

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

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October 2008

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List of Abbreviations

| | |
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| art. | Article |
| CCE | Conseil du contentieux des étrangers (Council for Aliens Disputes) |
| <i>C.D.E.</i> | <i>Cahiers de droit européen</i> |
| <i>C.D.S.</i> | <i>Chronique de droit social</i> |
| CE | Conseil d'État (Council of State, Supreme administrative court in Belgium) |
| C.E.D.H. | Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales |
| C.J.C.E. | Cour de Justice des Communautés Européennes (= ECJ) |
| C.T. | Cour du Travail (Labour Appeal Court) |
| ECHR | European Convention of Human Rights |
| ECJ | European Court of Justice |
| E.T.L. | European Transport Law |
| GOA | Governmental Office for Aliens |
| <i>J.D.E.</i> | <i>Journal de droit européen</i> (= <i>J.T.D.E.</i> after 2008) |
| <i>J.T.</i> | <i>Journal des tribunaux</i> |
| <i>J.T.D.E.</i> | <i>Journal des tribunaux-droit européen</i> |
| <i>J.T.T.</i> | <i>Journal des tribunaux du travail</i> |
| M.B. | Moniteur Belge |
| <i>R.D.E.</i> | <i>Revue du droit des étrangers</i> |
| <i>R.D.C.</i> | <i>Revue de droit commercial</i> |
| <i>Rev. b. sec. soc.</i> | <i>Revue belge de sécurité sociale</i> |
| <i>Rec.</i> | <i>Recueil</i> |
| <i>Rev. not. b.</i> | <i>Revue du notariat belge</i> |
| <i>R.T.D.E</i> | <i>Revue trimestrielle de droit européen.</i> |
| <i>Rev. trim. dr. fam.</i> | <i>Revue trimestrielle de droit familial</i> |
| <i>Rev. trim. dr. eur.</i> | <i>Revue trimestrielle de droit européen</i> |
| <i>Rev. trim. D.H.</i> | <i>Revue trimestrielle des droits de l'homme</i> |
| ss. | et suivant |
| T.T. | Tribunal du travail (First Instance Labour Court) |
| <i>T.R.V.</i> | <i>Tijdschrift voor rechtspersonen en vennootschap</i> |
| <i>T.Vreemd</i> | <i>Tijdschrift vreemdelingen recht.</i> |
| <i>R.W.</i> | <i>Rechtskundig Weekblad</i> |

Introduction and Summary of the Main Issues*

PAST

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

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

This is not to say that everything is 'perfect' in Belgium for what concern free movement of persons, but that there is a strong experience and '*acquis communautaire*'. However, there can still be important practical problems when one comes to the application in practice. For instance, it is known from different sources that language requirements of the different national official language are sometimes requested when not necessary used. Even if no case law is reported on this, it may lead to important difficulties in practice.

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The most interesting question in Belgium seems to be *reverse discrimination* in purely internal situations.

In one classical way of thinking, this question may be seen as a 'non question': this is not Community problem as there is no free movement. But in a pro-active way of thinking, this question is important for the future if one makes a link between free movement of worker, citizenship as 'fundamental status' (*Grzelczyk*, §31) and equal treatment between citizens on the one side and the competences of regional authorities to adopt legislatives in important fields such as social rights, on the other side. In fact, in the future, obstacles to free movement by regional legislations could replace obstacles to free movement by federal State legislations when those late are condemned.

This question is important for the rights of European citizens and workers who do not use freedom of movement or who use freedom of movement not between States but within States, and for the rights of family members of a national, particularly in Belgium where family members of a Belgian are partly assimilated to EU family members.

The ECJ, in the *Flemish insurance* case (C-212/06) did not follow advocate general Sharpston and refused to condemn reverse discrimination in a matter of social security delivered by a regional government who refused it to national workers residing in another region in the same State. But the ECJ did suggest the possibility for the national Court to condemn reverse discrimination with a national (constitutional) principle of equality interpreted the way the ECJ does for the EC equality principle. But the Belgian Constitutional Court did not follow the invitation of the ECJ to condemn reverse discrimination on the basis of a national principle of equality. If it is not condemned at the EC level, or at the national level, the European Court of Human Rights could be the only place where reverse discrimination would be condemned. If this is the case, EC law could be weakened for some years (Ch. IV).

* With thanks to Herwig Verschueren, Professor at the Universiteit Antwerpen, for comments.

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Another important point in Belgium is, like in Austria, the situation of **students** coming from other EU member states, particularly from France. If, during the negotiation of the Lisbon Treaty, the Commission did accept to suspend procedures against Austria and Belgium, a preliminary rule was asked in February 2008 by a Belgian Court (Case C-73/08, *Bressol et Chaverot*, see conclusions of A.G. Sharpstons on June 25 2009). The question refers also to the ICESCR and could reopen the discussion of the free movement of students (Ch. III).

Chapter I Entry, Residence, Departure

SUMMARY

- Acquis

In Belgium, entry, residence and departure are regulated by the Immigration law of 1980 (Law 15 December 1980 on access to the territory, residence, establishment and removal of foreigners).

This law has been amended more than 20 times since 1980. There is, in the law, a section on the Entry (Chapter II, Title I, ‘access and short stay’) and a section for EU citizens (Chapter I of Title II: ‘Foreigners from EC Member State, members of their family and foreigners members of the family of a Belgian national’). As shown by the translation of the title of this chapter, there is one specificity in Belgium: in order to avoid reverse discrimination, family members of a Belgian have the same rights as family members of a EU citizen.

As for entry, no specific formality is required of an EU Member State citizen who wishes to enter or reside in Belgium. The EU citizen is automatically registered without taking any further step. Nor is any professional card required to exercise a self-employed activity.

Family members of a Belgian or EU citizen, who are foreigners from third countries, will normally need a visa to enter. But this requirement is not absolute, in application of the *MRAX* case.

All foreigners, EU citizens as well as third country nationals, have the right to vote and to be elected in municipal elections under specific conditions related to duration of residence. This shows that in Belgium, political rights are more in relation with duration of residence rather than citizenship condition or European citizenship condition. However, such link does not exist for European elections contrarily to what has been created recently in UK (Spain v. R.U., 12 September 2006, C-145/04).

