

**REPORT**  
**on the Free Movement of Workers**  
**in the Czech Republic in 2008-2009**

Rapporteur: Mgr. Věra Honusková

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## **Abbreviations**

CR	Czech Republic
EA	Employment Act
EU	European Union
EU citizen	a citizen of another European Union Member State
EU MS	Member State of European Union
FOR A	Foreigners' Residence Act
TCN	third country national

## Introduction

There were not many developments in the legislation of the Czech Republic in 2008/beginning of 2009 comparing to rapid changes which were done in previous years. The rapporteur therefore focused this report also on practice, i.e. on whether the implementation of the *acquis* is in compliance with the respective EC legislation.

A judgment of the Highest Administrative Court dealt with access of third country nationals who are family members of Czech citizens to the register of job-seekers (Judgment of Highest Administrative Court No. 4 Ads 40/2008-73, available at [www.nssoud.cz](http://www.nssoud.cz)). One of the arguments which were presented by the applicant (the family member) was a different position of TCN family members of EU citizens compared to the position of TCN family members of Czech citizens in the provisions of the Employment Act. The court *inter alia* held that the position of both groups in the respective law must be identical otherwise there would be a discriminatory treatment. Similar reasoning (use of the argument of reverse discrimination) was used by Public Defender of Rights when he dealt with access of third country nationals who are family members of the Czech citizens to the public health care scheme; for detailed information on both cases see Chapter III. The argument of reverse discrimination starts to appear in the Czech practice in 2008/2009.

A Governmental Draft on Antidiscrimination Act was vetoed by president in May 2008 and the Parliament did not vote on it in 2008/2009 again. The Czech Republic thus does not have a general antidiscrimination norm, although some pieces of legislation deal with the issue. The Draft of the respective law was delivered to the Parliament on July 7, 2007 and passed through the legislative process during 2008. The law was created as a general antidiscrimination norm in the domestic legislation. It provides definitions of the relevant terms found in the existing anti-discrimination legislation and ensures the remedies against discrimination (e.g. as presumed in the Labour Code). It also frames the whole area of prohibition of discrimination and supplements the currently rather diffuse legislation. More detailed information is given in Chapter III.

The last 'development' that may be mentioned is the complexity of the Foreigners' Residence Act. Because of the constant changes (26 changes larger or smaller changes were done till 2000, 6 of them in 2008/2009) the FORA became a very complex document. The Czech government plans to prepare (already for several years) a new Act on Residence of Foreigners and the Minister of Interior was given a task by the government to prepare a new concept of legislation till the April 30, 2006.<sup>1</sup> But no draft legislation was published till the end of June 2009. The complexity of the law may affect also citizens of EU Member States and especially their TCN family members who may have difficulties to understand what their legal position is like under the Czech law (see also more information in the Chapter IX). There is a need for a new concept of migration legislation.

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<sup>1</sup> Usnesení vlády ČR ze dne 24. srpna 2005 č. 1055 (Government Decree No. 1055, August 24, 2005). There are no more official documents available till 31.03.2009.

## **Chapter I Entry, Residence, Departure**

### *Text(s) in force*

- Act No. 326/1999 Coll. of Laws, on Residence of Foreigners on the Territory of the Czech Republic (Foreigners' Residence Act, FORA), as amended.
- Act No. 634/2004 Coll. of Laws, on Administrative Fees, as amended.
- Act. No. 500/2004 Coll., Administrative Proceedings Act, as amended.
- Act. No. 150/2002 Coll., Code of Administrative Justice, as amended.

Detailed information on the transposition of Directive 2004/38/EC was already provided in the reports 2006 and 2007, therefore only following issues are analysed:

### **1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS: ART. 7(1A); ART. 7 (3 A-D); ART. 8(3A); ART.14 (4 A-B), ART.17, ART. 24 (2).**

The issue of entry, residence and departure of the EU nationals and their TCN family members is covered by provisions of the Foreigners' Residence Act (a general law which focuses on the position of all foreigners). The law is divided into main parts on entry, residence and departure. One part of the law focuses in its provisions only on the residence of EU citizens and their family members (Secs. 87a – 87aa), but their position is reflected also in other provisions of this law. The issue of entry, residence and departure of EU nationals and their TCN family members is basically in compliance with the Directive. The possible gaps were mentioned in the Report of 2007, thus only the main ones are mentioned below or in Chapter VI.

Although the term public policy and public security are not defined in the migration legislation, the decisions of courts on this issue appeared in recent years and the application is slowly unified. There are already several judgements of the higher court regarding this issue (esp. judgment of Highest Administrative Court No. 2 As 78/2006 – 64 of May 16, 2007, available at [www.nssoud.cz](http://www.nssoud.cz)) and the Highest Administrative Court continued to give judgments on this issue in 2008/2009. A recent case law showed that the above mentioned judgment, which established a 'test' for finding whether the breach of a law is at the same time a breach of (or endangers) public order, may not be sufficient for general interpretation of the term public order. The jurisprudence does not take into account the decisions of ECJ very much, and although it did not cause any problems in those specific judgments, the interpretation which is in conformity with *acquis* is needed.

#### ***Art. 7 (1 a), 7 (3 a-d), recital 9***

The provisions of Art. 7 (1 a), 7 (3 a-d) and 8 (3a) are transposed mainly into the Sec. 87a-87aa FORA and into the Employment Act (EA). The Police issue a *temporary residence certificate* to an EU citizen if he/she intends to stay in the Czech Republic for more than three

months. This certificate is issued upon request of the foreigner, but it is not an obligation to have it. When applying for the temporary residence permit, an EU citizen is required to submit certain documents; some of the documents which are required are not in compliance with the requirements provided for in Art. 8 (3) of the Directive. A foreigner is obliged to present: a document confirming his/her reason of stay (this condition applies only if the reason is employment, business activity or study), a passport or identity card, a document confirming assured accommodation, photographs and a document certifying a sickness insurance (this document is not required in case of request for the reason of employment, business activity or study) (*Sec. 87a FORA*). The FORA requires an EU citizen to report his/her presence on the territory of the Czech Republic within 30 days (if he/she intends to stay in CR for more than 30 days).

The law also provides for the possibility to reject the request for residence certificate or withdraw the residence certificate. The request for temporary residence certificate of EU citizen will be rejected, if

- 1) an applicant does not submit the documents required by the law;
- 2) he becomes a burden on the social assistance system, except for those persons, to which the directly applicable EC regulation is applicable;
- 3) there are reasonable grounds that he might endanger the security of the state or might seriously violate public policy;
- 4) or is an undesirable person pursuant to the provision of Sec. § 154 FORA<sup>2</sup> (*Sec. 87d (1) FORA*).

The points (2), (3) and a reason of a threat to public health (within the limits given by the Art. 29 (2) of the Directive) apply also to the possibility of withdrawal of a temporary residence certificate of an EU citizen (*Sec. 87d (2) FORA*).

The EU citizens have equal position with the Czech citizens in the field of employment and basically also in the self-employment. The legislation contains general provisions which deal with the status of a person who is no longer a worker or a self-employed person in general, i.e. the situation is solved for all persons. The EU citizen who is no longer a worker or self-employed person basically retains the status of worker or self-employed person, even if it is not explicitly stipulated in the legislation. The legislation covers his/her situation also in case of his/her involuntary unemployment or illness etc. If the EU citizen (employee or self-employed person) is unable to work as a result of an illness or an accident, he/she is then entitled to a health benefit. He/she may not be at the same time registered as a job-seeker. He/she may recover (= stay ill) for a period of maximum one year, the retirement and the respective benefits are provided after that. If he is registered as a job-seeker, he is treated pursuant to the provisions of Employment Act; he gets unemployment benefits for certain period of time.

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<sup>2</sup> The Foreigners' Residence Act stipulates that the undesirable person is a person, who cannot be admitted to the territory, because he/she might during his/her stay endanger state security, public order or public health, or endanger rights or freedoms of others, or similar interest protected by an international treaty. The law also stipulates that inter alia the person whose deportation costs were covered by the Ministry of Interior and the person did not reimburse the costs of his/her voluntary return will be indicated as an undesirable person.

**Art.14 (4 a-b)**

The Czech legislation is in compliance with the Art. 14 (4a-b) of the Directive. The law allows for expulsion of an EU citizen or of his/her TCN family member only in case of serious violation of public policy, endangerment of state security or public health (a disease occurred in the time limit of three-month after the entry) when they reside upon a *temporary residence permit*. If they reside on the basis of a *permanent residence permit* then only a reason of serious violation of public policy or endangerment of public security are taken into account (some other conditions are described in the Report for 2007). The expulsion order may be issued only if the withdrawal of a permanent residence permit will not be sufficient enough with regard to seriousness of his/her behavior (*Sec. 120 FORA*) and any decision on expulsion cannot be issued if its consequence has inadequate impact to a private or family life of the person concerned (*Sec. 119a FORA*). The fact that a person is unemployed does not play a role here.

