Network on the Free Movement of Workers within the European Union

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CHAPTER I: ENTRY, RESIDENCE, DEPARTURE

A. Entry

Texts in force

Laws

The Aliens Act[1] applies to EU/EEA citizens both regarding general and specific sections. However, the provisions of the Act only apply to EU/EEA citizens to the extent this is in accordance with EU law, cf. section 2 (3). A footnote to the title of the Aliens Act is indicating that the Act includes provisions implementing Directive 2004/38. This footnote was inserted by Amendment Act No. 301 of 19 April 2006 which also included more specific provisions aiming to implement Directive 2004/38 (see below chapter I.C). While these provisions and their necessity in order to implement the Directive were explained in detail in the Bill, no specific reasons were given for the insertion of the footnote.[2] It must, however, be seen in connection with section 2 (3), emphasizing and highlighting the prevalence of EU law in case of any conflict or divergence with the Act. This may have particular relevance because section 6 of the Aliens Act still stipulates the issuance of a *residence permit* to aliens falling within the EU rules.

Aliens Act section 2 (1) contains the basic rule on the right to enter and reside for up to 3 months or – if seeking work – up to 6 months, which applies to EU citizens as well as members of their family, cf. section 2 (2).

Aliens Act section 2 (2) states that it can be required that third country family members obtain a visa. See also chapter V on family members' residence rights.

Aliens Act section 9a stipulates the conditions for granting residence permits to citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary.

The provision was amended in 2006[3] so the basic condition is that the citizen in question must have been offered a job for at least 30 hours a week instead of full-time, cf. section 9a (5) or there are essential employment considerations. See also chapter VIII on the EU enlargement.

Aliens Act section 28 contains the general rules on refusal of entry.

Section 28 can only apply to EU citizens to the extent this is in accordance with EC law, which means that even though the section mentions the fact that some of the reasons for refusal of entry do not apply to EU citizens, it does not necessarily follow that the rest of the refusal reasons do, cf. section 2 (3).

Section 28 (5) states that refusal of entry may be effected until 3 months after entry, but for EU/EEA citizens this only applies to the refusal reasons mentioned in section 28 (1) (i), (v) and (vii).

Reasons for refusal of entry:

- Prohibition from entering as a consequence of a decision on expulsion, cf. section 28 (1) (i).
- Lacking valid passport or other valid identity document, cf. section 28 (1) (ii).
- Insufficient means to support him/her both as concerns the entire intended stay and to pay for his/her return. EU/EEA citizens may not be refused entry due to insufficient means, cf. section 28 (1), unless the person in question has insufficient means to pay for his/her return, cf. section 28 (5).4
- Public order, security or health, cf. section 28 (1) (vii).

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1 Consolidation Act No. 826 of 24 August 2005 and later amendments, and the most recent Consolidation Act No. 945 of 1 September 2006.

2 Explanatory memorandum to Bill No. L 94/2005-06, pp. 26-28. See also chapter I.C below.

3 By Act No. 532 of 8 June 2006.

4 See also Guidelines No. 91 of 19 June 1998 Chapter 1.3.

Administrative rules

Aliens Act section 2 (4) provides the legal basis for the Minister of Refugee, Immigration and Integration Affairs to set out more detailed provisions on the implementation of the EU rules on free movement. This has resulted in the EU/EEA Orders – now, the *EU Order* - which is the central piece of legislation concerning free movement as it implements the Directives on free movement.

Two new versions of the Order entered into force on 1 January 2006[5] and 30 April 2006,[6] respectively.

Executive Order No. 1255, 28 November 2005, entering into force 1 January 2006 provided changes to the 2004 EU/EEA Order[7] regarding citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary (see chapter VIII on the EU enlargement).

Section 1 states that an EU residence certificate is granted to citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary provided they have been active on the Danish labour market for a minimum period of 12 consecutive months.

Section 11 (1) and (2) exempt citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary working in Denmark but living in another state ('grænsearbejdere') and seasonal workers ('sæsonarbejdere') and their family members from the requirement to have a residence certificate provided they return to their residence once a week and provided the citizens have been legally active on the Danish labour market for a minimum period of 12 consecutive months.

Section 13 (2) exempts citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary from the requirement to have a work permit provided they have been legally active on the Danish labour market for a minimum period of 12 consecutive months.

Executive Order No. 358, 21 April 2006, entering into force 30 April 2006 provided general changes, which are mainly of a formal and structural character; emphasizing that the right to reside is based directly on the EC treaty and not dependant on the issuance of a residence certificate.

According to section 34 – and the subtitle to the Order ('EU Residence Order', contrary to the former Orders named 'EU/EEA Order'), the 2006 EU Order only applies to EU citizens, and the Executive EU/EEA Order No. 1255 of 28 November 2005 no longer applies to EU citizens. Hence, the Executive EU/EEA Order No.1255 of 28 November 2005 continues to apply to other EEA citizens (EFTA citizens) and only applied to EU citizens until 30 April 2006.

With regard to citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary, the 2006 EU Order contains the rule that these citizens obtain the right under the rules of the 2006 EU Order, provided they have been legally active on the Danish labour market for a minimum period of 12 consecutive months, cf. section 3.

Directive 2004/38/EC has been transposed into Danish law by the issuance of the 2006 EU Order which entered into force 30 April 2006. Furthermore, the Aliens Act was amended by Act No. 301 of 19 April 2006 in order to implement certain Directive provisions regarding expulsion (see below chapter I.C).

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5 Executive Order No.1255 on Residence in Denmark for aliens comprised by the rules of the European Union or by the Agreement on the European Economic Area (the EU/EEA Order), Ministry of Refugee, Immigration and Integration Affairs, 28 November 2005.

6 Executive Order No. 358 on Residence in Denmark for aliens comprised by the rules of the European Union (the EU Residence Order), Ministry of Refugee, Immigration and Integration Affairs, 21 April 2006.

7 Executive Order No. 292 on Residence in Denmark for aliens comprised by the rules of the European Union or by the Agreement on the European Economic Area (the EU/EEA Order), Ministry of Refugee, Immigration and Integration Affairs, 28 April 2004 and Executive Order No. 655 amending Executive Order No. 292 of 28 April 2004 on Residence in Denmark for aliens comprised by the rules of the European Union or by the Agreement on the European Economic Area (the EU/EEA Order), Ministry of Refugee, Immigration and Integration Affairs, 29 June 2005.

With regard to the right to enter into Denmark, the Order does not contain specific provisions, but the right to enter is, of course, a prerequisite for the enjoyment of the right to residence as set out in the Order (see chapter I.B).

Draft legislation, circulars etc.

On the 25 of January 2007, a proposal to amend the Alien Act etc. made by the Ministry of Refugee, Immigration and Integration was adopted by the Parliament.[8] The amending Act entered into force 1 February 2007 and concerns – among other things – the requirement for economic support in cases of family reunification under the general Danish rules.[9] Hence, the amendment does not concern the implementation of EU law.

Judicial practice

Nothing to report. It should be noted that Denmark does not have administrative courts and that ordinary courts only quite rarely deal with cases concerning the right to entry and residence.

Miscellaneous (administrative practices etc.)

Cases concerning EU citizens and their right to entry, residence etc. are – with some exceptions, including cases on workers from the EU-8 Member States – handled in the first instance by the Regional Government Administration ('Statsforvaltningerne'),[10] cf. EU Order section 29 (1). Residence permits pursuant to the transitional rules for citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary (see chapter VIII) are granted by the Danish Immigration Service ('Udlændingeservice'),[11] cf. EU Order section 29 (2).

Decisions made by the Regional Government Administration can be appealed to the Danish Immigration Service (DIS), cf. EU Order section 30. When the competence to handle these cases was delegated to the Regional Government Administration in 1995, DIS issued guidelines for the processing of the cases. The guidelines are updated and supplemented by letters of information or instruction from DIS to the Regional Government Administration whenever DIS deems it necessary, cf. EU Order section 32.

Decisions made by the Danish Immigration Service can be appealed to the Ministry of Refugee, Immigration and Integration. The Ministry of Refugee, Immigration and Integration can issue guidelines for the processing of the cases, cf. EU Order section 32.

Recent legal literature

Henrik Thomassen and Pernille Breinholdt Mikkelsen, 'Indrejse og ophold for udlændinge omfattet af EU-reglerne', in L.B. Christensen et al., *Udlændingeret*, 3. edition, Copenhagen 2006, pp. 239-246.
Ruth Nielsen, *EU-arbejdsret*, 4. edition, 1. print, Copenhagen 2006.

8 Act No. 89 of 30 January 2007.
9 See Bill No. L 17/2006-07.
10 Official website: www.statsforvaltning.dk.
11 Official website: www.nyidanmark.dk.

B. Residence

Texts in force

Laws

Aliens Act section 2 (1) contains the basic rule on the right to enter and reside for up to 3 months or – if seeking work – up to 6 months, which applies to EU/EEA citizens and members of their family, cf. section 2 (2).

Aliens Act section 6 states that a residence permit shall be granted to foreigners, to whom the EU rules apply. This provision was not amended by Act No. 301 of 19 April 2006 which otherwise aimed to implement Directive 2004/38 (see above at note 2).

Aliens Act section 14 (1) (ii), cf. section 13 and 2006 EU Order section 15, exempts EU citizens from the requirement to have a work permit in order to take up employment in Denmark, which is imposed on most other groups of foreigners. This does not apply, however, to citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary, cf. section 14 (1) (ii). For this group of persons special rules apply (see chapter VIII on the enlargement of the European Union).