- 2008

The most important modification in the Aliens law is the transposition of the 2004/38 EC Directive by a law of 25 April 2007 which entered in force on 1 June 2008. Since the creation of a new administrative jurisdiction in 2007, the *Conseil du contentieux des étrangers* (CCE, Council for Aliens disputes), this new Board is competent for all aliens, including EU citizens. A question regarding the non discrimination principle could appear as the CCE has full jurisdiction for refugee cases, not for EU citizen cases. But the Belgian courts (Constitutional Court and Council for Aliens Dispute (CCE)) refuse to consider that this difference of treatment is discriminatory.

1. Texts in force

The 2004/38/EC Directive was transposed in Belgian legislation by the law adopted on 25 April 2007 modifying the Alien’s law of 15 December 1980. This law was published in the Official Journal (*Moniteur belge*) on 10 May 2007 and entered into force on 1 June 2008. Generally speaking, the 2004/38 EC Directive was well transposed. Articles 40 to 46bis new of the Alien’s law are, for the most part, a copy of Directive 2004/38.

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Belgium was summoned by the Commission for the 2-year delay of transposition of Directive 2004/38. Consequently, Belgium had until 13 May 2008 to notify the Commission of the texts adopted to transpose Directive 2004/38. On 7 May 2008, a Royal Decree was adopted (Annex n° 20). Chapter II of this Royal Decree concerns what is considered by Belgian authorities as a durable relationship, duly attested, as required, by the partner with whom the Union citizen has such relationship. Chapter III concerns cases in which registered partnerships must be regarded as equivalent to marriage in compliance with art. 2 (2) of the Directive.

2. Transposition of provisions specific for workers of Directive 2004/38/EC (art. 7(1a); Art. 7 (3 a-d); art. 8(3a); art.14 (4 a-b), art.17, art. 24 (2)).

Art. 7 (1a) was transposed by art. 20 of the law adopted on 25 April 2007 modifying the Alien's law of 15 December 1980. This law was published in the Official Journal (*Moniteur belge*) on 10 May 2007 and entered into force on 1 June 2008 (annex n° 42). It is art. 40 §4, 1° of the Immigration law.

Art. 7 (3 a-d) was transposed by art. 27 of the same law. It is art. 42bis of the Immigration law. There is no art. 8(3a) in the 2004/38 Directive: consequently, it is assumed that art. 8 (3a) refers to art. 8 (3), 1st indent. Thus, Belgian law did transpose by art. 19, §4, 1° of the law. Art.14 (4 a-b) was transposed by art. 26, 27 and 28 of the law. It is art. 42bis, 42ter, and 42quater of the Immigration law. Art. 17 was transposed by art. 29 and 30 of the same law. It is art. 42quinquies, and 42sexies of the Immigration law. The difference with the Directive is that a 3-year period is enough to receive permanent residence, instead of 5 years. But 5 years is requested for a student. And finally, art. 24 (2) has not been transposed.

3. Situation of job-seekers

Job-seekers in Belgium can receive a registration certificate as soon as they arrive on the territory. Registration certificates are delivered by the municipality at the local administration without formalities when job-seekers come to register. This first registration certificate is a two months provisory document which is confirmed when jobseeker brings documents attesting his job-seeker status (*Antonissen*). They can claim for social assistance but it is not automatically granted, as public authority for social assistance considers they are supposed to have sufficient means of subsistence for their stay on the territory. This practice seems to be in conformity with the *Ioannidis* and *Collins* cases.

4. Draft legislation, circulars

On 14 May 2008, general instructions were adopted by the GOA relating to new residence permits and residence documents which have to be delivered in accordance with the 2004/38 Directive (Annex n° 21. Instructions générales cartes de séjour et doc. de séjour-14 mai 2008).

5. Judicial practice

As concerns entry, residence and departure, the new CCE is competent for the residence of all foreigners amongst which are the EU citizens (it is competent only for residence rights but not for rights related to work conditions depending on industrial Courts.

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However, as mentioned in the 2007 Report, for EU citizens and members of their families, the CCE does not have full jurisdiction but only a legality control. This could raise questions with regard to the EU non-discrimination principle (art. 12 CE) with access to justice even if it only concerns residence rights and not other rights of migrant worker. However, the Belgian authorities and the 'Office des étrangers' (GOA), consider that the controls allowed on the decision are both a control of the legality of the decision as well as a control of the facts and circumstances on which the decision is taken, and of the proportionality of the decision. In this view, these kinds of controls on the administrative act are closer to a control of full competence than a formal control of legality. The Constitutional Court confirmed this view and accepted this kind of control in its judgment 81/2008 given on 28 May 2008 (Annex n°43, Point B.37.3). The Constitutional Court supposes that the fact that the Council for Aliens Disputes (CCE) does not act with full jurisdiction but only 'en qualité de juge d'annulation' (as a judge of annulment, on the legality) is not a discrimination and 'ne prive pas les justiciables ... d'un recours effectif' (does not deprive European citizens from an effective remedy), arguing that Directive 2004/38, with art. 31, does not ask for more procedural safeguards. This view could be disputable with regard to article 31 of Directive 2004/38, particularly para. 3, and with regard to the control and procedural safeguards applied in practice by the CCE. In several decisions the CCE reaffirms that the Council 'n'exerce son contrôle que sur la seule légalité de l'acte administratif' (makes only a control of legality). The authors of this report believe that the CCE does insist on the limited powers given by the law. This point of view has been already mentioned in a judgment given on 28 April 2008 (annex n° 32), where the CCE did not give direct effect to art. 31.3 of the Directive. According to the CCE, this provision of the directive could not enable powers that only domestic law should give. The same view was repeated by the Court in judgments of 20 June 2008 (annex n° 29), 31 July 2008 (annex n° 25), 29 August 2008 (annex n° 36), 26 September 2008 (Annex n° 22) and 3 October 2008 (Annex n° 35).

