
February 2005	47 149	23.7	9 681	18.8	6 574	15.2
March 2005	47 194	23.6	9 477	18.7	4 7194	15.1
April 2005	44 976	23.7	8 831	18.8	6 434	15.2
May 2005	43 333	21.7	8 425	16.4	6 318	14.6
June 2005	42 478	22.7	8 234	16.6	6 297	15.3
July 2005	42 049	22.5	8 245	16.6	6 412	15.6
August 2005**	41 513	22.2	8 129	16.4	6 322	15.4

Source: Federal Agency for Employment

* percentage on the basis of data concerning employed persons subject to the obligation of social insurance plus unemployed persons

** no further data available

Unemployment of nationals of new EU Member States in December 2005

country	Federal Republic of Germany, total	federal territory, west	federal territory, east
Estonia	281	232	49
Latvia	990	784	206
Lithuania	1 292	1 045	247
Malta	44	39	5
Poland	25 551	20 039	5 512
Slovakian Republic	1 063	877	186
Slovenia	1 454	1 334	120
Czech Republic	2 615	2 104	511
Hungary	2 907	1 835	1 072
Cyprus	30	23	7

Source: Federal Agency for Employment

EU citizens in Germany

nationality	total	male	female	per cent*
EU Member States	**1 849 986**	**1 023 112**	**826 874**	**100.0**
Italy	601 258	356 354	244 904	32.5
Greece	354 630	193 771	160 859	19.2
Austria	189 466	102 4440	87 026	10.2
Portugal	130 623	72 734	57 889	7.1
Spain	125 977	65 043	60 934	6.8
The Netherlands	118 680	64 861	53 819	6.4
United Kingdom	113 578	68 361	45 217	6.1
France	113 023	52 521	60 502	6.1
Belgium	23 649	11 841	11 808	1.3
Denmark	21 568	9 565	12 003	1.2
Sweden	19 404	8 717	10 687	1.0
Finland	15 748	4 764	10 984	0.9
Ireland	15 478	8 411	7 067	0.8
Luxembourg	6 904	3 729	3 175	0.4

Source: Federal Agency for Statistics
* Percentage of nationals from EU Member States in total

EU citizens in Germany according to age and sex as of 31 December 2003

nationality	*sex*	*all age groups*	*%*	*age*			
				60 - 65	*%*	*65 and above*	*%*
Italy	male	356 354	59.3	21 083	5.9	28 583	8.0
	female	244 904	40.7	8 618	3.5	14 943	6.1
	total	601 258	100.0	29 701	4.9	43 526	7.2
Greece	male	193 771	54.6	12 404	6.4	20 178	10.4
	female	160 859	45.4	8 481	5.3	13 823	8.6
	total	354 630	100.0	20 885	5.9	34 001	9.6
Poland	male	157 387	48.1	3 094	2.0	6 326	4.0
	female	169 495	51.9	2 727	1.6	6 890	4.1
	total	326 882	100.0	5 821	1.8	13 216	4.0
Portugal	male	72 734	55.7	4 256	5.9	3 699	5.1
	female	57 889	44.3	2 785	4.8	2 629	4.5
	total	130 623	100.0	7 041	5.4	6 328	4.8
Spain	male	65 043	51.6	4 735	7.3	10 029	15.4
	female	60 934	48.4	3 522	5.8	6 576	10.8
	total	125 977	100.0	8 257	6.6	16 605	13.2
EU Member States in total	male	1 023 112	55.3	65 534	6.4	94 127	9.2
	female	826 874	44.7	40 080	4.8	66 369	8.0
	total	1 849 986	100.0	105 614	5.7	160 496	8.7
number of aliens in total	**male**	**3 894 684**	**53.1**	**191 133**	**4.9**	**250 848**	**6.4**
	female	**3 440 081**	**46.9**	**125 934**	**3.7**	**190 013**	**5.5**
	total	**7 334 765**	**100.0**	**317 067**	**4.3**	**440 861**	**6.0**