With regard to citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary, the 2006 EU Order contains the rule that these citizens obtain the right under the rules of the 2006 EU Order, provided they have been legally active on the Danish labour market for a minimum period of 12 consecutive months, cf. EU Order section 3 and 15.

Aliens Act section 1, cf. section 14 (1) (i), states that citizens from other Nordic countries can reside and take up employment without permits.

Citizens from Finland and Sweden, who satisfy the conditions acquire the rights under the rules of the EU Order, cf. 2006 EU Order section 14.[12]

Citizens from Island and Norway who satisfy the conditions are free to choose whether they want to apply for an EU residence certificate and thereby acquire the rights under the rules of the EU/EEA Order, cf. 2005 EU/EEA Order section 10.[13]

Administrative rules

For EFTA citizens, the previous rules as mentioned above in chapter I.A continue to apply. For EU citizens, however, there have been some changes – primarily of a formal and structural character - due to the 2006 EU Order, entering into force 30 April 2006.

EU citizens have a *right to reside* in Denmark for more than the 3/6 months mentioned in Aliens Act section 2 (1) if the person is self-employed or has taken up employment in Denmark, cf. EU Order section 3 (1).

This does not apply, however, to citizens of Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, the Czech Republic and Hungary. This group obtains the same residence rights when they have been legally active on the Danish labour market for a minimum period of 12 consecutive months (see chapter VIII on the EU enlargement).

EU citizens legally residing in Denmark for 5 consecutive years acquire the right to *permanent residence*, cf. EU Order section 16 (1). For family members specific rules apply, see chapter V.

The stay in Denmark is not considered interrupted due to temporary stays outside the country, when these stays in total do not exceed 6 months a year, if the stay abroad is due to obligatory military service or if one stay of maximum 12 months is caused by special circumstances, cf. EU Order section 16 (5).

Upon application a certificate for the right to permanent residence is issued, cf. EU Order section 24.

12 Executive Order No. 358 of 21 April 2006.
13 Executive Order No. 1255 of 28 November 2005.

EU citizens encompassed by section 6, 10 and 11 (3) have the right to *permanent residence* without any further conditions, cf. EU Order section 17.

Section 6 concerns

- The right to continued residence when the EU citizen reaches the age for entitlement to old-age pension as laid down in the Pension Act[14] or takes early retirement provided he/she has been working 12 months up to this point and has resided in Denmark the previous 3 years, cf. section 6 (1) (i). The demands for the length of the stay and working period are annulled when the spouse has Danish citizenship or has lost it due to the marriage, cf. section 6 (4).
- The right to continued residence when the EU citizen is forced to cease work due to permanent incapacity to work, provided he/she has obtained residence in Denmark the last 2 years or the permanent incapacity is due to an accident at work or an occupational illness entitling the person to permanent benefits, cf. section 6 (1) (ii).The demands for the length of the stay are annulled when the spouse has Danish citizenship or has lost it due to the marriage, cf. section 6 (4).
- The right to continued residence when the EU citizen takes up work in another Member State, provided he/she has had residence and has been working in Denmark the previous 3 years and returns to his/her residence in Denmark at least once a week, cf. section 6 (1) (iii).[15]

Section 10 concerns family members of the persons mentioned in section 6 (see chapter V.1).

Section 11 concerns the retention of residence right for family members of deceased persons and persons having left the country (see chapter V.1).

EU citizens with the right to *time limited residence* under the rules of the Order have to apply for a *registration certificate*[16] within 3 months from entry provided the stay is expected to exceed 3 months, cf. EU Order section 18. The registration certificate is not issued for a certain time period, since it is not a residence certificate, but the right to time limited residence ceases when the conditions mentioned in the specific provisions are no longer met, cf. section 26 and below 1.C.

The issuing of a *registration certificate* for an EU citizen encompassed by section 3 can be *conditioned* by valid identity card or passport and either documentation for self employment in Denmark or a declaration from his/her employer that he/she has paid employment in Denmark, cf. EU Order section 19 (1).

Jobseekers

If seeking job EU citizens have a right to reside in Denmark for up to 6 months without residence certificates/permits, cf. Aliens Act section 2 (1). Within this period the EU citizen has to supply for him-/herself.[17]

If the EU citizen upon the expiration of the 6 months time limit can substantiate that he/she continues to seek job and has actual chances to obtain employment, he/she will not be sent out of the country.[18]

According to the webpage of the Ministry of Refugee, Immigration and Integration, an EU/EEA citizen seeking job can apply for a residence certificate under the EU/EEA Order with the Regional Government Administration or a residence permit under the Aliens Act with the Danish Immigration Service if the person in question wishes to stay in Denmark for

14 Consolidation Act No. 759 of 2 August 2005.

15 See more on frontier workers below chapter III.3.

16 This certificate was formerly named a *residence certificate*. The term *residence permit* is still used in section 6 of the Aliens Act, see above at note 2.

17 See chapter II and VI.

18 See Guidance No. 33 of 4 May 2004 to section 12a in the Act on Active Social Policy 1.1. note 1 , Guidelines issued by The National Directorate of Labour, 'Arbejdsdirektoratet', a body under The Ministry of Occupation, official website: www.adir.dk.

more than 6 months provided he/she can supply for him-/herself.[19] The application has to be handed in within 6 months from entry.
According to information obtained from an official within the Danish Immigration Service, situations where an applicant seeking job wishes to stay in Denmark for more than 6 months have not been experienced in practice. Hence, the Danish Immigration Service does not have any information on the criteria for extension of the 6 months time limit in Aliens Act section 2 (1). The Danish Immigration Service further notes that the right to reside in Denmark for up to 6 months without residence certificates/permits starts over again upon renewed entry into Denmark provided the entry and leave did not take place with the purpose of circumvention.[20]

Draft legislation, circulars etc.

Nothing to report.

Judicial practice

Nothing to report.

Miscellaneous (administrative practices etc.)

The well-known criterion that employment must be actual and effective and that the employment must not be of such limited extent that the income appears as a purely marginal supplement to a person's other income or means in order to serve as the basis for the residence right has been tested in relation to EU citizens, who work in the country but whose wages consist partly or completely of a wage supplement from the state. The Danish Immigration Service stated that such cases must be dealt with on a case-by-case basis and that in doing so it must be taken into account whether the employment is temporary and provided through a public job agency or a municipality, whether the employment must be regarded as a form of job training, whether all unemployed persons receive a similar job offer, and whether the public-paid wage supplement covers the main part of the salary or is merely a minor supplement.[21]

Recent legal literature

Henrik Thomassen and Pernille Breinholdt Mikkelsen, 'Indrejse og ophold for udlændinge omfattet af EU-reglerne', in L.B. Christensen et al., *Udlændingeret*, 3. edition, Copenhagen 2006, pp. 246-258.

C. Departure

Texts in force

Laws

The general rules on *expulsion* in Aliens Act sections 22-26 apply to EU citizens, but only to the extent that these rules are compatible with the EC rules, as explicitly stated in section 2 (3). These rules imply a case-by-case evaluation based on the principle of proportionality, i.e. the longer an alien has resided in Denmark the better is his/her protection against expulsion. A decision on expulsion is usually made by a court of law but in some cases it can be decided administratively.

19 See www.nyidanmark.dk/da-dk/Ophold/borgere_fra_eu_og_norden/eu_eoes_statsborgere.htm and www. nyidanmark.dk/da-dk/spoergsmaal_og_svar/eu_opholdstilladelser/eu_opholdstilladelse.htm.
20 Cf. e-mail of 13 September 2007.
21 Information letter from DIS to the state county offices No. 2/2004 of 28 June 2004.

Reasons for expulsion:
- Crime, cf. sections 22-24.
- National security, cf. section 25 (1).
- Serious threat to the public order, safety or health, cf. section 25 (2).
- Minor offences, cf. section 25a.
- Unlawful stay, cf. sections 25b.[22]

The general rules on *lapse/revocation* of residence permits are laid down in Aliens Act sections 17-21, cf. section 2 (3). The modified application of these rules on EU citizens is described in the EU Order, see below.

In all cases on *expulsion and revocation* of a residence certificate or residence permit section 26 of the Aliens Act applies. According to section 26, an assessment of the alien's *personal situation*, including his/her attachment to the Danish society, family members here, the length of the stay etc., must be made in order to evaluate whether the expulsion or revocation would be excessively burdensome, cf. ECHR art. 8.

Administrative rules

The *time limited* right to reside ceases when the conditions mentioned in the specific provisions, according to which the residence right has been based, are no longer met, cf. EU Order section 26 (1).

EU Order section 3 (2) secures that EU citizens *will not lose* their right to reside due to unemployment, sickness etc. The provision states that an EU citizen who has been encompassed by section 3 (1), but no longer is active on the labour market preserves his/her status as an employee or self employed person, provided that the EU citizen
- Is temporarily disabled due to sickness or accident, cf. section 3 (2) (i).
- Is involuntarily unemployed upon paid occupation for more than 1 year, which is documented, and has entered an employment agency as seeking work, cf. section 3 (2) (ii).
- Has involuntarily lost his/her job within the first 12 months, which is documented, has entered an employment agency as seeking work or is involuntarily unemployed upon the expiration of a time limited employment contract of less than 1 year duration, cf. section 3 (2) (iii). This group of EU citizens preserves the status as an employee or self employed person for 6 months, cf. section 3 (3).
- Begins a business education related to the person's former occupation or is involuntarily unemployed and begins any form of business education, cf. section 3 (2) (iv).