In a case in front of the CCE, a third country national mother of a Belgian child tried to raise a preliminary ruling from the ECJ, arguing a violation of art. 31, §3 of Directive 2004/38 by the Belgian law dated 15 September 2006 giving competence to the CCE (Annex n° 23). Considering that the situation of this mother did not enter into the scope of the 2004/38 Directive, the CCE rejected the argument. The same judgment rejected the argument based on *Chen and Zhu* as the mother did not prove she had sufficient income to be supported by her child.

The new law does not abolish the consulting procedure applicable before the adoption of any removal decision concerning an EU citizen. The Alien Consulting Commission will still be competent to give advice before adopting such a measure. This status quo in the protection given is, however, source of discrimination between asylum applicants and EU citizens, as the former will have the benefit of a fully competent jurisdiction when challenging a decision and the latter will only have the benefit of a legality control without any opportunity control on a decision concerning aliens. Even if there is a preliminary advice from an independent body and if it is not contrary to the case law (C-136/02, *Dör & Ünal*, 2005), it could be a question of equality of rights for EU citizens.

As mentioned in the report last year, the extent of the control of the CCE on the decisions regarding EU citizens and their family members should be clarified by the Belgian authorities on that specific point.

Indeed, recent cases ruled by the CCE confirm the case-law of the State council Jurisdiction mentioned in the 2005 Report. The State Council Jurisdiction (Conseil d'Etat) ruled that

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an application lodged by a Belgian husband to obtain suspension of a refusal of visa for his wife, third-country family member, is inadmissible as he is not the recipient of the administrative act containing the refusal of visa for family reunification. According to the administrative jurisdiction, only his spouse and his child justify a sufficient interest to claim the suspension of the decision of refusal and are thus concerned by the decision (Annex n° 5 of the 2005 Report). This ruling was confirmed by the CCE in 2008 when a spouse claiming establishment and her husband lodged an action against the refusal for establishment decided by the GOA against her, as mother of a Belgian child. The husband was declared inadmissible as he was not the recipient of the decision (annex n° 22 and 24). Even the Belgian child was declared inadmissible to lodge an action against the refusal of establishment as s/he is not a 'foreigner who can allege an interest or a prejudice' as s/he is Belgian (Annex n° 26 and 33). However, more recently in 2009, the State Council (Conseil d'Etat) did accept the interest of a Belgian citizen to introduce recourse against a decision refusing a visa to his foreign, non EC, daughter (CE, 31 March 2009, n° 192-061, not published, annex 45).

Chapter II Access to Employment

Summary

- Acquis

Generally, access to employment is not a problem any more for EU citizens in Belgium (unless from 8 new Members States + Bulgaria and Romania, *infra* Chapter VIII). EU citizens do not need any working permit. Practices do not show many problems related to the language requirements, the recognition of diplomas and the nationality for captains of ships.

- 2008

Since the adoption on 17 August 2007 (Annex n° 41 of the 2007 Report) of a Decree for the transposition of Directive 2005/36 on recognition of professional qualification, no specific remark has to be held regarding access to employment.

The most important problem that seems to remain is the access to employment for Third country foreigners, family members of a Belgian, for instance a Belgian child. Due to the assimilation of a Belgian family member to a European family member in Belgian law (to avoid reverse discrimination), the obligation for this foreigner to benefit from a work permit for access to employment could be in contradiction with EC law (Dir. 2004/38, art. 24. See pending case ECJ, C-34/09, *Ruiz Zambrano*. However, questions of the Belgian court are based only on art. 12, 17 and 18 EC and not on Dir. 2004/38).

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

There are no cases reported in Belgium as the *ITC* case in Germany (C-208/05, 11 January 2007). On equal treatment in access to social advantage, see *infra*, Chapter III, point 2.

2. LANGUAGE REQUIREMENT

Investigations have been made. After these, no case is reported neither in the case law published nor by several magistrates of the industrial courts questioned specifically in the Brussels district where concerns by this matter. This does not exclude that in practice, European citizen can be confronted with excessive and discriminatory language requirements for access to work market. They should lodge an action in courts.

Chapter III Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS SUMMARY

- *Acquis*

Since the ECJ case law about Moroccans in the nineties (C-18/90, *Kziber*, 1991), Belgium has had a broad application of non-discrimination on the basis of nationality, even for non-EU workers. The ECHR case law also seems to be applied (*Gaygusuz*, *Koua Poirrez*).

- 2008

Case C-212/06 on the relationship between Regulation 1408/75 and article 39 CE answers the question of social rights given by autonomous Communities in a Federal State. However, the question of equality of treatment between citizens within the State will become more and more important.

1.1. *Students*

Free movement of students and application of the non-discrimination principle is an *acquis* in Belgian law since the *Gravier* case (C-293/83, 1985). However this could be challenged again as, in the French-speaking part of Belgium, the authorities are confronted with more and more French students, representing from 30% to 50 % of the students in some studies, mainly paramedical. In fact, France is applying a *numerus clausus* in those studies whereas Belgium is not. A Decree which limits to 30% the part of students who have not been residing in Belgium for at least 3 years before the studies, was adopted on 16 June 2006. As mentioned in the 2007 Report, two actions have been brought in front of the Constitutional Court in August and December 2006. The case is still pending currently but the Constitutional Court has asked preliminary rulings from the ECJ on 14 February 2008 (Annex n° 17). The questions are

‘1. Must articles 12, first indent, and 18, paragraph 1, of the EC Treaty, combined with article 149, paragraphs 1 and 2, second indent and with article 150, paragraph 2, third indent of the same Treaty, be interpreted as they prevent an autonomous community of a Member State which is competent for higher education and which faces massive arrival of students from a neighbour Member State in several training of medical sector funded by public authority and resulting as a consequence of restrictive policy pursued by a neighbour Member State, to take measure as the ones contained in the French Community Decree of 16 June 2006 regulating the numbers of students in some first cycle training of the higher education, when this Community invokes valid reasons to claim that this situation risks to overweigh public finance and to endanger the quality of the education given ? (... en ce sens que ces dispositions s’opposent à ce qu’une communauté autonome d’un État membre compétente pour l’enseignement supérieur, qui est confrontée à un afflux d’étudiants d’un État membre voisin dans plusieurs formations à caractère médical financées principalement par des deniers publics, à la suite d’une politique restrictive menée dans cet État voisin, prenne des mesures telles que celles inscrites dans le décret de la Communauté française du 16 juin 2006 régulant le nombre d’étudiants dans certains cursus de premier cycle de l’enseignement supérieur, lorsque cette Communauté invoque des raisons valables pour affirmer

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que cette situation risque de peser excessivement sur les finances publiques et d'hypothéquer la qualité de l'enseignement dispensé ?)