Source: Federal Agency for Statistics

EU citizens in Germany, born in Germany

nationality	*aliens in Germany*		*born in Germany*
	total	*female*	
Europe			
Belgium	23 649	11 808	3 357
Denmark	21 568	12 003	1 537
Finland	15 748	10 984	753
France	113 023	60 502	11 498
Greece	354 630	160 859	94 744
Ireland	15 478	7 067	816
Italy	601 258	244 904	173 184
Luxembourg	6 904	3 175	908
The Netherlands	118 680	53 819	35 350
Austria	189 466	87 026	28 525
Portugal	130 623	57 889	25 497
Sweden	19 404	10 687	1 227
Spain	125 977	60 934	29 951
United Kingdom	113 578	45 217	10 794
EU Member States in total	**1 849 986**	**826 874**	**418 141**
Estonia	4 220	2 872	161
Latvia	9 341	5 689	442
Lithuania	13 985	9 518	402
Poland	326 882	169 495	16 891
Slovakia	19 567	11 167	455
Slovenia	21 795	10 615	4 100
Czech Republic	30 186	18 813	814
former Czechoslovakia	15 006	7 203	897
Hungary	54 714	21 771	2 484
Cyprus	956	410	402

Marriages of EU citizens in Germany

German woman with husband of foreign nationality

country	*1960*	*1970*	*1980*	*1990*	*1995*	*1996*	*1997*	*1998*	*1999*	*2000*	*2001*	*2002*	*2003*
France	567	4	680	616	450	454	430	406	472	419	385	383	357
Greece	266	399	452	511	493	494	524	526	534	491	459	473	492
Great Britain and North. Ireland	708	586	975	1148	842	857	776	776	766	769	726	838	804
Italy	1215	2277	2301	2085	1772	1724	1772	1849	2005	1885	1895	1854	1702
Netherlands	1086	1182	863	866	792	755	730	761	768	738	702	698	672
Austria	1191	1783	1200	1085	978	936	934	943	931	934	872	888	828
Poland	194	11	125	1166	867	835	780	776	858	819	872	988	946
Spain	198	335	492	492	424	393	397	370	412	433	371	390	396

German man with wife of foreign nationality

country	*1960*	*1970*	*1980*	*1990*	*1995*	*1996*	*1997*	*1998*	*1999*	*2000*	*2001*	*2002*	*2003*
France	235	773	606	596	588	584	595	618	576	585	520	546	524
Greece	25	266	256	290	319	297	319	357	306	354	321	320	327
Great Britain and North. Ireland	99	356	381	354	354	341	327	288	281	303	274	290	308
Italy	239	457	487	836	842	799	815	964	1002	988	924	943	946
Netherlands	742	1257	568	557	517	529	530	508	485	453	425	382	396
Austria	1087	1568	969	1091	907	854	919	892	893	867	916	816	805
Poland	58	118	293	3193	5090	5295	5230	5146	5304	5210	5263	5536	5371
Spain	28	263	297	455	438	401	439	437	461	510	468	480	465

Spouses with the same nationality

country	*1960*	*1970*	*1980*	*1990*	*1995*	*1996*	*1997*	*1998*	*1999*	*2000*	*2001*	*2002*	*2003*
France	3	28	20	8	13	11	15	9	12	16	8	12	8
Greece	33	2415	782	45	45	39	52	47	70	99	100	121	131
Great Britain and North. Ireland	-	15	44	29	39	14	23	21	18	21	17	26	27
Italy	70	622	953	1033	1095	1107	1115	1187	1198	1145	1164	1069	977
Netherlands	37	67	34	33	26	33	22	24	30	42	37	53	46
Austria	85	150	61	41	57	45	62	55	53	54	51	60	58
Poland	38	13	52	771	157	200	163	188	160	195	230	240	236
Spain	44	645	239	24	16	14	17	17	19	13	15	23	15