The *permanent* right to reside, cf. EU Order section 16 and 17, ceases when the person in question has stayed outside the country for more than 2 consecutive years, cf. EU Order section 27.

The *residence document* ('registration certificate') proving the right to either time limited or permanent residence can be *revoked* in case of abuse of rights, if the basis on which the certificate was issued was incorrect or if the certificate was obtained by fraud. Fake marriage is specifically mentioned as fraud, cf. EU Order section 28 (2).

When the residence right ceases according to the EU Order section 26, 27 and 28 (2), the Regional Government Administration decides whether the EU citizen can stay in Denmark, cf. section 28 (1). This section specifically refers to the provision in the Aliens Act section 26 requiring the assessment of the alien's *personal situation*, including his/her attachment to the Danish society, family members here, the length of the stay etc. Such assessment must be made in order to evaluate whether expulsion or revocation would be excessively burdensome, cf. ECHR art. 8.

22 It should be mentioned that for EU citizens invalid registration certificates or permits are no ground for expulsion, since these permits are only proof of the right to reside based on the EC Treaty, see L.B. Christensen et al., *Udlændingeret,* p. 246-248.

Draft legislation, circulars etc.

Nothing to report.

Judicial practice

In a district court judgment of 1 September 2004 (unpublished), the court had been requested by the prosecutor to expel an Italian citizen who had committed a minor crime for which he was expellable according to the Aliens Act. The court decided not to follow the prosecutor's claim. In doing so, the court made reference to the general principles, which can be derived from the ECJ practices concerning limitations of the right to free movement, as well as to several judgments from which these principles are drawn, and concluded – taking into account all aspects of the case – that it would be inconsistent with Community law to expel the person in question as there was not an actual and serious threat to public order or security.

In a Supreme Court judgment of 2005[23] a Polish/German citizen was sentenced to 8 years imprisonment for smuggling 10 kilos of cocaine to Denmark with the intention of distribution. As a consequence of the crime, the citizen had been expelled from Denmark by the High Court. The decision on expulsion was not appealed to the Supreme Court, however.[24]

Miscellaneous (administrative practices etc.)

Certain rules of procedure are valid for EU and EEA citizens, in accordance with Directive 64/221 and the successor Directive 2004/38.

Act No. 301 of 19 April 2006 (in force 1 May 2006) amended section 32 (7) of the Aliens Act and inserted section 50 b into the Aliens Act. These new provisions were considered necessary in order to implement arts. 32 and 33, respectively, of Directive 2004/38:[25]

- Section 32 (7) states that an entry prohibition imposed on an EU/EEA citizen may be lifted at a later date where exceptional reasons make it appropriate.
- Section 50 b provides an automatically review of expulsion decisions concerning EU/EEA citizens if the expulsion has not been effected within 2 years, cf. section 49.

Aliens Act section 52 (1) (iii)-(iv), cf. sections 25a and 25b, provides for special review by a competent court of administrative decisions on expulsion of EU/EEA citizens.

EU Order section 33 (1)-(4) states that decisions regarding section 18 applications (time limited right to reside) must be made immediately. Decisions regarding sections 21 (third-country family members), 24 (permanent) and 25 (permanent for third-country family members) must be made as soon as possible and as the latest 6 months after the application has been handed in.

EU Order section 33 (5) states that the reasons for refusal of the issuance of a residence permit must be given unless considerations of national security prevent it.

EU Order sections 30-31 state that decisions related to EU residence certificates can be appealed to either DIS or the Ministry of Refugee, Immigration and Integration Affairs.

Recent legal literature

Henrik Thomassen and Pernille Breinholdt Mikkelsen, 'Indrejse og ophold for udlændinge omfattet af EU-reglerne', in L.B. Christensen et al., *Udlændingeret*, 3. edition, Copenhagen 2006, pp. 275-285.

23 Published in UfR (Weekly Legal Magazine) 2005, p. 1796/1H.

24 According to Aliens Act section 49 (1), a decision on expulsion is made in connection with a conviction of a criminal offence, which is subject to appeal according to Part LXXXV of the Administration of Justice Act.

25 See explanatory memorandum to Bill No. L 94/2005-2006, pp. 26, 31-32 and 38-39.

CHAPTER II: ACCESS TO EMPLOYMENT

Concerning basic *integration assistance*, the central piece of legislation is the Act on Integration.[26] This Act does not apply to EU citizens and members of their families, cf. the Act on Integration section 2, 3. It has been questioned whether third country nationals who are granted residence permit as family members to EU citizens according to the principles in the *Singh* judgment, should be encompassed by the Act on Integration. Such persons are granted a residence permit with a legal basis in the Aliens Act and not in the EU/EEA Order. The Ministry of Refugee, Immigration and Integration Affairs has determined that such persons shall not be encompassed by the Act on Integration since the background of these residence permits is the EU rules on free movement of persons (see chapter V).

1. Equal treatment in access to employment

Concerning equal treatment in access to employment, the central piece of legislation is the Act on *Prohibition of Differential Treatment on the Labour Market,*[27] which prohibits direct and indirect discrimination, harassment and instructions on differential treatment on grounds of race, colour, religion or belief, political opinion, sexual orientation, age or handicap or national, social or ethnic origin in the relationship between an employer and an employee.[28]

The Act transposes parts of Directive 2000/43/EC on equal treatment of all regardless of race or ethnic origin into Danish law and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[29]

According to the exemption clauses in Part III, the prohibition on differential treatment on grounds of political opinion, religion or belief does not apply to employers whose business has as its expressed purpose to promote a specific political or religious view or a specific belief, where the employee's political or religious belief may be deemed of importance for the company, cf. section 6 (1).

If it is of crucial importance to certain forms of business or education that the practitioner is of a certain race, political opinion, religious belief, sexual orientation or national, social or ethnic origin or has a certain colour, age or handicap and the requirement of a certain affiliation is proportional with the given working activity, the concerned minister can deviate from the prohibition on differential treatment in section 2-5 upon procured statement from the Minister of Occupation, cf. section 6 (2).

As regards discrimination on ground of *nationality*, the act does not encompass all kind of discrimination. Hence, differential treatment on the ground of citizenship is not in itself encompassed by the act. However, a requirement on citizenship may be categorized as indirect discrimination on the ground of ethnic origin. There is no published jurisprudence on differential treatment on the ground of nationality.

With regard to *public authorities*, a public employer is also subject to the principle on equality ('lighedsgrundsætning'), the principle on legality ('legalitetsprincippet') and the rule on instruction ('instruktionsreglen'). Also, a public employer has a special obligation to ensure equality for all employers regarding gender, ethnic origin, nationality etc. as stated in the Co-operative agreement, section 5 (5) ('Samarbejdsaftalen'), which is an agreement on co-operation and co-operation committees in the state's companies and institutions, see below chapter IV.2.

The Danish Institute for Human Rights (DIHR) can hear complaints concerning violation of the prohibition against differential treatment, cf. section 8a and below.[30] As men-

26 Consolidation Act No. 902 of 31 July 2006.

27 Consolidation Act No. 31 of 12 January 2005 and amendments (see below for description of these amendments).

28 As regards discrimination on the grounds of gender, this is regulated in a specific act, cf. Consolidation Act No. 1095 of 19 September 2007, which partly implements Directive 2004/113/EC.

29 Act No. 253 of 7 April 2004 and Act No. 1417 of 22 December 2004 amending Act No. 459 of 12 June 1996.

tioned below in chapter III, miscellaneous, no cases involving EU citizens concern the Act on Prohibition of Differential Treatment on the Labour Market.

The Act on *Prohibition of Differential Treatment on the Labour Market* was amended twice in 2006.

Act No. 240, 27 March 2006 provided a provision allowing an employer to advertise for a person of a specific race, colour, nationality, ethnicity, religion etc. if it is in accordance with the exemption clauses in the Act, cf. section 5 (2).

The Act also provided a provision allowing specific rules or standards to be made in collective agreements for people below 18. This provision also allows different treatment on the ground of age provided the employment is covered by a collective agreement with specific standards for payment of persons below 18, cf. section 5a (5).

The Act allows different treatment of people below 15 whose employment is not covered by a collective agreement, cf. section 5a (6). The Act entered into force 1 April 2006.

Act No. 1542, 20 December 2006 changed the age stipulation in section 5a (4) from 65 to 70. Hence, the Act raised the age stipulation in rules or standards of individual or collective agreements concerning termination of employment to the age of 70. The Act enters into force 1 January 2008.

The Act on *Equal Treatment Irrespective of Ethnic Origin*[31] remained unchanged in 2006. The Act which is partly an implementation of Directive 2000/43/EC on equal treatment of all regardless of race or ethnic origin, deals with conditions outside the labour market and contains a prohibition against direct and indirect discrimination on the grounds of race or ethnic origin and a prohibition against harassment and instructions to discriminate. The Danish Institute for Human Rights (DIHR) can hear complaints concerning violation of the prohibition against discrimination; cf. the Act on Equal Treatment Irrespective of Ethnic Origin Part IV. The committee established within DIHR to hear complaints has dealt with a smaller number of complaints, and the committee has also taken up cases on its own initiative, see below chapter III, miscellaneous.