**Art.17, art. 24 (2)**

The wording of Art. 17 (1-2 and 4) of the Directive is copied almost word by word to the Sec. 87g and 87h FORA, so the law is in compliance with the Directive. Regarding the transposition of Art. 17 (3) the law seems to meet the Directive only partly. The family member of a worker or a self-employed person shall be given a permanent residence permit upon his/her request in several cases, *inter alia* after 5 years of his/her continuous residence in the CR, or after 2 years of continuous residence in the CR under the condition that a worker or a self-employed person (of whom he/she is a family member) was granted a permanent residence permit. The time limit of 2 or 5 years is not applied in exceptional cases, like for granting the residence permit on humanitarian bases. The condition of 2 years of continuous residence was introduced to the FORA at the end of the year 2007; the change was done to prevent misuse of the law, esp. marriages of convenience.<sup>3</sup> EU citizens and their family members enjoy equal treatment with the Czech nationals.

**2. SITUATION OF JOB-SEEKERS**

The Employment Act differs between a person interested in a job and a job-seeker (*Sec. 22 and 24 EA*). A person interested in a job may still be an employee and for some reason seek a new job while employed; a job-seeker is a person who is unemployed and seeks a new job. The Report further focuses on the treatment of job-seekers (*Sec. 24-58 EA*).

In order to be treated as a job-seeker the person must register him/herself as a job-seeker within a competent labour office. A person has no obligation to do so, he/she may still seek a job and need not to be registered – but he/she cannot use the service of labour office then. A labour office acts according to the Employment Act, and e.g. seeks work for the job-seeker, offers relevant jobs etc. A job-seeker is obliged to cooperate with the labour office (to come to an interview with a possible employer which is recommended by the labour office, to visit

<sup>3</sup> See the explanatory report of the draft law No. 191, available at <http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=191&CT1=0> (opened February 28, 2009).

the labour office regularly etc.), otherwise he/she may be excluded from the register of job-seekers.

The Employment Act refers to necessity of having a registered place of residence in CR for job-seekers in order to treat them as job-seekers. Nevertheless a registered place of residence of an EU citizen and a family member of an EU citizen is defined as an address of his temporary or permanent residence and in case that there is no such a place then a place where he/she usually resides is taken into account (*Sec. 5 (b) EA*). A registered place of residence should anyway play its role only in determination of a responsible labour office.

A job-seeker that is included into the register of job-seekers is also entitled to unemployment benefits. There are several conditions stipulated by the law. The Czech legislation requires previous 12 months employment in last three years on the territory of the Czech Republic for the entitlement for granting of the unemployment benefits/job-seeker's allowance. The term of employment in another Member State should be theoretically also taken into account (because of the direct application of the Regulation 1408/71 and 1612/68 and instructions given by an internal directive issued by the central administration of Ministry of Labour and Social Affairs. The information about existence of the internal directive was given to the rapporteur during an interview with a government official, but the rapporteur does not have a copy of the instruction yet. Questions which the rapporteur posed to the authorities in charge by phone – mainly labour offices – were answered differently).

An EU citizen has the right of residence in the Czech Republic without any formalities (but see below). He/she is not obliged to ask for any residence certificate even if his/her stay exceeds three months. The Foreigners' Residence Act only requires an EU citizen to report his/her presence within the territory of the Czech Republic within 30 days (if he/she intends to stay in CR for more than 30 days) (*Sec. 93 (2) FORA*). The same obligation is placed on a family member who, if he/she is a third country national has an obligation to apply for a temporary residence permit. The time limit is non-discriminatory, the sanctions are proportionate and non-discriminatory (*Sec. 157 (1) (r) in connection with 157 (2) FORA*). An EU citizen will be granted a temporary residence certificate in any case; it does not depend on existing employment. But the registration as a job-seeker may be relevant for the purpose of granting a permanent residence permit later. The Ministry of Interior issues a permanent residence permit to an EU citizen upon her/his request *inter alia* after five years of continuous temporary stay<sup>4</sup> on the territory of CR, the length of registration of a job-seeker is also taken into account (only in case of involuntary unemployment). The labour office confirms the length of the registration of a job-seeker for this purpose.

### ***Judicial practice***

A recent case (case of the Highest Administrative Court No. 2 As 14/2008-50 issued on 14 May 2009 available at [www.nssoud.cz](http://www.nssoud.cz)) dealt with the term public policy, which is counted as 'abstract concept of law', i.e. the concept is not defined by the law and gives the Police large discretion in the decision making process. It used the test which was introduced to the Czech law by a previous judgment of the Highest Administrative Court; this judgment was mentioned in last years' report. The new judgment said that all persons who come into Czech

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<sup>4</sup> The continuous stay is defined by the Foreigners' Residence Act /Sec. 87g (7) AA/ and the definition corresponds to the definition in Art. 16 (3) of the Directive.



Republic via the airport and do not have travel documents or necessary visas breach public order and cannot be allowed to enter into the CR. This legal opinion is very disputable also in the light of the wording of a provision of Asylum Act, which stipulates reasons for which a person must not be allowed to enter the CR. There is also the reason of public order among them and also a reason of not having a visa – stipulated separately. So the judgment goes against the will of the lawmaker and shows that there is an urgent need of more judgments on the matter or a definition of the term public order.

*Miscellaneous (administrative practices, etc.)*

The internal instruction of the Director of the Foreigners' Police is issued regularly in order to unify the approach of local foreigners' police departments towards foreigners. The instruction also contains interpretation of provisions of the FORA. The instruction is very wide and together with often changing FORA creates a hard-to-orientate-in system of documents. The internal instruction is not available to the public, although it influences the practice.

*Recent legal literature*

Antoš, M., Volební právo cizinců žijících v České republice (Right to Vote of Foreigners in the Czech Republic), in *Interpretace Ústavy České republiky a Slovenské republiky*, 2008, p. 132-139.

## Chapter II Access to Employment

### *Text(s) in force*

- Act No. 262/2006 Coll., Labour Code, as amended.
- Act No.99/1963, Civil Procedure Code, as amended.
- Act No. 435/2004 Coll., Employment Act, as amended.
- Act No.455/1991 Coll., Trade License Act, as amended.
- Act No. 251/2005 Coll., Act on Labour Inspection, as amended.
- Act No. 18/2004 Coll., on Mutual Recognition of Qualifications, as amended.
- Act No. 95/2004 Coll., on Mutual Recognition of Diplomas on Medical Qualification of Doctors, Dentists and Pharmacists, as amended.
- Act No. 96/2004 Coll., on Mutual Recognition of Diplomas on Paramedical Qualification, as amended.
- Draft of the Antidiscrimination Act (Draft No. 361).

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

Equal treatment in access to employment is ensured mainly by the provisions of the Employment Act. The citizens of other EU Member States and their third country family members have equal position with the Czech citizens in the field of employment (*Sec. 3(2) Employment Act*). The equal treatment pursuant to the provisions of the Employment Act covers access to employment and also access to the public employment services including registration in order to seek work etc.

EU citizens and their family members do not need work permits for the access to the Czech labour market. They have equal position with Czech citizens and therefore there are no limits imposed on their access to the labour market. The obligation to obtain a work permit applies only to third country nationals who are not family members of an EU citizen (or of a Czech citizen). There are several exceptions for special categories of TCN who are not family members and have access to the labour market without a work permit; those are *inter alia* foreigners who was issued a permanent residence permit; a family member of a member of a diplomatic mission; a foreigner who was granted international protection etc. *Sec. 98 of Employment Act*). The Act also defines a term *foreign employee* which pursuant to *Sec. 85 Employment Act* means an individual who is neither a Czech citizen nor an EU citizen nor his family member.

An employee can be assisted by a labour office or an employment agency in searching for a job. An assistance can be obtained *inter alia* in the form of searching for a job or by advisory and information services (*§ 14 Employment Act*). Legal basis for the work of labour offices are given by *Sec. 18 EA*, legal basis for the work of employment agencies are given by *Part 2 (esp. Secs. 58 – 66 EA)*. As the law stipulates that EU citizens and their TCN family members have equal position with Czech citizens, there should be no difference between them for the purposes of the services given by labour offices and agencies.

## 2. LANGUAGE REQUIREMENTS

The laws contain provision on non-discrimination and it may be said, that although the employer can have different requirement according to the announced vacancy, the requirements must not be discriminatory. The person who meets the criteria should be employed regardless of his/her nationality, age etc. As the non-discrimination in the access to a job position is protected by the Employment Act (see below in Chapter III), the possible violation of this principle can be brought to a court.