2. Would the answer to question sub 1 be different if this Community can demonstrate that this situation results in too few students resident on this Community's territory achieving their diploma, to allow sufficient qualified medical staff to maintain the quality of the public health system within this Community? (En va-t-il autrement, pour répondre à la question mentionnée *sub* 1, si cette Communauté démontre que cette situation a pour effet que trop peu d'étudiants résidant dans cette Communauté obtiennent leur diplôme pour qu'il y ait durablement en suffisance du personnel médical qualifié afin de garantir la qualité du régime de santé publique au sein de cette Communauté ?)

3. Would the answer to question sub 1 be different if this Community, taking into consideration article 149, first indent of the EC Treaty and article 13.2, c), of the International Pact relating to economic, social and cultural rights which contains an standstill obligation, choose to maintain a large and democratic access to a higher education of quality for the population of this Community?'

The preliminary ruling is registered from the Belgian Cour constitutionnelle (formerly Cour d'arbitrage) lodged on 14 February 2008, re: *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* (Case C-73/08- see annex n° 17).

On 25 June 2009, A. G. Sharpston delivered its conclusions on that case. As announced in the 2007 report, even if the Commission decided to suspend the prosecution, the Belgian practice appears to be in violation with EC law. Advocate general concludes that:

- The first paragraph of Article 12 and Article 18(1) EC, in conjunction with Article 149(1), the second indent of Article 149(2) and the third indent of Article 150(2) EC, should be interpreted as precluding measures such as those contained in the Décret régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur enacted by the French Community of Belgium.
- Consideration of the last part of Article 149(1) EC and Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights does not affect the answer to the first two questions

One should wait for the ECJ judgment but it can be noticed that Advocate general underlines that 'Equally, however, the EU must not ignore the very real problems that may arise for Member States that host many students from other Member States' (§151) in order that she 'invite[s] the Community legislator and the Member States to reflect upon the application of these criteria to the movement of students between Member States (§153).

2. SOCIAL AND TAX ADVANTAGES

In the 2007 report, a focus was made on a Flemish Decree adopted on 15 December 2006 which appeared to be discriminatory. It concerns the Flemish Code of Public Housing. Amongst the conditions required by the authority to allow access to social housing, the applicant must be able to demonstrate a willingness to learn the Flemish language. This condition seems to be an indirect discrimination based on language to obtain a social advantage. The language requirement is pointed out by the United Nations as in violation of art. 11 of

the International Pact on economic, social and cultural rights. An action had been brought to the Constitutional Court by the Government of the French speaking Community and the decision of the Court was given on 10 July 2008. One of the arguments was related to the violation of the Belgian Constitutional right to housing combined with provisions of art. 18, 39 and 43 of the EC treaty and art. 7 and 9 of Regulation 1612/68 (Annex n° 5). On 10 July 2008, the Constitutional court rejected the argument, considering:

‘B.44.1. The right to free movement of workers and the principle of non-discrimination linked to it do not prevent authorities to set certain conditions, for example of language, for access to certain rights linked to the principle of free movement. According to the case law of the Court of Justice of the European Communities, ‘national measures which restrict the exercise of fundamental freedoms guaranteed by the Treaty can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective’ (ECJ *S. Haim*, 4 July 2000, C-424/97, § 57). It is in principle for the national court to determine whether those conditions are fulfilled in the case pending before it, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification to guide the national court in its interpretation (*ibid.*, § 58).’

Finally, the court did consider that language requirement was not an ‘obligation of result’ but only a ‘best effort obligation’ in charge of the applicants and that such requirement was not discriminatory as it is applicable disregarding the nationality of the applicants.

In different cases related to discrimination in access to social advantages the Industrial Courts applied the ECHR case law in *Gayguzuz* and *Koua Poirrez*. But the Supreme Court was reluctant to do it. In 2008 this Court (Cour de Cassation) did use the *Koua Poirrez* precedent in a case of disability (Cour de Cassation, 8 December 2008, RG S 07.0114 F/1).

3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS

In the case law following *Bosman* case, it seems that no more pending action exists relating to obstacle to free movement of workers for the year covered by the report in Belgium. This does not exclude that problems can still arise as in practice as in theory.

In theory, an interesting question for the future could be the difficulty to distinguish between different kinds of obstacles to free movement: direct discriminatory obstacles, indirect discriminatory obstacles and non discriminatory obstacles. On that specific point, Sharpston’s opinion in *Bressol and Cheverot* case includes interesting developments on differences between direct and indirect discriminatory obstacles.

The specificity of the facts in this case did not allow the court to envisage the more complex question of difference between indirect discriminatory obstacle and measures which apply without distinction (or non discriminatory obstacles) (J-Y CARLIER, *La condition des personnes dans l’Union européenne*, Bruxelles, Larcier, 2007, p. 101).

Practically, problems can also appear. On one hand, it can concern classical obstacles to free movement. Related to that specific matter, no case has been reported to the authors of the present report. On the other hand, it can concern obstacles related to new discriminations forbidden by the 2000/43 Directive. Whether this directive does not concern free movement as such, forbidden discriminations based on racial or ethnic origin mentioned in that Directive can apply as well for non-migrant worker as for the migrant worker (the worker who

uses the free movement and the one who doesn't). Consequently, case law relating to this directive could have some effect and be important for free movement of workers, not only because the directive can also apply to worker who uses free movement but also because the directive could, in the future, affect and have an influence on the interpretation of notions such as direct discrimination, indirect discrimination or non discriminatory obstacle as mentioned here above. On that specific point, the *Feryn* case gives an interesting example.