Source: Federal Agency for Statistics

EU citizens in Germany according to length of stay (in years) as of 31 December 2003

nationality	*total*	*less than 1*	*1-4*	*4-6*	*6-8*	*8-10*	*10-15*	*15-20*	*20-25*	*25-30*	*30 and more*
EU citizens	1 850.0	48.5	150.9	99.3	96.5	98.9	233.7	165.1	156.4	173.1	627.7
Italy	601.3	9.3	33.6	28.9	30.6	30.5	65.8	62.1	64.9	65.8	209.8
Greece	354.6	5.0	21.4	16.8	16.6	17.9	59.1	33.2	24.2	31.2	129.2
Croatia	236.6	3.2	9.5	7.1	7.2	9.9	42.9	15.0	19.6	24.2	98.1
Bosnia-Herzeg.	167.1	2.6	8.8	5.6	6.1	21.3	72.7	6.7	6.8	9.0	27.4
Portugal	130.6	2.8	10.3	8.8	11.0	13.3	22.5	7.7	7.7	14.9	31.7
Spain	126.0	3.9	9.5	5.3	4.6	4.1	8.3	6.1	7.1	11.5	65.7
Slovenia	21.8	0.5	1.0	0.6	0.6	0.7	1.9	1.0	1.4	2.2	11.9
Poland	326.9	24.2	54.1	28.8	28.8	28.3	84.8	47.1	19.4	3.8	7.6
Hungary	54.7	4.3	9.5	4.3	3.8	3.9	13.1	6.4	3.5	1.9	0.4
foreign nationals in total	**7 334.8**	**314,4**	**951.6**	**576.9**	**527.6**	**508.3**	**1 349.9**	**633.6**	**545.9**	**535.1**	**1 391.5**

Source: Federal Agency for Statistics

Children of EU citizens according to educational level as of 2002/2003 (in percent)

citizenship	*lower secondary school*	*intermediate secondary school*	*upper secondary school*	*comprehensive secondary school*	*others*
Greece (n = 17 347)	43.7	20.9	21.1	9.4	4.9
Italy (n= = 35 391)	51.5	19.8	11.9	10.7	6.1
Portugal (n = 6 950)	44.2	20.6	16.2	11.8	7.2
Spain (n = 4 188)	28.3	24.2	26.6	14.0	6.9
Turkey (n = 210 273)	45.7	18.4	10.8	16.3	8.8

Source: Federal Agency for Statistics

Education rate of foreign trainees (in percent)

citizenship	*1994*			*2000*			*2001*			*2002*		
foreign nationals in total	total 43.5	m 51.6	f 33.9	total 39.7	m 44.1	f 34.8	total 37.6	m 41.0	f 33.7	total 34.0	m 36.5	f 31.3
Greeks	45.0	55.2	34.0	43.9	50.1	37.1	45.1	51.6	38.1	42.5	46.8	37.7
Italians	54.5	65.1	43.2	53.2	60.0	46.0	52.9	59.5	45.9	50.0	56.0	43.5
Spanish	63.2	73.4	51.4	79.5	93.7	65.4	72.1	87.3	58.3	59.9	74.3	46.7
Turkish	48.3	58.2	36.1	48.4	57.3	38.4	44.7	52.0	36.6	37.6	42.7	32.0
Portuguese	53.8	69.0	38.6	45.8	53.1	37.6	45.2	52.0	37.6	41.9	45.0	38.2
Germans	69.7	80.6	58.3	66.7	78.4	55.1	65.3	74.4	55.7	63.5	72.4	54.2

Source: Federal Institute for Vocational Training

EU-employees covered by the social security system as of 31 March 2004

citizenship	*total*	*females*		*males*		*percentage of foreign nationals liable to social insurance*
		total	*percentage*	*total*	*percentage*	
Bosnia-Hercegowina	34 996	15 763	45.0	19 233	55.0	2.0
Greece	96 161	38 408	39.9	57 753	60.1	5.4
Italy	175 136	55 422	31.6	119 714	68.4	9.8
Yugoslavia	153 763	59 491	38.7	94 272	61.3	8.6
Poland	62 363	33 489	53.7	28 874	46.3	3.5
Portugal	42 156	15 580	37.0	26 576	63.0	2.4
Spain	35 679	14 481	40.6	21 198	59.4	2.0