Knowledge of the Czech language can be required for some professions, where the language is so important that it constitutes the basic element of the profession. Knowledge of the Czech language is e.g. required for performance of a regulated activity, but it may be required only to the extent that is necessary for a pursuit of a regulated activity (*Sec. 21 Act on Mutual Recognition of Qualifications*). There are also several provisions in the laws transposing sectoral directives. The knowledge of the Czech language is required from the doctors, dentists and pharmacists to the extent that is necessary for a pursuit of the medical practice (the language skills are verified by the Ministry of Health (*Sec. 32 of Act on Mutual Recognition of Diplomas on Medical Qualification of Doctors, Dentists and Pharmacists*)). The same requirements apply for the paramedical qualification (*Sec. 82 Act on Mutual Recognition of Diplomas on Paramedical Qualification*)).

### *Judicial practice*

There is almost no relevant case law on the matter. It can be said, that either cases in the relevant issue had not been brought before courts yet, or (and it is more likely) there are some cases brought before courts, but they had not get to the higher instance yet and therefore are not accessible (only the decisions of highest courts are available publicly).

### **Chapter III Equality of Treatment on the Basis of Nationality**

#### ***Text(s) in force***

- Act No. 262/2006 Coll., Labour Code, as amended.
- Act No. 435/2004 Coll., Employment Act, as amended.
- Act No. 143/1992 Coll., on Remuneration in Budgetary Organizations, as amended.
- Act No. 251/2005 Coll., Labour Inspection Act, as amended.
- Act No. 634/1992 Coll., Consumer Protection Act, as amended.
- Act No. 561/2004 Coll., Act on Education, as amended.
- Act No. 111/1998 Coll., Act on University Education, as amended.
- Act No. 221/1999 Coll., Act on Professional Soldiers, as amended.
- Act no. 361/2003 Coll., Act on Service Relationships of Members of the Service Corps, as amended.
- Act no. 218/2002 Coll., Act on Service of Public Servants, as amended.
- Act No. 100/1988 Coll., on Social Security, as amended.
- Act No. 117/1995 Coll., on State Social Support, as amended.
- Act No. 108/2006 Coll., Social Services Act.
- Act No. 111/2006 Coll., Assistance in Need Act.
- Act No. 586/1992 Coll., Income Tax Act, as amended.
- Act No. 61/2000 Coll., On Sea Navigation.

#### **1. WORKING CONDITIONS**

The equality provisions, which are contained within the legislation on the access to employment that was described above, have their equivalent within the labour legislation. According to the Labour Code the employers are obliged to treat all employees equally as regards the conditions of work including the remuneration and other financial obligations (*Sec. 16 (1) of Labour Code*). Similar provisions are included in the remuneration legislation (e.g. the Salary Act provides for the equal salary for the equal work in Sec. 3 (3)). Labour Code also prohibits direct and indirect forms of discrimination based on the citizenship, nationality etc. (*Sec. 16 of Labour Code*).

#### ***Direct and indirect discrimination***

According to the Labour Code the employers are obliged to treat all employees equally as regards the conditions of work including the remuneration and other financial obligations (*Sec. 16 (1) of Labour Code*). The Code explicitly prohibits discrimination (any discrimination in the labour relations is prohibited, *Sec. 16 (2) Labour Code*), and stipulates that the relevant terms, like direct and indirect discrimination, victimization, inciting discrimination, harassment or sexual harassment, are to be defined by a special law. The Labour Code also states that legal remedies against discrimination are to be defined by a special law, an Anti-

discrimination Act, which had not yet been adopted and therefore there is a problem of limited possibility to appeal in the discrimination matters pursuant to the provisions of Labour Code, i.e. in the labour relations issues.

The basis for equal treatment in terms of non-discrimination can be found also in other laws, *inter alia* Employment Act, which contains an obligation to treat individuals exercising the right of employment equally, prohibits both direct and indirect discrimination on the basis of sex, sexual orientation, racial or ethnical origin, nationality, citizenship, social origin, language, health, age, religion, matrimony or marital status or obligations to a family, membership in political parties or movements, trade unions or unions of employers. The Employment Act defines direct and indirect discrimination for the purposes of the respective act and also stipulates the possibility to give a claim against the discrimination conduct of the employer and ask *inter alia* to cease the conduct and appropriate compensation (*Sec. 4 of the Employment Act*). The prohibition of discrimination is stipulated also, e.g. by Consumer Protection Act, Education Act, Act on Professional Soldiers, Act on the Service Relationship of Members of the Security Corps and the Act on the Service of Public Servants.

There is a shifting of the burden of proof in the labour law related civil cases (Sec. 133a (1) of the Civil Procedure Code). The allegations that the party has been directly or indirectly discriminated on the grounds of his/her sex, racial or ethnic origin, religion, belief, world opinion, disability, age or sexual orientation, shall be deemed proved by the court in labour matters unless the opposite has transpired in the proceedings (facts bearing on the issue of discrimination are considered to be proved unless proven otherwise). The principle of shifting of the burden of proof had been challenged before the Constitutional Court as a principle which contravenes to the principle of equality of the parties. The finding of the Constitutional Court was published under No. 419/2006 Coll., the court stated that the principle of reverse burden of proof does not contravene the principle of equality of the parties, because the unequal position of the parties is objectively and reasonably justified. The respective judgment dealt with the shifting of the burden of proof in the cases of provision of services (§ 133a (2) Civil Procedure Code), but it can be nevertheless applied also on the similar provision of Sec. 133a (1) which contains the same principle.

There is very little case law on this issue and almost none with an EU citizen or his/her TCN family member as an applicant. Possibly, there are some cases, but they are probably settled out of a court. The discrimination is not perceived as a problem so much from the society (although there is a problem e.g. with the discrimination of Roma minority). There were cases of gender discrimination (Czech women), or on access to services (Roma applicant not allowed to enter a pub), or the one, which is mentioned in the judicial practice below.

### ***Draft legislation, circulars, etc.***

A Governmental Draft on Antidiscrimination Act was vetoed by president in May 2008. The president vetoed the law with the reasoning that the law is useless, counterproductive and of low quality, and he considers its impact problematic.<sup>5</sup> The Chamber of Deputies (lower chamber) of the Parliament should have voted on the law again as the law stipulates the pos-

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<sup>5</sup> The position of the President can be found on the website of the Parliament: <http://www.psp.cz/sqw/text/orig2.sqw?idd=29448>, Czech only, opened on January 27, 2009.

sibility to outvote the presidential veto, but the voting was postponed several times. The Draft of the respective law (and it was already a second attempt to pass such a law) had been delivered to the Parliament on July 7, 2007 and passed through the legislative process during the 2008. The law was created as a general antidiscrimination norm in the domestic legislation. It provides a necessary definition of the relevant terms found in the existing anti-discrimination legislation and ensures the remedies against discrimination (e.g. as presumed in the Labour Code, see above). It also frames the whole area of prohibition of discrimination and supplements the currently rather diffuse legislation.

The Antidiscrimination Act is inter alia transposing also the Directive 86/378/EEC and the Directive 96/97/EC. Following that the Antidiscrimination Act had not been adopted yet, both directives are still not transposed to the Czech law and European Court of Justice ruled in 2008 that the Czech Republic did not fulfil its obligations which rise from those directives (Judgment C-41/2008 of December 4, 2008).

### ***Judicial practice***

A judgment of the Highest Administrative Court dealt with an access of a third country national who is a family member of a Czech citizen to the register of job-seekers, when he did not have a permanent residence in the CR (Judgment of Highest Administrative Court No. 4 Ads 40/2008-73, available at [www.nssoud.cz](http://www.nssoud.cz)). The authorities (labour office) denied his registration with the reasoning that the law requires a permanent residence in this case (for a family member of Czech citizen). The appellant in his appeal stated that the law required only a registered place of residence for access of family members of EU citizens to the register and that this treatment is discriminatory. The court held that the appellant has access to the register even if he does not have a permanent residence in CR and also that this interpretation of laws would lead to discriminatory treatment comparing to the position of third country nationals who are family members of the citizens of one of the EU Member States. The Employment Act was changed and the position of family members of EU citizens and Czech citizens is now equal.

### ***Miscellaneous (administrative practices, etc.)***

The Public Defender of Rights (Czech Ombudsman) pointed on an imbalanced situation of some foreigners in their access to the public health care system. Esp. family members of Czech citizens who are third country nationals must pay for the health care or have a commercial insurance for the first two years of his/her stay as a family member in the Czech Republic, while the family members of EU citizens have access to public health care system immediately. A new law is being planned by the Ministry of Health, which would solve most of the problem. The Ombudsman suggested an early adoption of the new law or a change of the existing law in case the change is not done in the short-term perspective.<sup>6</sup>

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<sup>6</sup> Section 'News' on the website of Public Defender of Rights, available at <http://www.ochrance.cz/dokumenty/dokument.php?back=/cinnost/index.php&doc=1454>, accessed on April 13, 2009.