Assistance of employment agencies

EU/EEA citizens can register with employment agencies ('jobcentre' [32]), make use of these facilities and receive guidance on the conditions in Denmark.[33]

The job centers have an international section, *Eures,*[34] which is the co-operation between EEA countries and their employment agencies, unions, employers' associations and local/ regional authorities[35] with the purpose of supporting the free movement of workers by facilitating information and knowledge for citizens and companies.

2. Language requirement (private sector)

The National Labour Market Authority ('Arbejdsmarkedsstyrelsen'[36]), which is an authority under The Ministry of Employment[37] has issued a circular to the Act on *Prohibition of Differential Treatment on the Labour Market.*[38] The circular concerns employment agencies and their dealing with employers and ethnic minorities and constitutes general guidelines to the prohibition of different treatment on the labour market.

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30 This competence was introduced by Act No. 253 of 7 April 2004 amending Act No. 459 of 12 June 1996.
31 Act No. 374 of 28 May 2003 and later amendment.
32 Act No. 522 of 24 June 2005 on Responsibility for and Regulation of the Active Employment Initiative; cf. Act No. 685 of 29 June 2005 on Active Employment Initiative, and later amendments.
33 www.ams.dk/jobcenterguide/Tre_typer_jobcentre/eures.asp and www.workindenmark.dk.
34 Official website: www.eures.dk.
35 www.ec.europa.eu/eures/home.jsp.
36 Official website: www.ams.dk.
37 Official website: www.bm.dk.
38 Circular No. 60339 of 29 October 1998.

A circular constitutes guidelines to the private sector and are binding to employees in the public sector.[39]

According to the circular a language requirement is formally a neutral requirement. However, a language requirement may constitute indirect discrimination when an employer has a language requirement which is not reasoned/objectively justifiable. This will be the case if the requirement to the person's ability to speak or write Danish is disproportionate and without relevance for the maintenance of the job in question.[40]

According to the circular, qualification requirements in general have to be justified by considerations of satisfactory maintenance of the job in question.

The Act on *Danish Courses for Adult Aliens* was passed by the Parliament in 2003 and supplemented by an Executive Order.[41] The Act has been amended in 2005-2006 as a consequence of the reform of the municipal structures.[42]

Every adult alien residing in Denmark can receive education by attending Danish courses etc. arranged by the municipality, cf. section 2. The Act also applies to EU citizens and their family members. This means that they have a right to receive an offer from the municipality to take part in Danish courses, but they have no obligation to do so. Whereas such courses are free of charge for foreigners encompassed by the Act on Integration,[43] cf. section 14, the municipalities may require a fee from other categories of participants, including EU citizens and their family members, according to guidelines from the Ministry of Refugee, Immigration and Integration.[44] The government seems to have considered whether this will raise questions of discrimination under art. 12 TEC, since it is emphasised in the explanatory memorandum to the Bill that the language courses will provide general qualifications and not address the need for specific professional training. The Bill was therefore considered as having no EU law implications, even while it was clearly stated that EU citizens were to be among those participants required to pay for such courses under the Act.[45]

3. Recognition of diplomas (including academic diplomas), initiatives to transpose Directive 2005/36/EC

The Act on *Evaluation of Alien Educational Qualifications*[46] and the Executive Order issued on the basis of the Act[47] regulate CIRIUS' evaluation[48] of alien qualifications with the purpose of easing the flow to the Danish labour market and educational system, cf. the Act section 1.

CIRIUS was established in January 2005 as an authority within the Ministry of Education, replacing the former authority in this area (CVUU) as a result of the fusion of Cirius, CVUU and Eurydice.[49] With the establishment of CIRIUS, the international aspects of the education system have been united in one authority.

Section 2 (1) describes who has the *right* to an evaluation. According to this section everybody with an alien education, authorities who require the evaluation as a part of their review, employers who require the evaluation in order to enable them to decide whether the

39 See below, chapter IV, 1.2.
40 Chapter III.B.
41 Act No. 375 of 28 May 2003 and Executive Order No. 912, 28 September 2005 and amendments.
42 Act No. 259 of 18 March 2006 and amendment, Executive Order No. 1159 of 1 December 2005, No. 736 and 737 of 28 June 2006, No. 1270 of 7 December 2006, No. 1391 of 12 December 2006.
43 Consolidation Act No. 902 of 31 July 2006 and amendments. Danish courses are mandatory for aliens encompassed by the Act on Integration, cf. Part IV of the Act.
44 See Executive Order No. 737 of 28 June 2006, section 15 (1) (i) and (ii).
45 Bill No. L 158/2002-03. See below on Act No. 104 of 7 February 2007 increasing the state's co-financing of the municipalities' offers of Danish courses to strengthen the municipalities' supply of efficient Danish courses to aliens who are not encompassed by the Act on Integration (EU/EEA citizens and others).
46 Act No. 74 of 24 January 2003.
47 Executive Order No. 602 of 25 June 2003.
48 The evaluations are available at: http://ciriusonline.ciriusintra.dk/vdb/cvuu/Search.asp.
49 Information about the establishment of CIRIUS is available in the report from the Ministry of Education to the Parliament, April 2004, available on http://pub.uvm.dk/2004/internationalisering.

person in question with alien qualifications should be hired and educational institutions have a right to an evaluation under certain circumstances. Exceptions to this right to evaluation exist when the profession is regulated by law, since the competent authority obtains an evaluation when handling applications concerning the access to take up jobs regulated by law, cf. section 2 (2) and below on the Act to Take Up Certain Jobs in Denmark. Also, when a decision on merit is being made by an educational institution, the alien does not have a right to evaluation for the purpose of this decision, cf. section 2 (3) and below chapter XI.

Section 2a describes who has an *obligation* to obtain an evaluation under certain circumstances. According to this section authorities who are handling cases concerning the right to take up jobs regulated by law (see below) and professional committees deciding on shortening of the time frame for an education have an obligation to obtain an evaluation under certain circumstances.

According to section 3 the basis of the evaluation is a comparison of the qualifications that the alien has with the similar Danish educational qualifications.

According to section 3 (4) public authorities have an obligation to let the evaluation be the basis of their decisions,[50] however, the evaluation is only considered as a guidance to educational institutions' decisions on whether alien educational qualifications can replace parts of the institutions' education (merit), cf. section 3 (6).[51] Authorities handling applications on the access to take up jobs regulated by law[52] only have the obligation to let the evaluation be the basis of their decision, when the evaluation is obtained for this purpose, cf. section 3 (4) (iv), section 3 (5) and section 2 (2).

The Act on *Access to Take up Certain Jobs in Denmark*[53] passed by the Parliament in 2004, partly to replace an act from 1991 on the access to certain professions for citizens of the European Community and the Nordic countries and to implement parts of the relevant Directives,[54] remained unchanged through 2006 but was amended in 2007, see below on Directive 2005/36/EC.

The Act regulates the right to practise professions regulated by law (i.e. professions which require an authorisation), such as doctors, lawyers, veterinarians, etc. in Denmark, when the applicant has professional qualifications from another country.

The Act authorizes the Danish Education Ministry ('Undervisningsministeriet')[55] to set out rules for the purpose of coordinating implementation of the relevant Directives, cf. section 5. The Ministry of Education has delegated this authorisation to CIRIUS, cf. section 7.

The Act and the Executive Orders[56] carry out the implementation of the EU Directives on *Recognition of Exams and Professional Qualifications*.[57] With respect to EU/EEA citizens, the substantial part of the Act is that when they satisfy the conditions in the relevant EU Directives or Nordic agreements, cf. section 2, these citizens are allowed - upon application - to practise professions regulated by law in Denmark as self-employed or employed under the same circumstances as persons with Danish professional qualifications.

The application has to be handed in to the competent authority, which for some professions means the relevant ministry and for others CIRIUS.[58]

The practising of professions which are not regulated by law does not assume authorization and therefore there is no application requirement. However, CIRIUS can provide citizens with educations from another country with an evaluation of their education.[59]

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50 See below chapter IV.
51 See below chapter XI.
52 See below.
53 Act No. 476 of 9 June 2004.
54 Directive 1989/48/EEA, 1992/51/EEA, 1999/42/EC, 2001/19/EC.
55 Official website: www.uvm.dk.
56 Executive Orders No. 839 of 29 September 1994, 177, 178 and 179 of 17 March 2003, Executive Order No. 7 of 7 January 2003, Executive Order No. 152 of 11 March 2003 and Executive Order No. 818 of 22 July 2004.
57 And the Lisbon Convention of 11 of April 1997.
58 www.ciriusonline.dk/Default.aspx?ID=2838.
59 See above on The Act on Evaluation of Alien Educational Qualifications and www.ciriusonline.dk/Default.aspx?ID=2731.

Directive 2005/36/EC

The Minister of Education has proposed an amendment to the Act on Access to Take up Certain Jobs in Denmark and other acts on 4 October 2006.[60]

The amendment has as its purpose to transpose parts of Directive 2005/36/EC into Danish law, by

- Extending the application of the Act to encompass *temporary or occasional practising* of a profession regulated by law. In contrast to establishment, where an application is required upon practising of a profession regulated by law,[61] a temporary or occasional practising of a profession regulated by law requires a registration/notification only. If there is no legal basis for registration in the concrete act regulating the specific profession, the temporary or occasional practising of a profession regulated by law can be practised freely. The application is to be renewed once a year provided the person in question wishes to perform a temporary or occasional practising in the year ahead.
- Making the Ministry of Education the representative in the art. 58 committee.
- Authorizing the Ministry of Education to implement the Directive fully.
- Amending other acts on the area of architects, accountants, real estate agents, translators, interpreters and average adjusters.