Source: Federal Agency for Employment

Employment rate of Union citizens

citizenship		*1998*	*1999*	*2000*	*2001*	*2002*	*2003*
Germany	total	25 343 179	25 841 314	25 971 645	25 884 755	25 458 682	24 951 710
	employment rate	*33.9*	*34.5*	*34.6*	*34.5*	*33.9*	*33.2*
foreign nationals	total	2 023 788	1 915 178	2 007 948	1 979 336	1 901 815	1 794 674
	employment rate	*27.6*	*26.1*	*27.9*	*27.0*	*25.9*	*24.5*
EU citizens	total	639 232	633 566	642 131	631 152	593 342	557 931
	employment rate	*34.5*	*34.1*	*34.3*	*33.8*	*31.9*	*30.2*
Turkey	total	572 492	547 075	563 352	548 111	523 689	487 681
	employment rate	*27.1*	*26.6*	*28.2*	*28.1*	*27.4*	*26.0*
Yugoslavia/Serbia-Montenegro	total	272 659	213 765	198 802	188 359	174 863	155 965
	employment rate	*37.9*	*29.0*	*30.0*	*30.0*	*29.6*	*27.4*
Greece	total	109.637	111.613	111.534	111.017	105.005	97.663
	employment rate	*30.2*	*30.6*	*31.1*	*30.6*	*29.2*	*27.5*
Italy	total	197 150	199 783	203 137	198 006	186 314	173 735
	employment rate	*32.2*	*32.4*	*32.8*	*32.1*	*30.6*	*28.9*
France	total	72 039	78 002	81 124	80 746	73 941	69 816
	employment rate	*68.1*	*72.8*	*73.6*	*72.5*	*65.8*	*61.8*

Source: Federal Agency for Employment; Federal Agency for Statistics

Unemployed EU-foreigners in Germany in 2003 in comparison with some non-EU States

citizenship	total	males	females	rate of females in %
unemployed persons in total	4 376 769	2 446 202	1 930 567	44.1
Germans	3 828 239	2 095 708	1 732 531	45.3
all foreign nationals	548 530	350 494	198 036	36.1
from EU Member States				
EU Member States in total	110 318	70 726	39 591	35.9
France	5 377	2 935	2 442	45.4
Greece	23 807	14 147	9 660	40.6
Great Britain	4 939	3 546	1 392	28.2
Italy	45 730	32 131	13 599	29.7
Portugal	8 075	5 329	2 746	34.0
Spain	6 273	3 547	2 726	43.5
non-EU Member States				
non-EU Member States in total	438 212	279 768	158 445	36.2
Serbia and Montenegro	36 224	25 816	10 407	28.7
Morocco	6 198	5 023	1 175	19.0
Turkey	175 445	117 077	58 369	33.3

Source: Federal Agency for Employment

Naturalizations in Germany, EU and Turkey

Country of previous citizenship	2002				2003			
	naturalized persons		naturalizations with dual citizenship		naturalized persons		naturalizations with dual citizenship	
	total	females	total	in %	in total	females	in total	in %
Turkey	64 631	31 676	12 348	19.1	56 244	26 929	8 093	14.4
EU Member States	3 512	1 782	1 760	50.1	4 025	2 023	3 203	79.6
Total	154 547	74 826	64 117	41.5	140 731	67 632	57 285	40.7

Source: Federal Agency for Statistics

Chapter X
Social security

The question whether a Union citizen is entitled to a retirement pension due to unemployment on completion of the 60th year of age, who has been registered at a French labour office as seeking for employment, was decided by the Federal Social Court by judgement of 20 October 2004.[93] The Court decided that the plaintiff is entitled to a retirement pension upon completion of the 60th year of age. The Court referring to the decision of the European Court of 28 April 2004 in the case *Öztürk*[94] argues that in principle unemployment in other EU Member States and particularly in the framework of a temporary search of employment in the sense of the Regulation 1408/71 is not sufficient to establish a right to a special retirement pension.[95] The Court, however, argues that according to national law it would be sufficient that at a special date the plaintiff had been unemployed (wherever he has been registered for search of employment). A different treatment would amount to a discrimination of a EU citizen making use of his right of free movement within the European Union.