## 2. SOCIAL AND TAX ADVANTAGES.

As regards the Income Tax Act the situation of the worker from another Member States is in the same position as the Czech national if he has tax domicile in the Czech Republic (*Sec. 2 of Income Tax Act*; a person has a tax domicile in the CR when he/she stays there at least 183 days per year). From the year 2004 even persons without the tax domicile (normally person who do not habitually reside in the Czech Republic, *i.e.* mainly frontier workers) can require the tax reduction or tax bonus for a child and tax-relief for a spouse. There is number of bi-lateral treaties to prevent double taxation, their survey is accessible on the website of Ministry of Finance.<sup>7</sup>

## 3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS?

Nothing to report.

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

### 4.1 Frontier workers

Of particular interest here is the existence of residence clauses (see for instance the case law of C-212/05 *Hartmann*).

There is no special administrative or legal scheme for frontier workers in addition to the EU rules stipulated. It is also not an issue of a large debate, there is e.g. nothing debated on this issue at this moment.

The issue of frontier workers, *i.e.* persons who are employed in one State while residing in another State and who return to their State of residence at least once a week (Art. 1(b) of Regulation 1408/71), is regulated in the Czech Republic by direct application of Regulations 1408/71 and 1612/68 (the laws refer to them in their provisions).

In the field of social benefits, schemes of state social support and social assistance are primarily based on residence of the foreigner in the Czech Republic; the same applies to the provision of social services.

The Case C-212/05 *Hartmann* is based on the refusal of German authorities to give a child raising allowance to a spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State. The problem of whether such worker and/or his spouse fall within in scope of the Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community appears in the Czech legal context as unlikely.

One of the reasons is the non-existence of a social benefit comparable to the German *Erziehungsgeld* in the Czech social system. Furthermore, under Czech law governing social benefits, EU citizens are entitled to social benefits pursuant to Regulations 1612/68 and

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<sup>7</sup> See <http://cds.mfcr.cz/cps/rde/xchg/SID-3EA9846C-5355E46B/cds/xsl/4379.html?year=0> (accessed 28 June, 2009).

1408/71. Provisions of the State Social Support Act No. 117/1995 Coll., which can be considered as the basic national legislation specifying social benefits and conditions, under which they are granted, refer to the directly applicable Regulations 1408/71 and 1612/68. Thus the issue of frontier workers, i.e. persons who are employed in one State while residing in another State and who return to their State of residence at least once a week (Article 1(b) of Regulation 1408/71) is regulated in Czech Republic by direct application of Regulations 1408/71 and 1612/68. Therefore, as regards the classification of a person as a migrant worker, it can be assumed that under legislation applicable in the Czech Republic, a national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker, can also claim the status of migrant worker for the purposes of Regulation No. 1612/68. Taking into account this conclusion, also family members of a migrating worker would be entitled to social benefits under the Regulations stated above. Hence it follows that also the question of granting a social benefit to the spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State, would be in the Czech legal context most probably resolved in conformity with the *Hartmann* judgment. However, in the case that in Czech social care scheme a benefit comparable to the German child-raising allowance would be granted, it is most probable – especially when taking into consideration the national court arguments in the *Hartmann* case regarding the character of the German child-raising allowance as an instrument of national family policy, that Czech courts would have to submit the case to the ECJ for a preliminary ruling under Article 234 EC.

There are several agreements on the internships programmes and several agreements on mutual employment, including agreements to facilitate employment of frontier workers. An agreement to facilitate employment of frontier workers was signed with Austria,<sup>8</sup> there is a quota on its beneficiaries (450 for Czech employees). Austria still maintains transitional measures so existence of the agreement is useful. Although the quota is low, it is according to the information given by the Ministry of Labour and Social Affairs not filled.

#### **4.2 Sportsmen/sportswomen**

As regards the application of free movement rules in the sports sector there is no legislation regarding the issue of quotas or transfer fees and the sport clubs themselves set up the rules. According to the information given by respective sport clubs there are no national quotas for EU citizens participating in all sport activities at all levels. The only exception where the Czech citizenship is required is the Czech national team.

There are quotas which are aimed at citizens from third countries (non-EU, non-EEC etc.), they can be found e.g. at Football Competition Regulations, issued by the Football Association of the Czech Republic; art. 51 of the rules stipulate that no more than three third country citizens may take part in one game. The number of EU citizens is not limited, although they

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8 Published under No. 70/2005 Coll. of Int. Treaties, Agreement among Czech Republic and Austria on Employment of Frontier Workers in Border Regions (č. 70/2005 Sb.m.s., Dohoda mezi vládou České republiky a vládou Rakouské republiky o zaměstnávání občanů v příhraničních oblastech).



must have a professional contract registered in the Czech Republic. Similar provision can be found in Technical-Competition Regulations of I. (Gambrinus) League and II. League.

There is a Law on Support of Sport, which delimits a place of a sport as a nonprofit activity (common profit activity, *obecně prospěšná činnost*) in the society.<sup>9</sup> The law also stipulates tasks to ministries and other state authorities in the field of sport (they give conceptions, financial support etc.). There is no general framework for sport activities or a special provision regulating them separately. Professional sports activities are organized by the sport authorities themselves, and their activities in sports are not governed by any special legislation. There is only a general framework for the work of those entities as such (e.g. law on nonprofit organizations etc.).<sup>10</sup>

### 4.3 The Maritime sector

Czech legislation was changed in 2008. The change was most probably done because of the action which was brought before the European Court of Justice by the Commission of the European Communities in November of 2007 (C-496/07; the action was revoked by the Commission in March of 2009). The Czech Act on Sea Navigation does no longer reserve the post of captain of a ship flying the Czech flag to persons with Czech nationality and stipulates that the captain of the ships must be either a Czech citizen or a citizen of an EU Member State and at the same time must prove certain knowledge of the Czech language so that he/she can exercise the relevant powers. The explanatory report to the draft law refers to the ECJ judgments C-379/87 and C-414/97 when stipulating the condition of the Czech language.<sup>11</sup> Exception from this requirement are possible in the exceptional situations (*Sec. 28 (4) of the Law on Sea Navigation*).

As the CR is landlocked it must be said that the maritime law is not quite in the centre of attention; this fact is raised by the fact that there are almost no ships flying the Czech flag. There are also no agreements with non-EU countries on this matter.

### 4.4 Researchers/artists

The important issue in this regard is whether foreign EU nationals are treated equally ie are considered to have the same legal status as national researchers / artists.

The researchers/artists have same legal status as regards their access to the Czech labour market and other rights of migrant workers as the Czech nationals have. There are no restrictions or inequalities indicated.

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9 Act. No. 115/2001 Coll., Law on Support of Sport (zák. č. 115/2001 Sb., o podpoře sportu).

10 Act No. 83/1990 Coll., on Association of Citizens (zák. č. 83/1990 Sb., zákon o sdružování občanů).

11 See the explanatory report of the draft law No. 427, available at <http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=427&CT1=0> (opened February 28, 2009).

#### ***4.5 Access to study grants***

The focus should be put on whether the worker and the members of his/her family are equally treated with regard to accessing study grants in the host Member State, in particular if there are any residence conditions.

The school attendance in the length of 9 years is compulsory for Czech citizens, EU nationals and their family members residing on the territory upon a temporary or permanent residence permit. *EU citizens and their family members* have access to elementary and secondary education upon the same conditions as Czech citizens (*Sec. 20 (3) Act on Education*). The elementary and secondary education on the governmental schools is declared as free of charge (*Sec. 2 of Act on Education*). The sufficient knowledge of the Czech language is required for secondary and higher vocational schools, and can be attested during the entrance exams or by an interview taken by the school (*Sec. 20 (4) of Act on Education*). Czech language courses for free are offered to children with the citizenship of other EU Member State to integrate them to elementary schools (*Sec. 20 (5) of Act on Education*).

All students, regardless of their nationality, have access to the institutions of higher education (state university education) in the Czech language. The universities can establish conditions for the university education of foreigners. All students (including EU nationals and their family members and TCN students) have equal access to study grants and have the right to scholarships granted to students for their outstanding scholastic achievements, for outstanding study results, in case of student's strenuous social situation and in other cases worth special consideration (*Sec. 91 of Act on University Education*). Students can also study within the framework of the foreign development aid of the Czech Republic and under bilateral international agreements on co-operation in the field of education.