It is a case that has been lodged by the Centre for Equal Opportunities and Combating Racism in front of the Industrial tribunal of Brussels against a firm that publicly alleged to refuse recruiting of Moroccan citizens as workers. If the case does not directly concern free movement of EU workers, it could affect EU workers who could be discriminated on a racial basis. It does also concern the agreements with the Maghreb countries.

On 6 February 2007, the Industrial tribunal requested in this case a preliminary ruling from the ECJ (case C-54/07, *Feryn*), (Annex n° 32 of the 2007 Report). Questions were more on the application of Directive 2000/43 on non-discrimination than on free movement (see 2007 Report, p. 16).

The ECJ ruled on 10 July 2008 (Annex n° 2) that:

‘25 The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim.

(...)

28 In the light of the foregoing, the answer to the first and second questions must be that the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.’

4. SPECIFIC ISSUES

4.1 *Frontier workers*

No case or difficulty was reported for the concerned period. One of the explanations is related to the judiciary domestic law in Belgium which was considerably amended during spring 2007. The new law adopted deems to reduce the judiciary delays for obtaining a judgment. Consequently, judicial proceedings are now submitted to a calendar decided by the jurisdiction before pleading the case. Thus the date of pronouncing definitive judgment can be postponed by several months.

Two reports, published by Eures, give some information on problems related to mobility of frontier workers between Belgium and the Netherlands or Germany (W. Elschot: *Mobiliteitshindernissen in het grensoverschrijdend werknemers verkeer tussen België en Nederland*, 61 p. and *Grenzgänger in der Euregio Maas-Rhein*, 69 p.).

No specific administrative or legal schemes exist as far as the authors of the report know. Investigations are still pending and questions have been set up to the GOA.

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Bilateral agreements have been developed in order to avoid double taxation of the non resident worker incomes. All useful information can be found on the website of the federal tax administration:

http://www.belgium.be/fr/impots/impot_sur_les_revenus/particuliers_et_independants/international/

<http://fiscus.fgov.be/interfisc/fr/faq/tax-declaration/non-residents/index.htm>).

4.2 Sportsmen / sportswomen

Investigations have been made amongst the national federations of the sports concerned to obtain details on practice but up to now, some sportive association or federations have answered that in the actual situation, they don't wish to give informations. Others remained silent even after gentle reminder. This confirms that professional sport world stay very close. Our proper legal investigations can however give some principles.

4.2.1 Organisation of professional sport activities

As in the UK, in Belgium, sports are organized by the sporting associations themselves rather than through legislation. Legislation applies to sporting bodies in the same way in which it applies to any other body set up in the form chosen by the sporting body. The choice of how to establish a sport activity, or even the difference between a sporting activity and a hobby remains with those who establish the governing bodies. Normally, sporting activities are defined by their governing bodies which seek to establish a monopoly over the activity through providing rules of the game and the matches. Increasingly these rules are determined by reference to European or international governing body rules so that sports clubs are able to fulfill the requirements to participate in European and international matches.

Professional sport activities are regulated by regulations adopted by sports authorities as URBSFA regulations available from: http://www.footbel.com/fr/KBVB/bondsreglement_consultatie.html for football.

4.2.2 Equal treatment

According to the URBSFA regulation available, no citizenship clause appears in the football regulation. There is no limitation to EU or non EU citizen to access to the national championship competition.

Only the 9 June 1999 Royal decree executing a Belgian law dated 30 April 1999 legislation can be interpreted as a limitation for non EU-citizen. Art. 8 and 9 of this royal decree required from employer to pay the equivalent of 8 salary paid to a professional sportsman by art. 2, §1 of the law dated 24 February 1978 relating to work contract for paid sportsman. This requirement appears to be an obstacle to access to Belgian championship for a non EU-citizen who has to prove his salary is the equivalent of 8 times the ordinary paid sportsman.

4.3 The Maritime sector

As mentioned in the previous report, with the adoption of the Royal decree on 12 September 2007 (Annex n° 50 of the 2007 report) regarding the nationality condition for access to posts of captains of ships registered in Belgium, the Belgian nationality condition for achieving a commander function on a ship is not required any more, as the new royal Decree allows Bel-

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gian authorities to accept any applicant who is citizen of a EU Member State to become commander.

4.4 Researchers/artists

On a general point a view, a specific legislation exists in Belgium for researchers and artists. This legislation does not lead to discriminations between European citizens. For the artists, the legislation applicable is the law dated 30 april 1999 relating to occupation of foreigner workers and the Royal decree executing this law dated 9 June 1999 (art. 9, 15°). Post PhD Students are exempted of being holder of a work permit as allowed by art. 2, 25° of the Royal decree dated 9 June 1999. No special cases were reported. It seems that foreign EU nationals are treated equally and are considered to have the same legal status as national researchers/artists.

4.5 Access to study grants

No special cases or problems have been reported so far, but see supra the situation of students in some studies. For students family members of an EU workers, according to the information available on the website of the French Speaking Community (<http://www.allocations-etudes.cfwb.be/>), on the opposite of the Netherlands situation, no residence condition is imposed by the legislation for applying for a study grants.

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

FLEMISH CARE INSURANCE SCHEME

On 19 April 2006, the Constitutional Court asked 4 questions to the ECJ concerning the *Flemish care insurance scheme* (Case C-212/06). The case analysed by the Constitutional Court was quite complex and involves a Flemish Decree modifying the right to obtain care insurance coverage, depending on the place of work and the place of residence. The example given by applicants is about a Belgian or French worker who works in Flanders. This worker would be covered by the Flemish care insurance as long as he lives in France, in Flanders or in Brussels. However, he would lose the benefit of the insurance coverage if he transferred his residence in the Walloon Region. In a first argument, applicants alleged the new law is in violation of art. 18, 39, 43 of EC Treaty and art. 2, 3, 13, 18, 19, 20, 25 and 28 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. Applicants alleged also that the Flemish Decree is in the application field of Regulation (EEC) 1408/71 and, further, contrary to the *Lancry* (9/08/1994) and *Elsen* cases (23/09/2000).