By judgements of 26 January 2005 the Federal Social Court had to decide the question of whether retired Germans, living in Spain who are entitled to a German retirement pension as well as to a Spanish retirement pension are subject to the obligatory care insurance (Pflegeversicherung). The Social Court decided that the plaintiffs due to their permanent residence in Spain are not subject to the obligatory care insurance according to Sec. 3 no. 2 of the Social Code IV. The Court points out that the Regulation 1408/71 (Art. 13 para. 2 lit. f) does not contain any provisions concerning the scope of application of obligatory care insurance. Therefore, according to the provisions of German law, the plaintiffs were subject to the provisions of the state of residence. None of the provisions of the Regulation 1408/71 (Art. 13 -17) were applicable. Since the general provisions of the Regulation 1408/71 on health insurance according to the European Court' s jurisprudence in the case *Molennaar* were also applicable to care insurance, the state of residence (Spain) must be considered as responsible.[96]

The decision is heavily criticised by Schuller[97] although it is considered as correct in its outcome. Schuller argues that the Court did not properly determine the relationship between German national law and community law. The Court should have examined more precisely whether Art. 27 and 28 Regulation 1408/71 contain provisions concerning the obligation to pay insurance duties. Contrary to the statement of the Federal Social Court, Schuller argues that according to the European Court's jurisprudence[98] one cannot distinguish between the duty to pay insurance contributions and the responsibility for granting insurance protection (this question, however, has been left open by the Federal Social Court). Therefore, the Court should have argued that Art. 27/28 Regulation 1408/71 have to be considered as special provisions in relation to Art. 13, determining also the obligation to pay insurance contributions and to that extent replacing national law. The criticism is mainly directed against the Court's statements as to the relationship between community law and national law and in particular the interpretation of Art. 27/28 of the Regulation 1408/71.

Sec. 34 para. 2 Social Code VI provides for a right to a retirement pension before completion of the age of 65 within certain income limits. The Federal Social Court has decided by judgement of 1 February 2005[99] that the income derived from pre-retirement grants of the Dutch Pension Fund for employment in commercial road traffic must be taken into account for calculating the income limits although Sec. 34 para. 2 does not explicitly mention foreign income and equivalent pre-retirement money. The Federal Social Court, therefore, interprets Sec. 34 para. 2 Social Code VI as a national anti-cumulation provision in the sense of Art. 46 lit. a para. 3 lit. a Regulation 1408/71.

The Federal Social Court in two decisions of 10 February 2005 has submitted to the European Court questions according to the scope of application of the German provisions on a parental educati-

93 B 5 RJ 3/04 R, see *EuroAS* 2005, p. 15.
94 Case C-373/02, judgement of 28 April 2004.
95 This view is criticised by Schuler, *EuroAS* 2005, p. 15.
96 Cf. Art. 27 Regulation 1408/71.
97 *EuroAS* 2005, p. 59.
98 ECJ of 8.7.2004, case C-502/01, *Silke Gaumain/Zerry* and case C-31/02, *Barth*.
99 B 8 KN 6/04 R, see EuroAS 2005, p. 101.

on allowance (Erziehungsgeld). In one case[100] the question was raised whether a Dutch national, living with her German husband in the Netherlands and partly employed in Germany (3-4 hours per week) is entitled to German parental education allowance. The claimant does not fall within the scope of application of Regulation 1408/71 since she does not qualify as a worker due to her low income and therefore does not fulfil the requirements for family allowances according to the Court. The Court, however, raises the question whether the claimant is entitled according to Art. 7 para. 2 Regulation 1612/68 to the same social benefits and therefore must be included into the scope of application of the German provisions on parental education allowance (Sec. 1 para. 4 Federal Law on Parental Education Allowances, old version).

In a second decision[101] the scope of application of the prohibition of discrimination of Art. 7 para. 2 of Regulation 1612/68 is raised with respect to the claim of an Austrian national living together with her husband, who is a German civil servant, and her children in Austria to parental education allowance. The Federal Law on Parental Education Allowance provides for children born after 31 December 2000 an entitlement for persons who are frontier workers in a neighbouring state and are employed as public civil servants in Germany. Since the children in question have been born before the critical date, the Court submits a request for a preliminary judgement to the European Court whether a civil servant must be considered as a worker in the sense of the Regulation 1612/68 and whether the exclusion from parental education allowance does constitute a discriminatory treatment if the spouse of a civil servant due to his residence in another EU Member State is excluded from the scope of application of the parental education allowance.