The proposal was adopted by Act No. 123 of 13 February 2007.

4. Nationality condition for captains of ships

With regard to *nationality conditions for captains and first officers of ships,* the ECJ judgments in the cases C-405/01 and C-47/02[62] led to a change in Danish law in 2004 as the Act on Ships' Crew[63] was amended with the specific aim to bring national law in compliance with Community law as it was interpreted in these two judgments.[64]

According to the *Act on Ships' Crew*, the starting point is that captains of merchant ships and fishery vessels must hold Danish citizenship, cf. section 13, 6 and 19. The amendment of the Act[65] meant an insertion of a provision authorising the Danish Maritime Authority ('Søfartsstyrelsen')[66] to set out rules in an Executive Order for the purpose of exempting persons encompassed by the rules on free movement from the requirement on nationality.

In the explanatory memorandum to the Act amending the Act on Ships' Crew,[67] it was stressed that international conventions require that captains of ships have certain knowledge of the maritime rules of the country in which the ship is registered. Against this background, the Executive Order will be accompanied by rules to secure this by setting up basic requirements to the education of captains, where necessary. From the explanatory memorandum follows as well that it cannot be excluded that – in special cases – the extent to which the captain will have to exercise powers conferred by public law will justify that he/she holds Danish citizenship. The Executive Order will include provisions to provide for this.

It is interesting to note that there was some debate on the proposed amendment during the parliamentary process as some political parties were reluctant to give up the nationality requirement. This led the Minister responsible for the Bill to issue a statement promising that with regard to exemptions from the nationality requirement, the Executive Order will not go further than provided for by Community law.

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60 Bill No. L 11/2006-07.
61 See above.
62 ECJ judgments of 30 September 2003 *Colegio de Oficiales de la Marina Mercante Espanola* and *Albert Anker*.
63 Act No. 15 of 13 January 1997 and amendments.
64 The Act also had as its purpose to partly implement Council Directive 1999/70/EC of 28 June 1999 and Council Directive 2000/78/EC of 27 November 2000.
65 Act No. 1462 of 22 December 2004.
66 Official website: www.sofartsstyrelsen.dk.
67 Bill No. L 65/2004-05.

In October 2006 the Executive Order was issued.[68] The Order exempts persons encompassed by the rules on free movement from the requirement on nationality, cf. section 1 (1).

Captains of merchant ships must have a Danish recognition certificate, cf. section 2 (2).

According to section 1 (3) in the Executive Order, there is an exception to the exemption from the requirement on nationality: The Danish Maritime Authority in consultation with the organisations of the ship owners and the mariners can impose a demand in the crews contract for the ship in question that the captain must hold Danish citizenship when it is documented that rights under powers conferred by public law granted to the captain of a passenger ship or a ship transporting troops, military materiel or nuclear waste are in fact exercised on a regular basis and do not represent a minor part of their activities.

In May 2005 the Danish Maritime Authority ('Søfartsstyrelsen') issued an Executive Order on *Recognition of Foreign Qualifications for Service on Merchant Ships*[69] on the basis of section 20 (5) and (6) in the Act on Ships' Crew. The Order implements Directives 2003/103 and 2001/25 and regulates navigation officers, machine officers and radio operators and the recognition of their qualifications according to the STCW Convention and EU Directives on recognition of exams and professional qualifications.

The Act on Access to Take up Certain Jobs in Denmark[70] is only applicable to professions under the competence of the Danish Maritime Authority provided the application has to be treated according to EU Directives on recognition of exams and professional qualifications.[71]

Draft legislation, circulars etc.

On 4 October 2006, the Ministry of Refugee, Immigration and Integration proposed an amendment to the *Act on Danish Courses* (and other acts).[72]

Among other changes, the proposal changed section 15 in the Act on Danish Courses.

Section 15 concerns the states refund of the expenses the municipality has to Danish courses for participants not encompassed by the Act on Integration or the Act on Active Employment Initiative.[73]

The amount with which the state refunds the municipalities' expenses was proposed amended from 33 Danish kroner pr. lesson to 50 % of the expenses. This is an increase of the state's co-financing of the municipality offers on Danish courses and has as its purpose to strengthen the municipalities' supply of efficient Danish courses to aliens who are not encompassed by the Act on Integration (EU/EEA citizens and others).[74]

The Act was adopted by the Parliament 8 January 2007 and enters into force 1 January 2008.[75]

On 30 November 2006 the Ministry of Education proposed an amendment to the *Act on Evaluation of Alien Educational Qualifications*.[76]

The purpose of the proposal is to strengthen the possibilities of being credited for educational qualifications (merit) in order to hinder extension of the time of study as for instance changing of study.

The competence of the appeals committee ('Kvalifikationsnævnet')[77] is proposed broadened to encompass qualifications obtained at Danish educational institutions as well, instead

68 Executive Order No. 1010 of 9 October 2006 on exempting captains of merchant ships and fishery vessels from the nationality conditions in the Act on Ships' Crew (Access for captains from EU and EEA), entering into force on 18 October 2006.

69 Executive Order No. 315 of 4 May 2005.

70 Act No. 476 of 9 June 2004.

71 Executive Order No. 818 of 22 July 2004, issued with the legal basis in The Act on Access to Take up Certain Jobs in Denmark section 1 (2).

72 Bill No. L 16/2006-07.

73 See Executive Order No. 1391 of 12 December 2006 and letter No. 9047 of 19 January 2007 section 11.

74 See explanatory memorandum to Bill No. L 16/2006-2007, general comments para. 1and specific comments to section 2, paras 5-6, and the background Government plan for Integration 'En ny chance for alle', 17 June 2005, www.nyidanmark.dk/NR/rdonlyres/1311B350-281F-4CD1-ADD5-F9B717F16FAA/0/ en_ny chance_til_alle. pdf.

75 Act. No. 104 of 7 February 2007.

76 Bill No. L 97/2006-07.

77 See below chapter XI.

of just alien educational institutions, and complaints over pre merits obtained upon a period of study abroad (such as in another member state).

The proposal was adopted by Act No. 315 of 30 March 2007.

Judicial practice

Nothing to report.

Miscellaneous

See below chapter III, Miscellaneous on the practice from The Danish Institute for Human Rights (DIHR) on discrimination.

The statistics on the administration of the rules on *Access to Take up Certain Jobs in Denmark*[78] show that there are only quite few negative decisions on applications to be allowed to take up employment according to the national rules implementing the Directives on recognition of exams and professional qualifications (5 % in September 2005 - August 2006).[79]

Recent legal literature

Ruth Nielsen, EU's rammedirektiv 2000/78/EF og gennemførslen i Danmark, 2005.
Ruth Nielsen, 'Princippet om forbud mod forskelsbehandling pga. alder som et almindeligt EU-retligt princip', in Ufr (Weekly Legal Magazine) årg. 140, no. 34, 2006, pp. 259-266.
Ruth Nielsen, Koncernarbejdsret, 2. revised edition, Copenhagen 2006.
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Ole Hasselbalch, Arbejdsmarkedets regler, 8. edition, Copenhagen 2007.
www.ciriusonline.dk.

78 Act No. 476 of 9 June 2004.
79 http://www.ciriusonline.dk/Default.aspx?ID=3770, see "Beretning for 2006 om vurdering og anerkendelse af udenlandske uddannelseskvalifikationer", p. 26-29 and p. 4.

CHAPTER III: EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

Employment under a collective agreement or on individual contract (as opposed to employment as a civil servant, see chapter IV) is not conditional on the applicant being a Danish citizen. Foreign citizens are generally free to hold such posts.[80]

1. Working conditions, social and tax advantages (direct, indirect discrimination)

Working conditions

With regard to *equal treatment in the maritime sector,* questions have been raised relating to the conditions for Polish seafarers on ships sailing under Danish colours. Polish seafarers have complained that they are not being accorded rights similar to those of Danish seafarers with regard to membership of labour unions, and that they are treated in a discriminatory way with regard to wages and other working conditions.

The disputed issue relates to the fact that the *Act on a Danish International Ship's Register*[81] determines that Danish collective agreements regarding wages and working conditions on board ships can only apply to persons living in Denmark or persons who must be put at an equal footing with Danish nationals on the basis of international obligations, cf. section 10 (2). In practice this provision has been construed by the Danish authorities to mean that the *place of residence* is the decisive factor. This interpretation was upheld by the Industrial Court ('Arbejdsretten')[82] in a case where it was argued that the entire crew, consisting mainly of Dutch seafarers, on a certain ship should be covered by the collective agreement entered into by a Danish labour union.[83] The Court turned down this argument as in the Court's opinion the residence criterion reflects the relevant objective differences in the employee's living conditions, such as taxation, in their respective home countries, and hereby provides a reasonable justification for differences in the terms and conditions in the respective collective agreements and individual employment contracts. The Court found that there were *no international obligations* at present according to which persons residing outside Denmark should be treated as Danish nationals, and thus should be covered by Danish collective agreements.

At the end of 2004 a case on this question was submitted to the Industrial Court by the Confederation of Danish Labour Unions ('LO') on behalf of Polish seafarers.[84] The LO claimed that around 4,000 Polish seafarers had been underpaid since 1994. The case was dismissed by the Industrial Court on 27 October 2005 on the ground of *lacking industrial dispute*. The subject of the competence of the Industrial Court is cases concerning disputes relating to collective agreements or individual contracts, and since the subject of this case was found by the Court to be more of a general and principled character regarding section 10 (2) and its relation to EC law, the case was dismissed as being *outside the scope* of the Industrial Court's competence.