A second argument is about reverse discrimination. Applicants allege that if this kind of reverse discrimination could be acceptable in the matter of social security regimes pointed by Regulation 1408/71, it would be different and in violation to EC law if the concerned workers did use their right to free movement. This refers to the *Maris* case ruled on 6 December 1977. For example, a national working in the Flemish Region who, after using the free movement right, leaves the Member State where he lived to return and live in Belgium, more specifically in the Walloon Region, would lose the benefit of the care insurance regime. The new Decree would create discrimination between foreign residents and some national residents.

On 1st April 2008, the ECJ (case 212/06 – Annex n° 1) decided that:

‘1. Benefits provided under a scheme such as the care insurance scheme established by the Decree of the Flemish Parliament on the organisation of care insurance (Decreet houdende de organisatie van de zorgverzekering) of 30 March 1999, in the version contained in the Decree of the Flemish Parliament amending the Decree of 30 March 1999 (Decreet van de Vlaamse Gemeenschap houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering) of 30 April 2004, fall within the scope *ratione materiae* of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999.

2. On a proper construction of Articles 39 EC and 43 EC, legislation of a federated entity of a Member State, such as that governing the care insurance scheme established by the Flemish Community by the decree of 30 March 1999, as amended by the Decree of the Flemish Parliament of 30 April 2004, limiting affiliation to a social security scheme and entitlement to the benefits provided by that scheme to persons either residing in the territory coming within that entity’s competence or pursuing an activity in that territory but residing in another Member State, is contrary to those provisions, in so far as such limitation affects nationals of other Member States or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community.

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3. On a proper construction of Articles 39 EC and 43 EC, legislation of a federated entity of a Member State limiting affiliation to a social security scheme and entitlement to the benefits provided by that scheme only to persons residing in that entity's territory is contrary to those provisions, in so far as such limitation affects nationals of other Member States working in that entity's territory or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community.'

The ECJ did not confirm the Advocate General's views on the opportunity to partially include internal situations in EC law on the basis of the application of the non-discrimination principle with citizenship, and to condemn reverse discrimination. The ECJ leaves this open to the national judge:

'37 First, application of the legislation at issue in the main proceedings leads, inter alia, to the exclusion from the care insurance scheme of Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of Brussels-Capital but who live in the French- or German-speaking region and have never exercised their freedom to move within the European Community.

38 Community law clearly cannot be applied to such purely internal situations.

39 It is not possible, as the Government of the French Community suggests, to raise against that conclusion the principle of citizenship of the Union set out in Article 17 EC, which includes, in particular, according to Article 18 EC, the right of every citizen of the Union to move and reside freely within the territory of the Member States. The Court has on several occasions held that citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law (Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 23; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 26, and Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 20).

40 It may nevertheless be remarked that interpretation of provisions of Community law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court (see, to that effect, Case C-250/03 *Mauri* [2005] ECR I-1267, paragraph 21, and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 29).'

On 21 January 2009, the constitutional Court reached its decision after the ECJ ruling (Annex n° 3). The provision of the new Flemish Decree modifying the right to obtain care insurance coverage, depending on the place of work and the place of residence (art. 4, §2) has been partially cancelled. Partially, because, following the ECJ, the Belgian Constitutional Court cancelled the provisions concerning European citizens from other countries than Belgium, and Belgian citizens who did use free movement in EU. But the Constitutional Court does not cancel the decree when this provision is applied to Belgians who reside within Belgium in the French or German regions and move only within Belgium. The Court argues that, if there is a discrimination in the internal free movement of Belgians within Belgium, this discrimination is not a consequence of the Flemish decree but the consequence of the fact that the French and German regional legislators, or the Federal legislator, do not take the same legislation

§ B16: 'Sans que la Cour doive examiner si [ces] personnes pourraient être victimes d'une discrimination dans l'exercice de leur droit à la libre circulation des personnes ... il convient de constater qu'en toute hypothèse, cette éventuelle discrimination ne pourrait avoir son siège dans le décret attaqué, mais dans l'absence de dispositions analogues dans des décrets des Communautés

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française et germanophone ou dans l'absence de mesures fédérales de sécurité sociale ... de sorte que les moyens de droit interne dirigés contre les dispositions du décret ne sont pas fondées'.

In other words, the ECJ did refuse to condemn reverse discrimination but made (in § 40) a strong invitation to the national court to condemn it, using the 'interpretation of provisions of Community law'. But the Belgian Constitutional Court did refuse to do so arguing (in § B16) that this is to be made not by the Court, but by a regional or federal legislation. In consequence, reverse discrimination remains tolerated. The judgment of the Belgian Constitutional Court refused to make the issue from a strictly internal one to an issue covered by EC law which is, strictly speaking, in conformity with the ECJ decision but does not follow the proposition made by the ECJ to the national court to use the same interpretation for the national question as for the community question. In consequence, in the view of the authors of the present report the (lack of) follow-up of this ECJ decision on a purely internal situation confirms that the Advocate General's conclusions to give clear interpretation for the Constitutional court to apply the non discrimination principle as well for community situation with free movement of workers as for purely internal situation and reverse discrimination should have been followed by the ECJ.

Chapter V Employment in the Public Sector

SUMMARY

- *Acquis*

In principle, employment in the public sector in Belgium is quite open to EU citizens except when there is direct or indirect participation in the exercise of powers conferred by the public law.

In practice, there does not seem to be much refusal of access to employment or of professional advantages due to language requirement, recognition of professional experience or of diplomas.

However, up to now, the rate of non Belgians in the public sector seems low. This results from different items as sociological and economical reason as the fact that, generally speaking, non nationals seem applying less vacations in the public sector. This results also perhaps because of insufficient information relating to access to these jobs.

- 2008

The most important difficulty remaining is the access to the profession of notary.

1. ACCESS TO PUBLIC SECTOR

No reform of the national rules has been reported since the previous report.

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

An action has been brought on 11 February 2008 by the case *Commission of the European Communities v Kingdom of Belgium* (Case C-47/08 – Annex n° 18). The Commission claims that, by laying down a nationality requirement for access to the profession of notary and by failing to transpose Council Directive 89/48/EEC (Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years duration, OJ 1989 L 19, p. 16) in respect of the occupation of notary, the Kingdom of Belgium has failed to fulfil its obligations under the EC Treaty, in particular Articles 43 and 45 EC, and Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.