Within a request for a preliminary ruling the Federal Social Court by decision of 5 July 2004[102] has raised the question whether the German practice to register migrant workers whose spouse and children live in another Member State automatically in the less favourable tax group II (single), while they could be registered in tax group III (married) on application only. The Federal Social Court considers that this practice may amount to discriminatory treatment since migrant workers may suffer disadvantages as a result of the automatic registration in the tax group, particularly with regard to illness payments. Although tax disadvantages as a result of the registration in group III may be corrected subsequently by an application, a migrant worker might suffer disadvantages with regard to the illness payment as a result of delayed correction of the tax group.

In two decisions of 5 July 2005[103] the Federal Social Court had to decide about the question whether a Union citizen living in another EU Member State who is entitled to a German retirement pension and insured in the obligatory health insurance for retired persons is entitled according to German health insurance law to protection during a temporary visit in Germany. The Federal Social Court has confirmed its previous jurisprudence that a person obligatory insured in the German health insurance does not loose his/her status as an insured person by moving to another EU Member State. Therefore, he/she is entitled to payment during a temporary visit in Germany according to the national law rules. The Court refers in this connection to Art. 28 Regulation 1408/71 and to the jurisprudence of the European Court in the cases of *Van der Duin/Van Wegberg*.[104]

In connection with the government bill on amending the Immigration Law of 2004, new legislation has been proposed on accession of foreigners who do not enjoy as migrant workers or self-employed persons or family relatives of such persons free movement: These persons would be excluded for the first three months of their entry in Germany from social benefits according to the Social Code II (see also chapter VIII at p. 37 et seq.).

100 B 10 EG 18/03 R.
101 B 10 EG 12/03 R.
102 B 1 KR 7/04 R, EuroAS 2005, p. 169.
103 B 1 KR 4/04 R and 2 /04 R, EuroAS 2005, p. 170.
104 ECJ of 3 July 2003, case C-156/01, ECR 2003, I-7045.

Chapter XI
Establishment, provision of services, students

The question whether the freedom to provide services implies a right of entry and residence for a Union citizen and his third country spouse if the Union citizen moves to another Member State in order to receive for an unlimited duration services is examined in a decision of the Hamburg Administrative Appeal Court of 27 January 2005.[105] The Court states that the provisions of community law on the freedom to provide services are not applicable in this case. The Court, however, emphasis that this does not lead to the reverse conclusion that any kind of residence provided it is for a specific length of time is covered by the freedom to receive services. The Hamburg Court refers in the context to the judgement of the European Court of 19 October 2004.[106]

The Administrative Appeal Court of Baden-Württemberg in a decision of 7 July 2005[107] discusses the question of admission of a Union citizen who has passed a law study outside the Federal Republic of Germany as a trainee in the preparatory legal service of Baden-Württemberg (the judgement is reported in chapter III on p. 27 et seq.).

105 3 Bs 458/04.

106 C 200/02, *Chen,* by quoting the European Court that the provisions on freedom to provide and receive services are not applicable if a Union citizen intends to receive in another EU Member States for an unlimited length of time service.

107 4 S 901/05, *DÖV* 2005, 1048.

Chapter XII
Miscellaneous

Gutmann in an article comments on the relationship on the new Directive 2004/38 and Art. 14 para. 1 of the Association Council Decision 1/80. According to *Gutmann* it follows from the European Court's jurisprudence in the case *Dör* and *Ünal*[108] that the principles laid down in the Directive 2004/38 about the protection against expulsion and in particular Art. 28 of the Directive must be taken into account on a comparative basis in order to determine the rights of Turkish nationals under the Association Council decision 1/80. Therefore, Art. 28 should be applied in the author's view also with respect to Turkish nationals deriving their residence right from Art. 6 of the Association Council decision 1/80.