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

### *Text(s) in force*

The regulation 1612/68/EC is directly applicable; therefore, there is no transposition of its provisions into the relevant legislation. The Czech laws use references to the application of directly applicable regulation. For the due application of the regulation the Ministry of Labour and Social Affairs issues internal guidelines for the public authorities.

In the field of social benefits, schemes of state social support and social assistance are primarily based on residence of the foreigner in the CR. To be eligible for a benefit, the recipient must reside in the territory of the Czech Republic, the condition of stay for more than three months may be required (and a test of unjustified burden on social system is done) or in one case a report of presence on the territory is required. Therefore, for access to these kinds of benefits for migrant workers, it is extremely important to apply Sec. 7 (2), to overrule the residence requirement in case of workers covered by Regulation 1612/68/EC. Other conditions for granting benefits within these schemes consisting in an assessment of the income of a family concerned, overall social situation, the ability to improve the situation by own effort, the fact that the beneficiary is taking care of a child etc. are connected with the individual's situation and do not have a discriminatory character.

The same applies to the provision of social services that is also internally based on the permanent residence. However, for the Community workers and their family members this requirement is overruled by the Regulation (the law refers to the application of directly applicable regulation).

So, if an EU citizen is not entitled to the social benefits pursuant to the Regulation 1612/68, he/she is entitled to the social benefits pursuant to the Regulation 1408/71. If Regulation 1408/71 is not applicable, then national laws apply. The laws then usually use the condition of residence in the CR (e.g. three months stay for granting of the assistance in need allowances or social security allowances) and the test of unjustifiable burden on social system is done. There was also a change in the State Social Support Act (a law which includes most of the social benefits in it) in 2008 and the law stipulates explicitly the possibility to grant social benefits also to citizens of another EU Member or their TCN family member upon a condition of report of their presence to the Police within the 30 days on the territory of the Czech Republic (Sec. 3 (2) State Social Support Act in connection with Sec. 93 FORA);<sup>12</sup> there was a condition of previous stay in CR stipulated by this law previously.

Nevertheless, as the range of social advantages are considerably wide, there might still be some cases of inequalities. On the other hand, the respective authorities (interview with the representative of Ministry of Labour and Social Affairs) did not record complaints indicating the violations of the Regulation.

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<sup>12</sup> The FORA requires an EU citizen to report his/her presence on the territory of the Czech Republic within 30 days if he/she intends to stay in CR for more than 30 days.

*Miscellaneous (administrative practices, etc.)*

The Ministry of Labour and Social Affairs issues internal guidelines for the public authorities to ensure the due application of the regulation 1612/68 and 1408/71.

*Recent legal literature*

Tomeš, I., Koldinská, K., Pikorová, G. & Švec, L., *Sociální zabezpečení osob migrujících mezi státy EU* (Social security of migrant workers), Praha: C.H.BECK 2008.

## Chapter V Employment in the Public Sector

### *Text(s) in force*

- Act. No 1/1993 Coll., Constitution of the Czech Republic, as amended.
- Act No. 62/2003 Coll., on Elections to the European Parliament, as amended.
- Act No. 247/1995 Coll., on Elections to the Parliament, as amended.
- Act No. 491/2001 Coll., on Elections to Municipal Councils, as amended.
- Act No. 312/2002 Coll., on Officers of Municipalities, as amended.
- Act No.182/1993 Coll., on the Constitutional Court, as amended.
- Act No. 6/2002 Coll., on Courts and Judges, as amended.
- Act No. 283/1993 Coll., on Public Prosecutors, as amended.
- Act No. 349/1999 Coll., on Ombudsman, as amended.
- Act 361/2003 on Service Contract of Members of Security Corps from 1.1.2007.
- Act No. 221/1999 Coll., on Professional Soldiers, as amended.
- Act No. 154/1994 Coll., on Security Information Service, as amended.
- Act No. 218/2002 Coll., on Public Services (i.e. civil servants and the other employees at administrative authorities and their remuneration), as amended.
- Act No. 262/2006 Coll., Labour Code, as amended.
- Act No. 18/2004 Coll., on Mutual Recognition of Qualifications, as amended.

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

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

Various Acts (see relevant texts in force) also require Czech nationality for some of occupations or functions. Even for these positions the EU citizens can apply, nevertheless, on the basis of the exception provided for by the Treaty and with regard to the European Court of Justice interpretation the nationality will be in these cases one of the prerequisites for the occupation. According to the case law of the European Court of Justice such an exception is acceptable if there is a direct or indirect participation in exercise of sovereign rights or in fulfilling tasks connected to general targets of the state or other entities of the public law. The legislation regarding the public sector is rather extensive.

The laws, *inter alia*, require Czech citizenship for leading representatives of the Czech Republic, e.g. for becoming a president (*Art. 57 (1) of Constitution of the Czech Republic*), for becoming a Member of Parliament (*Art. 19 (1), (2) of Constitution of the Czech Republic*), also the voters and the members of the electoral committees must be Czech citizens (*Sec. 1 (7), 14e of the Act on Election*); the Czech citizenship is not required for the elections to the European Parliament, the voters and also the candidates can be citizens of another Member State (the candidates must fulfill the condition of having the permanent residence permit on the territory at least for 45 days on the second day of the elections, *Sec. 5, 6 of the Act on Elections to the European Parliament*). There are no requirements for the members of

the Government. The Act on Elections to Municipal Councils requires a voter to the municipal councils (and also a member of municipal councils) to be either a Czech citizen or a foreigner with the permanent residence in the respective district who's right to vote is declared by an international treaty (*Sec. 4, 5 of Act on Elections to Municipal Councils*). The Czech citizenship is not required for officers of the municipal authorities, only the condition of the permanent residence must be fulfilled (*Sec. 4 of Act on Officers of Municipalities*). Also policemen, security corps (firemen, members of counter-intelligence service etc.) and professional soldiers are required Czech citizenship (policemen – *Sec. 3 of Act on Service Contract of Members of Police, security corps - Sec. 13 of Act on Service Contract of Members of Security Corps*, which will replace the old one from 1.1.2007, professional soldiers – *Sec. 2 of Act on Professional Soldiers*). Some positions of lawyers, who exercise the state power, require the Czech citizenship; those are, *inter alia*, judges and assistants of the Constitutional Court and High Court (*Art. 84, 93 of Constitution, Sec. 9 of Act on the Constitutional Court, Sec. 16 of Act on Courts and Judges*), all judges (*Art. 93 of Constitution*) or public prosecutors (*Sec. 17 of Act on Public Prosecutors*). Also the *Sec. 2 of Act on Ombudsman* states that only a Czech citizen can become ombudsman.

The Act on Public Services requires the Czech citizenship for the employment in public service, unless the employment is of manual, service or unskilled character (*Sec. 17 (1) in connection with Sec. 2 (3) Act on Public Services*). The Act on Public Services does not therefore apply to the employees who exercise auxiliary, manual and technical support and those, who operate, organize or control the work of the support employees (*Sec. 2 of Act on Public Services*). The execution of public service includes *inter alia* preparation of draft laws, preparation of proposals of international treaties, preparation of conceptions, supervision of lower administrative authorities, administration of a chapter of a state budget, defense of the foreign interests of the CR, protection of classified information, state control, supervision and inspection, i.e. all these activities are connected with the participation in exercise of sovereign rights of the state (*Sec. 6 (2) Act on Public Services*).

The Czech citizenship may thus be required for participation in a recruitment procedure as prerequisites for the occupation within the above mentioned extent.

### ***1.2. Language requirements***

Under the current legislation, the language requirements depend on the conditions for participation in a recruitment procedure, which are stated by the employer (*e.g. Sec. 17 of the Act on Public Service allows for a requirement of knowledge of foreign language for the respective field of activity*). The Czech language should be required to the extent necessary to the execution of the employment. The conditions must not be discriminatory.

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

The recruitment procedure depends on the conditions given by the employer who may grant additional points for the professional experience within the procedure. The advertisements for positions in public sector often contain requests for certain level of education, certain language knowledge etc.

The term professional experience means certain knowledge or ability which is necessary for pursuance of the activity. The knowledge or abilities may be documented by a formal document on certain education or training or by a document, that a person actually pursued an activity where he/she used the required knowledge or ability.

Recognition of the training, education and experience undertaken in another Member State for the regulated professions is recognized according to the *Act on Mutual Recognition of Qualifications* ((incl. the recognition of formal qualification for pursuit of an activity (e.g. diplomas etc.)). The Czech Republic has large number of regulated professions (390),<sup>13</sup> so a lot of jobs fall within the regulated profession. There is no other law which would regulate recognition of professional experience.

The recognition of education in more academic terms is done according to the provisions of the Act on Pre-elementary, Elementary, Secondary, Higher Vocational and Other Education (Act on Education, mainly for third country nationals) and the Act on University Education when it deals with the recognition of academic diplomas.