By its action, the Commission first of all alleges that Belgium, by laying down a nationality requirement for access to the profession of notary and its practice, disproportionately restricts freedom of establishment as laid down in Article 43 EC. Admittedly, Article 45 EC exempts from the application of the chapter relating to the right of establishment activities connected directly and specifically with the exercise of public authority. According to the Commission, the tasks entrusted to notaries under Belgian law are so distantly connected to the exercise of public authority that they do not fall within the scope of that article or warrant such a restriction of the freedom of establishment. Those tasks, in fact, do not confer on no-

taries a power of coercion and less restrictive measures than a nationality requirement could be laid down by the national legislature, such as subjecting the operators concerned to strict conditions for access to the profession, specific professional duties and/or a specific test.

By its second complaint, the Commission further alleges that the defendant failed to fulfil its obligations by failing to transpose Directive 89/48/EEC in respect of the profession of notary. As it is a regulated profession, the directive is fully applicable to that profession and the high level of qualification required of notaries could easily be guaranteed by an aptitude test or an adaptation period.

1.2. Language requirement

No specific problem where reported for the public sector, but see supra for the access to some social assistance and to public housing (Ch. III, 2)

1.3. Recognition of professional experience for access to the public sector

No specific problems were reported.

Several verifications have been made regarding discriminations that could be applicable to the public sector. This year again, all the public job offers are published officially on the website of the Public recruitment office (SELOR). From the controls made, there is no language requirement condition for access to jobs in the public sector. If it can seem obvious that such a condition is not published officially, the case law of the Supreme administrative jurisdiction (Conseil d'Etat - State Council) was assessed on that particular aspect. Except some old cases ruled in the 80's, the recent case law does not show any cases of discrimination on basis of language requirements or on basis of refusal of recognition of professional experience.

2. WORKING CONDITIONS

No specific questions were reported so far, on the question of recognition of professional experience for the purpose of determining the working conditions.

Chapter VI Members of the Worker's Family and Treatment of Third Country Nationals

SUMMARY

- *Acquis*

The position of the family members is strengthened in Belgium by the refusal of reverse discrimination for family members of Belgian citizens.

- 2008

Due to the assimilation of the family members of a Belgian to family members of a EU citizen in some aspects of Belgian law, to suppress reverse discrimination, the most important problems concern this kind of internal situation, linked to EC law by the Belgian law. However, there is a derogation to the equal treatment principle for the family members of a Belgian as far as ascendants are concerned; the Belgian supporter has to prove stable, regular and sufficient means of subsistence (for case law, see *T. Vreemd.*, 2008, p. 146-150; 211-217; 289).

Most of the cases reported concern Belgian children with non EU foreigner parents.

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

For access to the territory (visa) for members of the family, see *supra*, ch. I.

For access to employment for members of the family, see *supra*, ch. II.

1.1. Situation of family members of jobseekers

According to the practice analysed, family members of job-seekers do receive residence permits under the same conditions as the EU citizen jobseeker.

1.2. Application of the Metock judgment

After the *MRAX* case, it does not seem that Belgium would apply a condition of previous legal residence (*Akrich*). Belgium seems to follow *Jia* and *Metock*.

1.3. Problems of abuse of rights (Art. 35 of Directive 2004/38)

As mentioned in the 2007 report (Annex n° 46 of the 2007 Report), the Council for Aliens Dispute (CCE) decided, in several cases, not to cancel a GOA decision which refuses to recognise the right of residence to the parent of a Belgian child .

Basing its decision on the application of the *Baumbast* and *Chen* cases, the CCE considered that the refusal of residence permit did not concern the Belgian child. Additionally, the Court recalled that the right of residence of the Belgian child is a consequence of his Belgian nationality but not a consequence of any EC provision. Moreover, the situation of the Belgian child is different from the *Chen* case as the child never used his free movement right

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since he has always been resident in Belgium. Consequently, he is not entitled to allege the EU rights protection as beneficiary of the EU citizenship.

To understand the judgment, one must bear in mind the specificity of the Belgian Alien's Act which implements family reunification for family members of a Belgian citizen. Article 40(6) of the Alien's Act 15/12/1980 considers these family members as EU citizens by assimilation. This principle of assimilation is a specificity of the Belgian law to exclude reverse discrimination. Regarding the *Chen* case, the ECJ ruled that the use of EU law to acquire a nationality of a Member State and the benefit of the residence permit given through this EU nationality is not forbidden by EU law. In the same case, the ECJ reminds that under international law, it is up to each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. Applying this ruling in Belgium, article 10 of the Belgian nationality Code gives the Belgian nationality to a stateless child born in Belgium. This provision raises some cases in which parents, third country nationals, considered as EU citizens in accordance with the above-mentioned assimilation principle, should have received a residence permit in Belgium. This occurred with Equatorial parents who did not declare their child at their own Embassy in order to benefit first from the stateless status for their children, then from the Belgian nationality for their children, and then from the Belgian assimilation principle for themselves.

The same assimilation principle raised another debate relating to social benefits, when the parents of a Belgian child, by application of article 10 of the Belgian nationality Code, are irregular on the territory. Arguing their quality of EU citizen by assimilation, they lodged several actions to obtain social benefits in Belgium. Applying the *Chen* case, the Industrial Tribunal of Brussels decided, on 4 June 2007, to refuse social benefits to the parents of a Belgian child as no border has been crossed by the applicants and they have no sufficient resources (Annex n° 47 of the 2007 Report). Another decision of the same Industrial Tribunal confirms this point with reference to Directive 2004/38 and exclusion of purely internal situations (annex n° 48 of the 2007 Report). These case-laws show the limits of the Belgian principle of assimilation of family members of a Belgian with family members of a EU citizen.

In a judgment of 19 December 2008, the Industrial Tribunal of Brussels introduced a preliminary rule to the ECJ (annex n° 44; pending case ECJ, C-34/09, *Ruiz Zambrano*).