Subsequent to that decision, the LO has been corresponding with the European Commission regarding this matter. Furthermore the LO is collecting documentation, which might result in the LO filing a new case to the Industrial Court or the ordinary Danish courts.[85]

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80 For general information on the Danish labour market, see 'Employment in the Danish State Sector', a publication from the State Employers' Authority on www.perst.dk/visSideforloebBeholder.asp?artikelID=14329.

81 Consolidation Act No. 273 of 11 April 1997 and later amendments.

82 Official website: www.arbejdsretten.dk.

83 Judgment of 24 April 1997 in Case No. 96.017; upheld by Judgment of 31 August 2006 in case No. 2001.335.

84 Case No. 2004.435.

85 Information obtained from correspondence with the LO in May 2006.

In October 2004 the Commission filed an *opening statement regarding breach of Article 39 (2) of the EC Treaty and Articles 7 and 8 of Regulation 1612/68.* According to governmental information obtained in May 2006, meetings concerning amendment of the Act on a Danish International Ship's Register section 10 have been held with the Commission. The Danish Ministry of Justice is awaiting the Commission's response on the proposed legislative amendment.[86]

By August 2007 the Act has not been amended.

Social advantages

The Act on Active Social Policy[87] section 3 (2) (ii) states that any foreigner legally residing in Denmark has a right to cash benefits, but only for a limited period. The right to such benefits on a permanent basis is restricted to Danish citizens and EU citizens and members of their family residing in Denmark on the basis of Community law (as well as to certain third country nationals on the basis of international agreements). On this point EU citizens and members of their family are treated equally with Danish citizens.

However, according to section 12a EU/EEA citizens residing in Denmark on the basis of Community law on *jobseekers' right to residence* are entitled to no other economical assistance under the Act than the coverage of costs related to the return to their home country,[88] see below chapter VI.

As a consequence of the enlargement of the European Union taking effect 1 May 2004, the legislation on social benefits was amended on a few points, see chapter VIII.

Tax advantages

See chapter VI.

2. Other obstacles to free movement of workers

The *Act on Active Social Policy*[89] section 11 on starting aid, resulting in the starting aid to be primarily for Danish citizens (see below chapter VI).

3. Specific issue: Frontier workers (other than social security issues)

Residence

EU Order section 6 (1) (iii), cf. section 6 (1), states that frontier workers have the right to reside for more than the 3/6 months mentioned in the Aliens Act section 2 (1) when the EU citizen takes up work in another Member State, provided he/she has had residence and has been working in Denmark for the previous 3 years and returns to his/her residence in Denmark at least once a week.

The period of time working in another Member State is considered spent in Denmark with regards to the acquisition of the rights in section 6 (1) (i) and (ii), cf. section 6 (3).[90]

EU citizens encompassed by section 6 have the right to *permanent residence* without any further conditions, cf. EU Order section 17.

Tax issues

The Act on Pay-as-you-earn Taxation ('Kildeskatteloven')[91] Part IA deals with frontier workers.[92]

86 E-mail of 13 April 2007 from an official within the Danish Ministry of Justice.
87 Consolidation Act No. 1009 of 24 October 2005 with amendments.
88 Guidelines No. 33 of 4 May 2004.
89 Consolidation Act No. 1009 of 24 October 2005 with amendments.
90 On the rights in section 6 (1) (i) and (ii) see below chapter X.

Section 5A-5D provides the frontier worker with a choice on how his/her income should be taxed.
Since a frontier worker does not reside in Denmark, the rules on unlimited tax liability in the Act on Pay-as-you-earn Taxation section 1 do not encompass the worker. Instead the rules in section 2 on limited tax liability apply, which limits the access to tax relief.
However, section 5A states that provided the frontier worker earns at least 75 % of his/her global income in Denmark in the form of payment for personal work or profit from performing business, he/she can choose to get access to deduction for expenses, cf. section 5B-5C, i.e. tax relief, which means the frontier worker will be in the position as an unlimited tax liable, cf. section 1.

Draft legislation, circulars etc.

See chapter VI.

Judicial practice

Nothing to report.

Miscellaneous

As mentioned above in chapter II.1 the Danish Institute for Human Rights (DIHR)[93] can hear complaints concerning violation of the *prohibitions against discrimination* both inside and outside the labour market. The Committee established within the DIHR to hear the complaints has dealt with a smaller number of complaints and has also taken up cases on its own initiative.[94]

No cases involving EU citizens concern the Act on Prohibition of Differential Treatment on the Labour Market.[95]

Concerning the Act on Equal Treatment Irrespective of Ethnic Origin[96] (outside the labour market):

2005: Two of the Committee's cases involved EU citizens.

- In a decision from 19 September 2005 the Committee dealt with a complaint from a Dutch citizen of Indian origin. The claimant alleged that he was subject to discrimination due to the fact that the state county demanded him to show further documentation of his Dutch citizenship than his Dutch passport. Further he complained of the fact that the state county would not accept an employment declaration which was not signed by his employer. The Committee concluded that the state county was not allowed to make those demands, but since the demand regarding the documentation of his Dutch citizenship was caused by the fact that there were fake Dutch passports in circulation, and since the demand regarding the declaration from the employer was caused by the state county office's misunderstanding of the EU/EEA Order, the citizen had not been subject to discrimination.[97]
- In a decision from 17 May 2005 the Committee dealt with a complaint from a person who held both Iranian and German citizenship. The claimant alleged that she was subject to discrimination given the fact that the state county treated the application for residence permit as an application from an Iranian and not a German citizen. The

91 Act No. 1086 of 14 November 2005.
92 The rules on frontier workers were originally introduced by Act No. 1095 of 20 December 1995 on the background of the Commission's recommendation 1993-12-21 and the judgments in C-279/93 and C-80/94. The rules took effect from the income year 1992.
93 Official website: www.humanrights.dk.
94 Information on this is found at the website of the committee: www.klagekomite.dk.
95 Consolidation Act No. 31 of 12 January 2005 and amendments.
96 Act No. 374 of 28 May 2003 and later amendments.
97 J.nr.711.9.

Committee concluded that the state county had made a procedural error by categorizing the application as one from an Iranian citizen, as the state county itself had admitted during the case. Since there was no indication that the error in the administrative procedure was deliberate in order to discriminate, the Committee found that the citizen had not been subject to discrimination.[98]

2006: One of the Committee's cases involved EU citizens.

- In a decision from 19 September 2006 the Committee dealt with a complaint from a person who claimed that a company renting out holiday houses had exposed him to indirect discrimination, cf. The Act on *Equal Treatment Irrespective of Ethnic Origin* section 3 (3).[99]
  The claimant had consulted the company when he was living in Germany. Due to the claimant's address, the company had offered him a holiday house at a higher price than would have been the case if the claimant had resided in Denmark.
  The company informed the Committee that the difference in prices was due to the difference in the markets, such as consumer laws. The German consumer law required cancellation insurance wider than the Danish one, and the insurance was mandatory and therefore part of the price. So were the costs of the insurance for insolvency, required by German law, and the costs of conversion of foreign exchange.
  The Committee stated that it was not of decisive importance whether the difference in prices corresponds the extra costs, since a company has the right to exercise a *wide discretion* in the determination of the price and that it was not decisive whether the German consumer law applied to all rental agreements involving customers residing in Germany, since a company has the right to *decide the conditions* for the terms and conditions in rental agreements with customers residing outside of Denmark.
  The Committee concluded that the different prices were *objectively justified* in a *reasoned purpose* and that the means were *appropriate and necessary*, cf. the Act on Equal Treatment Irrespective of Ethnic Origin section 3 (3) in fine.
  Therefore the claimant had not been subject to indirect discrimination.[100]

It could be questioned whether the Committee's decision is compatible with the contents and purpose of the Act on Equal Treatment Irrespective of Ethnic Origin section 3 (3), since companies' discretion of determination of prices and decision on conditions in rental agreements with customers residing outside of Denmark indeed are limited by the provision. However, section 3 (3) in fine states that measures which constitute indirect discrimination, are legal provided that the measures are objectively justified in a reasoned purpose and provided that the means are appropriate and necessary, which the Committee found the company's measures to be.

Recent legal literature

Ruth Nielsen, 'Svensk blockad blev olovlig när Arbejdsretten dömte enligt dansk lag' in *EU och arbetsrätt*, no. 3, 2006.
www.ciriusonline.dk.
Niels Winther-Sørensen in *Skatteretten 3*, 3. edition, Copenhagen 2000, pp. 405ff.

98 J.nr.711.31.
99 Consolidation Act No. 374 of 28 May 2003 and later amendment.
100 J.nr.740.16.

CHAPTER IV: EMPLOYMENT IN THE PUBLIC SECTOR

1. Access to the public sector

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

Circular 210 of 11 December 2000 specifies the special positions where appointments as *civil servants* ('tjenestemænd') are confined.

If the position is not regulated by the circular, the employment is not encompassed by the rules on civil servants, and aliens are free to hold such posts under the same circumstances as Danish citizens.