The conditions of the recruitment procedure often contain a request of professional experience and a request must be reviewed according to the principle of non-discrimination (principle of non-discrimination is stipulated in the Labour Code and Employment Act).

## **2. WORKING CONDITIONS**

Recognition of professional experience for the purpose of determining the working conditions (e.g. salary; grade) (comment: in this area many MS had to undertake reforms of their national rules during the last years and it would be very interesting to see how the new rules are applied in practice).

The professional experience and the qualification and other professional skills influence the determination of the professional advantages, the experience acquired in other Member States may be basically taken into account.

According to the legislation, the salary is given to the employee according to a salary tariff (Sec. 123 Labour Code). The salary tariff is applied on the employee according to a salary group and salary level to which he is situated. There are 16 salary groups, which differ in accordance with the qualification of the employee and 12 salary levels which differs in accordance with the professional experiences; the employee is placed there in dependence on his qualification and professional experiences.

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<sup>13</sup> See <http://www.msmt.cz/mezinarodni-vztahy/databaze-regulovanych-povolani>.

## **Chapter VI Members of the Worker's Family and Treatment of Third Country family Members**

### **1. RESIDENCE RIGHTS\_TRANSPOSITION OF DIRECTIVE 2004/38/EC**

#### *Text(s) in force*

- Act No. 326/1999 Coll. of Laws, on Residence of Foreigners on the Territory of the Czech Republic (Foreigners' Residence Act), as amended,
- Act No. 115/2006 Coll. on Registered Partnership,
- Act No. 435/2004 Coll., Employment Act, as amended,
- Act. No. 586/1992 Coll., Income Tax Act, as amended.

The legal definition of family members of an EU citizen is stipulated by the FORA in its Sec. 15a. A family member of an EU citizen is

- a spouse,
- a parent, if an EU citizen is younger than 21 years of age and dependent and they are living in a common household,
- a child under 21 years of age, or such a child of a spouse of an EU citizen,
- a dependent direct relative in the ascending or descending line, or such relative of the spouse of an EU citizen (*Sec. 15a (1) FORA*).

If the purpose for stay of the EU citizen in the CR is study, then only a spouse and a dependent child are considered as family members (*see Sec. 15a (2) FORA*).

The provisions on family members will also apply to a foreigner, who is living in a common household with a EU citizen; or who is subsisted by an EU citizen; or who cannot care for him/herself due to health reasons without personal care provided by the citizen of the European Union; or who is living in a stable and durable relationship with an EU citizen in a common household.

The registered partnership was given equivalent position to marriage for the purpose of the provisions of the Foreigners' Residence Act (Sec. 180f FORA). A partnership can only be registered in the Czech Republic if one of the partners is a citizen of the Czech Republic, but there are no limits for partners (EU citizens or third country nationals) whose partnerships are registered outside the Czech Republic. Section 180f of the Foreigners' Residence Act provides that the norms which apply to 'marriage', 'spouse', 'child' also apply to the partners who has contracted a registered partnership. Therefore wherever the law uses the term marriage, spouse and child, it applies non-discriminatorily also on the registered partnership. The possibility to register a partnership is restricted to same-sex partners.

The issue of entry, residence and departure of TCN family members of EU citizen is basically in compliance with the Directive, for possible problems see below. The possible gaps are also mentioned in the Chapter I, IX (mainly the issue of entry visas, or the documents which must be presented together with an application for residence permit).

One of the questionable things is the length of the procedure of the issue of a visa at the borders for TCN family members of EU citizens in case that they are required to have one as



is presumed in the Art. 5 (2) of the Directive. The Directive stipulates that a visa should be issued *as soon as possible and on the basis of an accelerated procedure*. The law stipulates the time limit of up to 14 days (*Sec. 170 (3) of the FORA*). When comparing the time limit given by the law for the issue of a visa for TCN family members of EU nationals with the regular time limit given by the law for the issue of a visa (30 days), it can be said, that the procedure is accelerated. But there is a question whether the time limit stipulated by the law as 'up to 14 days' might be counted as issuing 'as soon as possible' pursuant to the Art. 5 (2) of the Directive. There is no information available on complaints on application of this provision. The above mentioned visas are issued free of charge (*item 117A, 144A Act on Administrative Fees*).

Access to information about the visa regimes, about the possible necessity of obtaining visas and about the procedure which must be followed to have a visa issued to a TCN family member of an EU national may also be a problem. This problem is connected to the issue of complexity of the FORA which was already described above and also to limited sources of information which are more elaborated on in Chapter IX.

### ***1.1. Situation of family members of job-seekers***

Generally when an EU citizen comes to the CR he/she must register him/herself within 30 days but there are no other obligations stipulated by the law for him/her. If he/she is accompanied by a family member who is him/herself an EU citizen then this family member may ask for a temporary residence permit in the CR and he/she is obliged to present certain documents (a passport or identity card, a document confirming accommodation, photographs, a document certifying a sickness insurance and a document attesting the existence of a family relationship (which is at the same time the document confirming the reason of stay). If a dependent direct relative lodges an application, he/she must also enclose a document certifying his dependency on the EU citizen. If an EU citizen is accompanied by a family member who is a third country national then this family member may stay in the CR without a visa for the first 3 months (under the condition of accompanying the EU citizen), and if he/she intends to stay in the CR for more than 3 months then he/she is obliged to ask for a temporary residence permit (he/she presents the same documents as the family member who is an EU citizen).

When an EU citizen comes to the CR to seek a job, then he/she can register him/herself within the respective labour office. The family member must fulfil all the criteria of the FORA (see above). A job-seeker who is included into the register of job-seeker is also entitled to unemployment benefits, under the condition of previous 12 months employment in last three years on the territory of the Czech Republic (this issue is in fact not clear from the wording of the law and the rapporteur has ongoing discussions on it with the state authorities). The EU citizen and his/her family member may be entitled to some social benefits (to the subsistence minimum range). The test on unjustifiable burden to social system is done.

### ***1.2. Application of Metock judgement***

The Czech Republic does not require a third country national who is a spouse of an EU citizen to reside previously in another Member State before arriving in the Czech Republic in order to benefit from the provisions of the Directive 38/2004/EC.

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

The law contains provisions on a marriage of convenience. The Police will withdraw permanent residence permit of TCN family member in case of circumvention of the law, i.e. in case of a marriage of convenience or false acknowledgement of paternity. There used to be a provision in the law, that the residence permit will not be cancelled if a child was born from the marriage or a child was irrevocably adopted during the marriage. It was found out in the last years that the respective provisions can be misused and therefore the more restrictive attitude had been chosen. The protection of best interest of a child should be ensured by the provision which stipulates that the decision of respective authority must not have inadequate impact to a private or family life of the person concerned.

The marriage of convenience is a reason for denial of request of a temporary residence permit by a family member (*Sec. 87e FORA*), or for denial of request for permanent residence permit by a family member (*Sec. 87k (1) (c) FORA*) and for withdrawal of such permit (*87l (1) (b) FORA*). An impact to a private or family life of the person concerned must always be taken into account.

An explicit possibility of holding an interview with the applicant when he/she lodges an application for temporary or permanent residence permit was introduced to the FORA in 2007. When a person does not (without a serious reason) attend the interview, refuses to answer or gives false facts then this fact is also a reason for not granting the residence permit (upon the condition of adequate impact to family life).

## **2. ACCESS TO WORK**

The Sec. 3 of Employment Act stipulates that the citizens of another EU Member States and their family members are at the same legal position in legal relations regulated by this Act as Czech citizens, unless provided otherwise. Furthermore Sec. 85 defines foreign employees who for the purposes of this Act as individuals who are neither citizens of the Czech Republic or of the European Union nor their family members. Therefore EU citizens and their family members do not need to obtain the work permit pursuant to the provisions of the Czech laws, and their employers do not have to apply for the permit to engage foreign workers. There is only an information obligation towards an Labour Office (*Sec. 87, 102 of Employment Act*).

## **3. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS**

This issue is dealt with above in 1.1.

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

As regards the Income Tax Act the situation of the dependent family member from another Member States is in the same position as the Czech national if he has tax domicile in the Czech Republic (*Sec. 2 of Income Tax Act*). From the year 2004 even persons without the tax domicile (normally person who do not habitually reside in the Czech Republic, *i.e.* mainly frontier workers) can require the tax reduction or tax bonus for a child and tax-relief for a spouse.

##### *Recent legal literature*

Radvanová, S. & Smolík, P., Fingované manželství v českém právu (Marriages of Convenience in the Czech Law), in *Acta Universitatis Carolinae Iuridica*, 2008, p. 181-193.