The Administrative Court of Darmstadt in a decision of 25 January 2005[109] has requested a preliminary ruling by the European Court on the question whether Art. 64 of the Europe Agreement with Tunisia has effect as to the implied residence rights of Tunisian nationals and whether the prohibition of discrimination contained in Art. 64 obliges the Member States to grant a residence right if a Tunisian national is in possession of an unlimited labour permit.

The Federal Administrative Court in a decision of 20 April 2004 has interpreted the provision of Section 87 para. 2 of the Aliens Act 1990 providing for naturalization of Union citizens on the condition of reciprocity.[110] The Federal Administrative Court has decided a controversy in the jurisprudence of administrative appeal courts on the question whether the condition of reciprocity requires that another EU Member State in order to acquire the German nationality without the requirement to give up his/her previous nationality must provide in the national law generally a dispensation from the requirement of giving up a previous nationality. The Federal Administrative Court takes a more flexible interpretation stating that it is sufficient according to the Nationality Law and practice of the Member State of the European Union that a German citizen can be naturalized either on the basis of a general law or with regard to a particular group of persons. It is not necessary that all conditions and consequences of naturalization are equal to the German provisions. This question concerns a Greek national living since 1980 in Germany. Administrative authorities had refused to naturalize him on the basis of the provision of Section 87 since Greece did not generally provide for a dispensation of the requirement to give up a previous nationality but would only accept naturalization in individual cases on the basis of a discretionary decision. In particular, German nationals could acquire Greek nationality without having to give up their German nationality. By this decision the Federal Administrative Court has opened the gate for a more generous practice of naturalizing Union citizens as dual nationals.

Literature

Alber, S./Schneider, L., Gewitterwolken über dem Ausländergesetz, *Die Öffentliche Verwaltung* 2004, 313-322;

Breucker, M., *Transnationale polizeiliche Gewaltprävention – Maßnahmen gegen reisende Hooligans*, Würzburg 2003;

Borrman, A., Rechte drittstaatsangehöriger Ehegatten wandernder Unionsbürger – unter besonderer Berücksichtigung des Problems der Scheinehe, *ZAR* 2004, 61-67;

Fehrenbacher, A., Übergangsregelungen bei der EU-Erweiterung und deren Auswirkungen im Ausländerrecht, *ZAR* 2004, 240;

Fritz, R. (ed.), *Gemeinschaftskommentar zum Ausländerrecht*, Luchterhand, Neuwied;

Hailbronner, K., *Ausländerrecht*, Vol. I-IV, 46th supplement, Heidelberg 2006;

Hailbronner, K., *Asyl- und Ausländerrecht*, Kohlhammer, Stuttgart 2006;

Hailbronner, K., Unionsbürgerschaft und Zugang zu den Sozialsystemen, in: *Juristenzeitung*, 23/2005, 1138-1144;

108 ECJ of 2 June 2005, case C-136/03, *InfAuslR* 2005, 289.
109 8 E 2499/04 (2), *InfAusl* 2005, 135.
110 Judgement of 20 April 2004, 1 C 13.03.

Hailbronner, K., Union Citizenship and Access to Social Benefits, in: *Common Market Law Review*, 42/2005 Kluwer Law International, The Netherlands, 1245-1267;

Hailbronner, K., Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den EuGH?, in: *Neue Juristische Wochenschrift* 2004, 2185 – 2189;

Hailbronner, K., Arbeitsmarktzugang und Anspruch auf soziale Leistungen im europäischen Ausländerrecht, in: *Weltinnenrecht, Festschrift für Jost Delbrück*, Duncker & Humblot, Berlin, 2005, 315 – 328;

Riedel, E. (ed.), *Neuere Entwicklungen im Einwanderungs- und Asylrecht*, Baden-Baden 2004;

Schiller, G., Freier Personenverkehr im Bereich der freiwilligen Gerichtsbarkeit, *EUR* 2004, 27;

Sieveking, K., Hartz IV und die Folgen für Ausländer: Grundsicherung für Arbeitssuchende – Arbeitslosengeld II, in: Barwig et al. (eds.), Baden-Baden- 2004;

Westphal, V./Stoppa, E., Die EU-Osterweiterung und das Ausländerrecht, *Informationsbrief Ausländerrecht* 2004, 133.