As far as marriages of convenience are concerned, one has to remind that this problematic does not concern only members of the EU worker but all the family members of an EU citizen, of a Belgian or of a non Belgian citizen. On 13 September 2005, the Minister of Justice edicted a circular related to exchange of information between local civil officers in collaboration of GOA when a marriage declaration is made by a foreigner. This circular completed the 4 May 1999 circular adopted to marriage which empowered local civil officer to refuse to celebrate a marriage between two people when it appears to be suspicious or considered as marriage of convenience.. T the government will examine the possibility to introduce stronger controls on the validity of a marriage, particularly when the union was celebrated abroad.

The civil Code contains article 146*bis* which is deemed to combat marriage of convenience or simulated marriage. According to this provision existing since 2000, an *ex ante* control is possible by the local civil officer which is competent for celebrating marriage. This situation has to be distinguish form the recognition in Belgium of marriage celebrated abroad which can be in another European member State.

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If the marriage is celebrated in another EU member State, according to the principle of mutual recognition translated in the 2201/43 regulation called Bruxelles I and according to the Belgian private international law code, no control on the merits should be done as the validity of the documents presented should be presumed.

On the opposite, if the marriage has been celebrated in a third country, for instance with a EU citizen, the above mentioned principle of mutual recognition will not be applicable. However, the Belgian private international law code applies the same principle of recognition without *ex ante* control for the foreigner public authority documents. The Belgian legislator envisage to reinforce powers of Belgian diplomatic authorities abroad regarding the legal evidence force of these documents.

2. ACCESS TO WORK

No specific problem or case reported.

3. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

See *supra* 1.1.

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

See *infra*, Chapter VII, the follow-up of C-408/03, *Commission v. Belgium*, about the income of a partner to be taken into account for the sufficient resources.

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

- C-212/06, *Flemish Insurance*

See *supra*, ch. IV.

- C-408/03, *Commission v. Belgium*:

As reminder, in this case, ECJ allowed the family members of an EU worker the benefice of a new delay of one month to prove to the authority of the welcome State its incomes as family members. This case only concerns family members of an EU citizen who uses free movement.

In a case before the CCE, a spouse, claiming establishment and her husband lodged an action against the refusal for establishment decided by the GOA (Government Office for Aliens) against her as mother of a Belgian child. The applicant argued the violation of art. 2, 3 and 7 of Directive 2004/38, but the CCE did consider that the mother of a Belgian child does not enter into the scope of the Directive as she did not use free movement from one Member State to another. Taking argument of the *Commission v. Belgium* judgment, the CCE considers it inapplicable to family members of a Belgian citizen even if, in Belgian law, family members of a Belgian are assimilated to family members of a EU citizen (Annex n° 22).

On 29 August 2008, the CCE decided to cancel the GOA order to leave the territory given to a Luxemburg citizen without taking into consideration the reason why the applicant did not fulfil the conditions of EU citizen worker (Annex n°36).

- C-200/02, *Chen and Zhu*

The CCE judgment decision of 10 October 2007 (p. 23 of the 2007 Report) has been largely confirmed in 2008. The CCE refused to cancel a GOA decision which did not recognise the right of residence to a Belgian child's mother.

Basing its decision on the application of the *Baumbast* and *Chen* cases, the CCE considered that the refusal of the residence permit did not concern the Belgian child. Additionally, the Court recalled that the right of residence of the Belgian child is a consequence of his Belgian nationality but not a consequence of any EC provision. Moreover, the situation of the Belgian child is different from the *Chen* case as the child never used his freedom of movement since he has always been resident in Belgium. Consequently, he is not entitled to allege the EU rights protection as beneficiary of the EU citizenship.

In the line of this 2007 judgment, several decisions ruled by the CCE in 2008 rejected arguments based on *Chen and Zhu*, considering this judgment as inapplicable to third country national parents of a Belgian child (Annex n° 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34

- C-459/99, *Mrax*

On 15 July 2008, the CCE cancelled the GOA decision to refuse the establishment of a Bosnian citizen who claimed the right to establishment as spouse of a Belgian wife. The GOA refusal was based on the lack of ID documents from the applicant. Indeed, the applicant

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could not give his original passport alleging its loss but proved his identity with a photocopy of his passport, a national ID card and a birth certificate. In conformity with the *Mrax* judgment, the CCE cancelled this refusal decision (annex n° 37).

Chapter VIII

Application of Transitional Measures

As the Belgian government decided to postpone the transitional period for 3 years, no change can be found in national law and practice in Belgium since the last report.

The circular dated 10 May 2006 about the non respect of the deadline to implement the 2004/38 Directive modifies the previous circular on enlargement, as it provides to extend the transitory period for 3 years for the citizens of the EU-8 Member States who entered on 1st May 2004. Consequently, the end of the new transitory period is set on 30 April 2009. In March 2009, the Minister of Foreign Affairs did announce that Belgium would stop the transitional measures on 30 April 2009 and would not request a prolongation. In April 2009, the Government confirmed that the transitional measures for the EU-8 Member States will end on 30 April 2009 and that Belgium will not ask for an extension.

As the Belgian authorities had decided to postpone the end of the transitory period until 30 April 2009, mostly the same legal regime as that existing during the first period mentioned in the previous report, was applicable to the second phase, until 30 April 2009.

Transitional measures are still applicable for Romanians and Bulgarians. On 20 December 2006, a Royal Decree was adopted modifying the 1981 Royal Decree relating to access to the territory, residence, establishment and removal of aliens. The Belgian government decided to put into force a two-year transitional period provided by the Accession Treaty for Bulgarian and Romanian citizens. The transitional arrangements were applicable until 1st January 2009 (Annex n° 36 of the 2006 Report). On 24 December 2008, a new Royal Decree was adopted extending the transitional period for Bulgaria and Romania until 31 December 2011 (Annex n° 4)

As mentioned in the 2007 Report, it appears that local centres in charge of social assistance (CPAS) in the area of Brussels still face social assistance requests from Bulgarian and Romanian citizens during their short term residence in Belgium. Several cases are reported in which pregnant women claimed for social assistance. The lack of provision in the EU Treaty and legislation regarding short term residence allows these centres to refuse to give any social assistance, considering their stay in Belgium as illegal. National legislation allows only urgent medical assistance to an alien in irregular stay. Consequently, only urgent medical care is provided for such EU citizens. This would not be really different after the transitional period.

Chapter IX Miscellaneous

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