Scheu, H.C., Lidská práva přistěhovalců a vývoj judikatury Evropského soudu pro lidská práva (Human Rights of Immigrants and Developments in the Case-law of European Court of Human Rights), in *Jurisprudence* 3/2008, p. 32-38.

## **Chapter VII**

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

#### *Text(s) in force*

- Act No. 586/1992 Coll., on Income Tax, as amended.
- Act No. 111/1998 Coll., on University Education, as amended.
- Act No. 100/1988 Coll., on Social Security, as amended.

As a general remark, similarly to the 2007 report, it has to be pointed out, that citation and use of ECJ judgments in activities of Czech authorities is not very common. The continuation of the positive trend as in regard to references to sources of EU law other than judgments of the ECJ, as it was stated in the 2007 report, can be confirmed also for 2008.

As to the overall respect for ECJ judgements and their influence on decisions of courts, it may be repeatedly pointed out, that in the Czech Republic, case-law databases and collections cover judgments only of the Constitutional Court, the Supreme Court and the Supreme Administrative Court. Judgments of other higher courts are covered only if dealing with questions of particular interest or importance; lower courts decisions are not published officially at all. This makes it particularly difficult to assess *overall* respect of the Czech courts for ECJ judgements and the influence on their decisions. Thus the significance of ECJ judgements for national courts and the extent of their influence can be evaluated merely on the basis of the available case-law of higher courts.

The examination of these case-law databases and collections revealed that in 2008 the above mentioned courts did make reference to ECJ decisions. However, there is no case-law specifically referring to ECJ judgements in the field of free movement of workers matter.

It might be mentioned, that the Czech Supreme Court in two of its judgments (25 Cdo 1582/2006 from 05 June 2008 and 25 Cdo 2802/2007 from 17. April 2008) made reference to the Case C-415/93 *Bosmann*, however, not in the context of free movement of workers, but in the context of jurisdiction of the ECJ to give a preliminary ruling pursuant to Art. 234 EC on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by the national court bears no relation to the actual facts of the main action or its purpose..

The implementation or possible impact of ECJ judgements, which are of special interest to the Commission, is examined in the following text:

#### *Hendrix*

In the Case C-287/05 *Hendrix* the ECJ ruled that it is not contrary to the Treaty, Art. 39, for a Member State to validly reserve benefits for young disabled persons residing on the territory of the Member State providing such benefits, which fall under the category of special

non-contributory benefits within the meaning of Article 4 (2a) and Article 10a of Council Regulation No. 1408/71, and which are listed in the Annex IIa to Regulation 1408/71.<sup>14</sup>

No concrete examples of follow-up actions of the *Hendrix* judgement could be identified for 2008. Assessing the potential influence of *Hendrix*, the 2007 report explanations might be briefly recalled, as there was no relevant change of relevant legislation in 2008: Benefits to disabled persons, regulated in general by the Act No. 100/1988 Coll. on Social Security, are granted to persons with permanent residence in the Czech Republic, to citizens of other EU member States entitled to such benefits under the direct applicable EU law<sup>15</sup>. In cases falling outside of this scope national laws apply, stipulating a requirement of a 3 months previous stay of EU citizens and their relatives in order for them to be entitled to benefits for disabled persons (and to social benefits in general on the basis of Act No. 100/1998 Col., on Social Security). Nevertheless, a special non-contributory benefit payable to young persons suffering from total or partial long-term incapacity for work before joining the labour market still does not exist in the Czech Republic. Therefore appearance of a case similar to *Hendrix* is unlikely in the Czech context.

### ***Raccanelli***

In the Case C-94/07 *Raccanelli* the Court called upon the concept of ‘worker’ within the meaning of Art. 39 EC, affirmed that a researcher, preparing a doctoral thesis on the basis of a grant contract, can be acknowledged to have the status of worker only if the referring court were to establish the existence of subordination and the payment of remuneration in return for the activities performed for a certain period of time. The Court affirmed also that a private-law association must observe the principle of non-discrimination based on nationality in relation to workers within the meaning of Article 39 EC.

At present, no concrete follow-up of this judgment could be found in the activities of Czech authorities or courts. As in regard of possible influence of the case, a situation similar to *Raccanelli* Case may occur also in the Czech Republic, i.e. a private association employs a researcher/provides a researcher with a grant enabling him to prepare a doctoral thesis on this bases. A researcher with an employment contract would be liable to income tax and social security contributions, whereas a grant recipient would be not affiliated to the social security and health insurance system, however, he would be liable to income tax.<sup>16</sup> The Czech law, in general, does not contain any specific provisions on providing grants to students/researchers by private-law associations.<sup>17</sup> In a case similar to *Raccanelli*, the Czech courts would be obliged to apply the Community law concept of a ‘worker’ on the basis of direct applicability of Community law in order to asses, whether the grant recipient can be regarded as a ‘worker’ under Art. 39 EC. The same applies to the question, whether the private-law association in such a case did observe the principle of non-discrimination.

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14 In this case the benefit was provided under the Law on provision of incapacity benefit to disabled young people (‘Wet arbeidsongeschiktheidsvoorziening jonggehandicapten’ in Dutch).

15 EC Regulations 1612/68 and 1408/71.

16 Sec. 4 (1) (k) of the Income Tax Act states explicitly which types of grants are exempted from income tax; grants from private-law associations are not exempted from income tax.

17 Contrary to grants provided by public associations and universities, which are covered by provisions e.g. of the Income Tax Act or University Education Act.

At present, no obstacles in the Czech legal system could be found, which could hinder the national courts to comply with the ECJ ruling in this case.

### ***Renneberg***

The ECJ has ruled in *Renneberg* Case, that a negative income, relating to a dwelling in the Member State of residence, should be taken into account by the tax authorities of the Member State of employment for the purposes of determining taxable income in the Member State of employment.

No concrete follow-up of *Renneberg* judgment in the activities of Czech authorities or courts could be identified. As in regard to possible influence of the case: First it might be noted, that the case concerns also special provisions of a bilateral agreement for the avoidance of double taxation between The Netherlands and Belgium. Thus the main question of the *Renneberg* case, whether mortgage interest relief for a residence in another EU state can be claimed, would be in the Czech context a question to be assessed also on the basis of an agreement with the concrete state, which this property is located in. However, according to the ruling of the ECJ, Member States are not entitled to impose measures contravening the freedoms of movement guaranteed by the EC Treaty. Thus the Czech authorities would be obliged, on the basis of Community law, to prevent unequal treatment. The question remains, if the Czech legal system entails provisions possible leading to such a situation.

Under Czech income tax law, residential taxpayers and taxpayers, who stay in the Czech Republic more than 183 days a year, are subject to tax on their entire income, all other taxpayers (non-resident taxpayers) are subject to tax only on income received in the Czech Republic.<sup>18</sup> Pursuant to provisions of Act. No. 586/1992 Coll., on Income Tax, mortgage interest relief may be claimed under certain conditions, however, these provisions do not specify, whether the dwelling concerned has to be located in the Czech Republic. Thus it appears that it is possible to claim a mortgage relief also for properties located outside the territory of the Czech Republic.

However, the income tax law stipulates the requirement, that non-resident taxpayers may claim mortgage relief (and certain other reliefs) only if their income from the Czech Republic is at least 90 per cent of his/her entire income.<sup>19</sup> This provision appears to be problematic, as such requirement is applicable only to non-resident taxpayers, but no such precondition is entailed for the resident taxpayers. Thus in a case of a person with e.g. 85 per cent income from Czech Republic, the right to claim mortgage relief under Czech income tax law would depend from the residency of that person or the fact, whether or not such person has stayed for at least 183 days of the particular tax period (year) in the Czech Republic. *Renneberg* Case concerned a person, inter alia, receiving 'all or almost all of its income' in a Member State, which he/she was not resident of. It remains questionable, whether a non-resident with e.g. 85 per cent income from the Czech Republic would still fall under this category. If the answer would be positive, it appears, that the provisions stipulating the precondition of 90 per cent income from the Czech Republic would be in contrary to the ruling of the ECJ ruling in *Renneberg* case and thus with the Community law.

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<sup>18</sup> Sec. 2 (2), (3) of the Income Tax Act.

<sup>19</sup> Sec. 15 (9) of the Income Tax Act.

## Chapter VIII

### Application of Transitional Measures

#### *Text(s) in force*

- Government Resolution No 13/2004 on the position of the Government to transitional period on free movement of workers.
- Government Resolution No 1345/2006 on the position of the Government concerning free movement for nationals of Bulgaria and Romania.
- Employment Act No 435/2004 Coll., as amended.
- Act on Accession of the Czech Republic to the EU.