Danish nationality is a prerequisite for employment as a *civil servant*, cf. The Danish Constitutional Act section 27.[101] This is modified, however, by the fact that foreign citizens can be employed on conditions similar to those of civil servants in positions where persons with Danish nationality are employed as civil servants. A rule on this is inserted in the Act on Civil Servants[102] and the Act on Civil Servants' Pension,[103] and reference is made to this rule and its connection with art. 39 of the EC Treaty in the guidelines from the Ministry of Finance to public employers.[104]

The right to be employed under the same circumstances as civil servants is limited by restrictions that are justified by regard for public order, public security and public health.[105]

According to the Guidance on Personnel Administration 2007 from the Ministry of Finance chapter 15.2.1.4, job posting may not contain a requirement on Danish citizenship in a way that may restrain EEA citizens from applying for the job, unless the job is encompassed by the exceptions for employment in the public sector, i.e. employment as a civil servant.[106]

In 2004 the State Employers' Authority ('Personalestyrelsen',[107] an agency within the Ministry of Finance) carried out a survey on the extent to which a requirement on Danish citizenship exists regarding positions in the public sector. The survey covers all Danish ministries but not the regional and municipal parts of the public sector.[108] The conclusion of the survey is that within the public sector there are in general not posts where a requirement on Danish citizenship is upheld. Exceptions to this are certain posts within the Ministry of Defence for which, however, a dispensation can be given, and certain posts within the Prison and Probation Service.[109]

As mentioned above in chapter II an Executive Order was issued in October 2006[110] regarding *captains of ship*. The Order exempts persons encompassed by the rules on free movement from the requirement on nationality.

According to section 1 (3) in the Order, there is an *exception to the exemption from the requirement on nationality:* When it is documented that rights under powers conferred by public law granted to the captain of a passenger ship or a ship transporting troops, military materiel or nuclear waste are in fact exercised on a regular basis and do not represent a minor part of their activities, the Danish Maritime Authority in consultation with the organisa-

101 Constitutional Act No. 169 of 5 June 1953.
102 Consolidation Act No. 531 of 11 June 2004 and later amendments, section 58 c.
103 Consolidation Act No. 230 of 19 March 2004 and amendments, section 19 (1).
104 Guidance on Personnel Administration ('Personale-Administrativ Vejledning'), issued by the Ministry of Finance, 2004, chapter 17, and 2007, chapter 15.2.2.2 and 15.2.2.3. The guidance is updated every year and is available on the internet from 1 January 2007 on www.pav.perst.dk.
105 See *Employment in the Danish State Sector*, publication from the State Employers' Authority, chapters 1-3 (www.perst.dk/visSideforloebBeholder.asp?artikelID=14329).
106 See also Circular No. 60339 of 29 October 1998, III, B, where it is stated that a requirement of Danish citizenship is indirect discrimination of EU citizens, where there is no exceptional rule regulating the position.
107 www.perst.dk.
108 The survey neither does not include information on positions for law graduates within the Danish courts.
109 See *Employment in the Danish State Sector*, chapter 3.
110 Executive Order No. 101 of 9 October 2006.

tions of the ship owners and the mariners can insert a demand in the crews contract for the ship in question that the captain must hold Danish citizenship.

1.2. Language requirement

The National Market Authority ('Arbejdsmarkedsstyrelsen'[111]), which is an authority under The Ministry of Occupation,[112] has issued a circular to the Act on *Prohibition of Differential Treatment on the Labour Market*.[113] The circular concerns employment agencies and their dealing with employers and ethnic minorities and constitutes general guidelines for the prohibition against different treatment on the labour market.[114]

A circular constitutes guidelines for the private sector and are binding to employees in the public sector.[115]

According to the circular, a language requirement is formally a neutral requirement. However, a language requirement may constitute indirect discrimination when an employer's language requirement is not reasoned/objectively justifiable. This will be the case if the requirement to the person's ability to speak or write Danish is disproportionate to and without relevance for the maintenance of the job in question.[116]

According to the circular, qualification requirements in general have to be justified by considerations of satisfactory maintenance of the job in question.

In order to apply for admission at most of the higher educations in Denmark, an alien must pass a Danish language test.[117] This does not apply, however, to students from other Nordic countries if Danish, Norwegian or Swedish is incorporated in the qualifying exam.[118]

1.3. Recruitment procedures: Follow-up of Burbaud case

The situation giving cause to the ECJ judgment in the *Burbaud* case,[119] the use of competitions for access to training and afterwards employment in the public sector does not seem to be relevant in Denmark.

1.4. Recognition of diplomas

Regarding the *recognition of diplomas for access to employment in the public sector,* degrees obtained at foreign universities are to be evaluated by CIRIUS.[120]

The Act on *Evaluation of Alien Educational Qualifications*[121]and the Executive Order issued on the basis of the act[122] regulates CIRIUS' evaluation of alien qualifications with the purpose of easing the flow to the Danish labour market and educational system, cf. the Act section 1. The system of recognition of diplomas does not generally distinguish between posts in the public sector and posts in the private sector.[123] CIRIUS is to evaluate on a case-by-case basis which foreign degrees are comparable to the relevant Danish degrees. Accord-

111 Official website: www.ams.dk.
112 Official website: www.bm.dk.
113 See above chapter II.1.
114 Circular No. 60339 of 29 October 1998.
115 See below, chapter IV, 1.2.
116 Chapter III.B.
117 See more on Danish courses above chapter II.2.
118 www.ciriusonline.dk/Default.aspx?ID=3783. Consolidation Act No. 319 of 16 May 1990 authorizing the Ministry of Education to issue regulations on numerus clausus for higher educations, cf. Executive Order 167 of 22 February 2007 section 6 (2), Executive Order No. 802 of 22 September 2003 section 8 (3) on vocational training schemes and Executive Order No. 362 of 20 May 2005 section 10 on universities ('Adgangsbekendtgørelsen') and the regulations for the specific institutions published on the institutions' websites. See more on students below chapter V and XI.
119 ECJ judgment of 9 September 2003 *Burbaud* (C-285/01).
120 www.ciriusonline.dk, see above chapter II.3.
121 Consolidation Act No. 74 of 24 January 2003.
122 Executive Order No. 602 of 25 June 2003.
123 See above chapter II.3 for description of the Act.

ing to section 3 the basis of the evaluation is a comparison of the qualifications that the alien has with the similar Danish educational qualifications.[124]

According to section 3 (4) (iii) *public authorities* have an *obligation* to let the evaluation be the basis of their decisions on *employment* (as do unemployment insurance funds in their decisions on acceptance, cf. section 3 (4) (ii) and public recognized educational institutions in their decisions on acceptance, cf. section 3 (4) (i)).[125]

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

In 2006 there were no major developments regarding the right to be credited for *previous employment in the public administration* in other EU Member States. In a paragraph in the Guidance on Personnel Administration[126] it is expressly stated that previous employment in other Member States shall be taken into account to the same extent as had it been employment in Denmark. This applies to Danish citizens and other EU citizens alike. In the guidelines reference is made to the jurisprudence of ECJ and the Communication from the Commission from December 2002.[127]

2. Equality of treatment

A public employer has a special obligation to ensure equality for all employers regarding gender, ethnic origin, nationality etc.[128] as stated in the Co-operative agreement, section 5 (5) ('Samarbejdsaftalen'), which is an agreement on co-operation and co-operation committees in the state's companies and institutions.[129] Apart from the legislation on prohibition on differential treatment on specific grounds, a public employer is subject to the principle on equality ('lighedsgrundsætning'), the principle on legality ('legalitetsprincippet') and the rule on instruction ('instruktionsreglen'). See also above chapter II.1.

2.1. Recognition of professional experience for the purpose of determining the professional advantages

Regarding salary, the Guidance on Personnel Administration, 2007, chapter 16.2.4.1 states that *professional experience obtained in another EEA country* has to be accounted for in the same manner as had the occupation been in Denmark.[130]

Hence, the comparison of previous occupation has to be done on an objective and non-discriminatory basis, and without accounting for whether the previous employment was under the conditions for civil servants or collective agreements.

These principles apply to both workers from other Member States and Danish citizens working in another Member State.

In the guidelines reference is made to the jurisprudence of ECJ and the Communication from the Commission from December 2002.

In addition to rules on grade, there are rules on anniversary bonus.[131] The seniority is estimated from the first employment within the Danish state only (previous employment within the state in Greenland is included).

124 See www.cvuu.dk/Default.aspx?ID=3509 and www.cvuu.dk/default.aspx?id=3510.
125 This is also mentioned in the Guidance on Personnel Administration, 2007, chapter 15.3.2.5. See above chapter II.3 on the exception to this.
126 Guidance on Personnel Administration, 2004, chapter 18.
127 *Free movement of workers – achieving the full benefits and potential*, Communication from the Commission, 11 December 2002.
128 Guidance on Personnel Administration, 2007, chapter 15.2.2.9.
129 Circular No. 9209 of 29 April 2005.
130 Circular No. 6633 of 16 July 1987 on Salary Seniority contains the detailed rules on determination of advantages.
131 Circular No. 186 of 28 December 1989 and amendments.

Draft legislation, circulars etc.

Nothing to report.

Legislative trends following procedures of infringement set in motion by the Commission

Nothing to report.

Judicial practice

Nothing to report.

Miscellaneous (administrative practices etc.)

The statistics show that 86 % of the evaluations performed by CIRIUS regarding professions not regulated by law, were evaluations obtained by the person holding the educational qualifications. The rest of the evaluations were mainly obtained by an employer, which in most of the cases was a public employer (8,2 % and 3,7 % as regards public employers and municipalities, respectively).[132]

Recent legal literature

Ruth Nielsen, *EU's rammedirektiv 2000/78/EF og gennemførslen i Danmark*, 2005.
Ruth Nielsen, *Koncernarbejdsret*, 2. revised edition, Copenhagen 2006.
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Ole Hasselbalch, *Arbejdsmarkedets regler*, 8. edition, Copenhagen 2007.
www.ciriusonline.dk.