As regards the transitional periods situation in the year 2008/beginning of 2009 did not change. Prior to joining the EU, the Czech Republic did not renounce the possibility to introduce transitional measures towards Member and Acceding States upon evaluation of situation on the labour market (*Government Resolution 13/2004*). In the year 2008/2009 the Czech Republic did not introduce any transitional measures towards other Member States even though the Act on Accession, the Government Resolution No.13/2004 Coll. and the Art. 103 of the Employment Act enable the Government to do so. There were not restrictive measures adopted towards either the Member States of EU-15 or the Member States of EU-8. As regards position towards free movement of nationals of Bulgaria and Romania there was not any change in 2008/2009. The Government Resolution No. 1345/2006 of November 2006 in which was stated the Czech Republic would not introduce measures restricting access of nationals of Bulgaria and Romania to the labour market as of the date of accession of these two states to the EU was applied. Nevertheless this Resolution did not renounce the possibility to introduce such restrictions later upon assessment of current situation on the Czech labour market. Opening of the Czech labour market to nationals of these Member States did not give rise to adoption of any measures, even though current figures on employment of Bulgarian and Romanian nationals were quite high in comparison with the situation before their joining the EU (end of the year 2006: employment of Bulgarian nationals- 1671/ employment of Romanian nationals- 819, end of the year 2008: employment of Bulgarian nationals-5108/ employment of Romanian nationals- 3605). According to the position of the Czech Ministry of Labour and Social Affairs the positive approach towards free movement of nationals of these two countries was based on the consistent position of the Czech Republic in the matter of free movement of persons as one of fundamental freedoms belonging to the EU citizens and an elementary condition for existence of the internal market.

A change of Sec.103 of Employment Act was made with the objective to reformulate the respective provision in order to make it more general for any further enlargement of the European Union in 2008 (by Act No. 57/2008 Coll., which changes the EA).

As far as further application of the transitional arrangements by other Member States towards the Czech Republic is concerned, some Member States of the EU-15 decided to maintain the transitional measures (Austria, Germany), while others decided to open their labour markets fully (Finland, France, Greece, Italy, Luxemburg, Netherlands, Portugal, Spain, United Kingdom, Ireland and Sweden; plus Belgium and Denmark since May 2009). In case of the partial opening of the labour markets in the respective Member States the work per-

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mits have been issued under easier and faster procedures. As regards the EU-8 the transitional measures towards the Czech Republic have not been introduced as of the date of joining the EU.

The Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty was published in November 2008. This report assessed also the second phase of the application of the transitional arrangements for the EU-8, which was initiated by the Czech Republic, and served as a basis for further discussions on removing all restrictions of mobility during the Czech Presidency according to motto 'Europe without barriers'. An exchange of views on all aspects of mobility was a topic for discussion at the informal meeting of Ministers of Labour and Social Affairs in Luhačovice on January 22-24, 2009.



## Chapter IX Miscellaneous

### 1. SHORT ANALYSIS OF EXISTING POLICIES, LEGISLATIONS AND/OR PRACTICES OF A GENERAL NATURE

#### *Problems with information about visa regimes for foreigners*

The Public Defender of Rights of the Czech Republic (Ombudsman) registered complaints about the accessibility of information about the visa regimes and process for the TCN family members of EU citizens. He therefore examined the most used way of getting information – internet in 2008. In relation to his findings he criticized the websites of some Czech embassies. The criticized websites were either inaccessible or incomplete or out of date; some websites also did not contain basic information on the process of visa issue, information on whom the visa regimes apply or information about possible remedies although the Czech Republic is bound by Directive 2004/38/EC and shall grant such persons every facility to obtain the necessary visas (Art. 5 (2) of the Directive). He also criticized the fact that the applicants are – because of the lack of information – forced to use an intermediate person and the process itself is untransparent. The Ministry of Foreign Affairs then established a section on a new website of the Ministry, a section called ‘foreigner’s information’.<sup>20</sup> The relevant part of the website is nevertheless mostly in Czech still.

The Public Defender of Rights also paid attention to the issue of interviews in the process of granting visa or residence permit. An interview is a key aspect in the process of the visa issue. Interviews for short term visas are not documented with the exception of interviews with the TCN family member of an EU citizen, which are transcribed, but they are not signed by the applicant [as proof that the applicant has read it]. The applicant thereby does not have a possibility to disprove the statements in the decision of the authority.<sup>21</sup>

#### *System of green cards and the project Selection of Qualified Foreign Labour*

A system of green cards was introduced by an amendment to the EA and FORA in 2008 to make access of third-country nationals to the Czech labour market faster and easier. The green cards are issued for vacancies that cannot be filled up by the Czech nationals or nationals of other EU Member States and their family members in 30 days as of their notification to a labour office by an employer. This mechanism should ensure a sufficient protection of the Czech labour market. A foreigner applies to the vacancy and a dual type of document is then issued to him/her for both work and residence permits. There are three categories of persons eligible for the system: qualified workers (those with university level education and key personnel, type A), low skilled workers (skilled workers with apprentice level education, type B) and others (type C).

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20 *Yearly Report on Activities of Public Defender of Rights (2008)* (Souhrnná zpráva o činnosti Veřejného ochránce práv 2008), p. 73; available at <http://www.ochrance.cz/documents/doc1239792209.pdf> (accessed on March 31, 2009, Czech only).

21 *Ibid.*, p. 74.

The Czech Republic also continues with the Pilot project ‘Selection of Qualified Foreign Labour’.

Detailed information about both projects was given in the Report of 2007.

### ***Studies, seminars***

A discussion on a topic ‘Employee’s rights protection’ was held by the Public Defender of Rights of the Czech Republic on October 7, 2008. Between the issues which were discussed were also the topics as sanctions for breaches of the labour law or labour conditions of foreign employees. The discussion was attended by representatives of the Ministry of Labour and Social Affairs of the CR, representatives of Labour Inspectorates and several Non-Governmental Organizations.<sup>22</sup>

A seminar ‘Rules for Free Movement of Services and Freedom of Settlement in the EU’ was held by Czech Confederation of Commerce and Tourism in cooperation with the Office of the Government of the Czech Republic (Department on European Affairs Information) on October 21, 2008.<sup>23</sup> A revised and supplemented edition of a handbook on regulations of free movement of services and freedom of settlement in the EU was published on this occasion.<sup>24</sup>

An exchange of views on all aspects of mobility was a topic for discussion at the informal meeting of Ministers of Labour and Social Affairs in Luhačovice in January 22-24, 2009 which was held at the beginning of the Czech term of Presidency of the EU Council.

The ministerial ‘Conference on Strengthening EU Competitiveness – Potential of Migrant Workers on the Labour Market’ was held in Prague on February 26-27, 2009. Speakers from the public and private sector, universities and non-governmental organisations attended the conference, they addressed the issue of integration of immigrants into the labour market and the host society and their contribution toward increasing EU competitiveness.<sup>25</sup>

### ***Legal literature, reports***

Antoš, M., Volební právo cizinců žijících v České republice (Right to Vote of Foreigners in the Czech Republic), in *Interpretace Ústavy České republiky a Slovenské republiky*, 2008, p. 132-139.

Hlustik, P., Několik poznámek k zavedení tzv. zelených karet (Several Comments on the Green Card System), in *Právní zpravodaj* 11/2008, p. 9-10.

Radvanová, S. & Smolík, P., Fingované manželství v českém právu (Marriages of Convenience in the Czech Law), in *Acta Universitatis Carolinae Iuridica*, 2008, p. 181-193.

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<sup>22</sup> *Ibid.*, p. 39.

<sup>23</sup> See <http://www.euroskop.cz/787/2770/clanek/seminar-pravidla-pro-volny-pohyb-sluzeb-a-svobodu-usazovani-v-eu> (accessed on March 31, 2009, Czech only).

<sup>24</sup> The handbook is available at [http://www.businessinfo.cz/files/zahranicni-obchod/EU-pravidla-podnikani\\_090210.pdf](http://www.businessinfo.cz/files/zahranicni-obchod/EU-pravidla-podnikani_090210.pdf) (accessed on March 31, 2009, Czech only).

<sup>25</sup> See the website of the Czech Presidency <http://www.eu2009.cz/scripts/modules/diary/action.php?id=299> (accessed on April 20, 2009).

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Scheu, H.C., Lidská práva přistěhovalců a vývoj judikatury Evropského soudu pro lidská práva (Human Rights of Immigrants and Developments in the Case-law of European Court of Human Rights), in *Jurisprudence* 3/2008, s. 32-38.

Tomeš, I., Koldinská, K., Pikorová, G. & Švec, L., *Sociální zabezpečení osob migrujících mezi státy EU* (Social security of migrant workers), Praha: C.H.BECK 2008.

***References to national organisation, bodies where citizens can launch complaints for violation of Community law on free movement for workers (apart from SOLVIT centres).***

The complaints may be launched at the courts or respective state authorities.