132 http://www.ciriusonline.dk/Default.aspx?ID=3770, see "Beretning for 2006 om vurdering og anerkendelse af udenlandske uddannelseskvalifikationer", p. 7, accessed on 22 August 2007.

CHAPTER V: MEMBERS OF THE FAMILY

1. Residence rights (transposition of Directive 2004/38)

The rights of family members concerning entry and residence are derived from those of the EU citizen performing the right to free movement. Reference can therefore be made to the general rules described in chapter I of this report, while the rules applying specifically to family members will be described below.

The 2006 EU Order[133]

The 2005 EU/EEA Order contained detailed rules on the issuance of residence certificates to family members, largely upholding the requirements of the 2004 EU/EEA Order, including those concerning housing and economic support. While economic requirements still have a basis in the 2006 EU Order, the *housing requirement* for family members of EU workers has been abandoned in the rules on family reunification that entered into force on 30 April 2006.
Section 2 of the 2006 EU Order defines the family members eligible for residence under the EU rules. For this purpose section 2 (1) includes the following categories of family members:

1) The EU citizen's spouse
2) Descendants (of the EU citizen or the spouse) under 21 years of age
3) Other descendants (of the EU citizen or the spouse) who are dependent on the EU citizen
4) Relatives in the ascending line (of the EU citizen or the spouse) if they are dependent on the EU citizen
5) Other relatives of the EU citizen if they, in the country of origin, are dependent on the EU citizen or are (were) living under the roof of the EU citizen
6) Other relatives of the EU citizen, if serious health reasons make it absolutely necessary that the EU citizen personally takes care of such relatives.

According to section 2 (2) a *registered partner* will be treated equally with a spouse.

The rules on spouses also apply to *cohabiting partners* in a *stable relationship*. This concept is defined in section 13 (1) of the Order as "regular cohabitation of prolonged duration", in practice normally at least 1½ years. For this category it is always a condition for family reunification that the EU citizen undertakes to support the applicant, cf. section 13 (2) of the Order. This corresponds largely to the general rules applying to cohabiting partners of Danish citizens and third country citizens (section 9 (1)(i) and 9 (3) of the Aliens Act).

The *right of residence* for family members, as defined in section 2, is laid down in sections 7-13 of the 2006 EU Order, in some instances subject to a requirement of economic support:

- Family members of *workers and self-employed persons* have the right of residence in Denmark, if they accompany or join the EU citizen and already have permanent lawful residence ("fast, lovligt ophold") in an EU Member State, cf. section 7 (1). For those family members defined in section 2 (1) no. (3)-(5) (see above) the residence right is, unless exceptional reasons make it inappropriate, conditioned on the EU citizen's ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system, cf. section 7 (2). These provisions also apply to family members of EU-8 citizens having lawful and actual paid employment in Denmark, provided that their income from such employment is to be considered more than just a marginal supplement to their other means, cf. section 7 (3).
- Family members of an EU *student* encompassed by section 4 of the EU Order have the right of residence in Denmark, if they accompany or join the EU citizen and already have permanent lawful residence ("fast, lovligt ophold") in an EU Member State, cf. sec-

133 For detailed reference, see above note 6.

tion 8 (1). According to section 8 (2) the residence right is, unless exceptional reasons make it inappropriate, conditioned on the EU citizen's ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system.

- Family members of an EU citizen with *sufficient means* encompassed by section 5 of the EU Order have the right of residence in Denmark, if they accompany or join the EU citizen and already have permanent lawful residence ("fast, lovligt ophold") in an EU Member State, cf. section 9 (1). According to section 9 (2) the residence right is, unless exceptional reasons make it inappropriate, conditioned on the EU citizen's ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system.
- Family members of an EU citizen encompassed by section 6 of the EU Order (*pensioners* etc., see chapter I.B above) have the right of residence in Denmark, if they accompany or join the EU citizen and already have permanent lawful residence ("fast, lovligt ophold") in an EU Member State, cf. section 10 (1). According to section 10 (2) the residence right for those family members defined in section 2 (1) no. (3)-(5) is, unless exceptional reasons make it inappropriate, conditioned on the EU citizen's ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system.

As described above, all these provisions of the 2006 EU Order are conditioning the right of residence for family members on their *previous lawful residence* of a permanent or long-duration nature ("i forvejen har fast, lovligt ophold") in an EU Member State. According to the Ministry of Refugee, Immigration and Integration Affairs, this requirement is based on the *Akrich* judgment,[134] of which special reference was made to paras. 49-54.[135] The exact meaning of this requirement is still unclear, in particular as regards the *duration and stability* of the required residence in another EU Member State. The Ministry is not known to have given any precise definition of the required duration of the previous residence, apart from stating that a visa-based stay cannot be considered sufficient for this purpose.[136] While more than 3 months is therefore necessary, it remains an open question whether some degree of permanency is generally required, as might be suggested by the Danish wording ("fast ophold"). The Ministry further argued that, despite the fact that article 10 of Regulation No. 1612/68 has now been repealed, it cannot be assumed that Directive 2004/38 was intended to challenge the asserted *Akrich* interpretation of the Regulation.[137]

The condition of economic support mentioned above can be enforced by requiring *economical documentation* in connection with the issuance of residence documents, depending on the status of the EU citizen (the 'sponsor') and, in some cases, on the family relationship:

- If the sponsor is a *worker or self-employed person*, or a *pensioner* or another EU citizen encompassed by section 6 of the EU Order, the issuance of a residence document ('registration certificate') for those family members defined in section 2 (1) no. (3)-(5) can be conditioned on the sponsor's presentation of documentation for his or her ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system, cf. sections 20 (3) and 22 (3) of the EU Order.
- If the sponsor is an EU citizen with *sufficient means*, the issuance of a residence document ('registration certificate') for all the family members defined in section 2 (1) can be conditioned on the sponsor's presentation of documentation for his or her ability to dispose of such income or other means of support that the family member(s) cannot be

134 ECJ judgment of 23 September 2003 *Akrich* (C-109/01). The Ministry's assessment of the impact of the ECJ judgment of 15 January 2007 *Jia* (C-1/05), if any, is not known yet.

135 Letter of 26 September 2006 from the Ministry of Refugee, Immigration and Integration Affairs to Aarhus Free Legal Aid Office.

136 *Ibid.*, p. 1.

137 *Ibid.*, p. 2.

assumed to become a burden to the public welfare system, cf. sections 20 (3) and 22 (3) of the EU Order.

- If the sponsor is a *student*, the issuance of a residence document ('registration certificate') for those family members defined in section 2 (1) no. (1), (2) and (6) can be conditioned on the sponsor's presentation of a *declaration* on his or her ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system, cf. sections 20 (2) and 22 (2) of the EU Order. The issuance of a residence document ('registration certificate') for those family members defined in section 2 (1) no. (3)-(5) can be conditioned on the sponsor's presentation of *documentation* for his or her ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system, cf. sections 20 (3) and 22 (3).

In assessing economical documentation, as required according to sections 20 (3) and 22 (3) of the EU Order, regard must be had to the personal circumstances of the sponsor and his or her family. The *documentation requirement* will always be fulfilled if the sponsor and the applicant family member together dispose of total income or other economic means corresponding to the sum of the benefits for which they would be eligible under section 25 (12) and section 34 of the Act on Active Social Policy.[138] These provisions refer to the so-called introductory aid ('starthjælp') which is the lowest cash benefit under the Act on Active Social Policy (around 600 euros per adult per month). Detailed rules on the calculation of the income and means, as well as the procedures to be followed by the administrative authorities involved, are laid down in section 23 of the EU Order.

While the requirement of documentation for the economic ability to support EU citizens' family members can be made at the time of the issuance of the residence document to the applicant family member(s), the condition of economic support is generally not supposed to be enforced *subsequent* to the actual family reunification.[139]

The requirement of economic support in relation to residence right for some family members of EU citizens – as well as the housing requirement in relation to family members of EU workers (not upheld in the 2006 EU Order) – was introduced in the 2004 EU/EEA Order. The background of these changes was the enlargement of the European Union and the Danish political agreement on transitional arrangements, as described in the explanatory memorandum to the Bill amending the Aliens Act in order to implement the transitional arrangements for citizens from the 8 new EU Member States in Central Europe.[140] Here it was stated that a precondition for letting workers from the EU-8 Member States bring their families with them should be that they dispose of appropriate housing and are able to support their family. As the Accession Treaty does not allow for transitional arrangements on such measures, these additional requirements were to apply to citizens from all EU Member States.[141]

Against this background, *discrimination* against EU workers is not likely to occur in connection with the requirement of economic support. Equal treatment with Danish citizens – and other sponsors applying for family reunification under the general national rules – seems to be provided for by the possibility to dispense with this requirement if exceptional reasons make it appropriate, cf. sections 7 (2), 8 (2), 9 (2) and 10 (2) of the EU Order. This criterion is similarly phrased as that governing the possibility of dispensation from the general economic support requirement for the sponsors of spouses applying for reunification under section 9 (3) of the Aliens Act.[142]

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138 Consolidation Act No. 1009 of 24 October 2005.

139 Cf. the explanatory memorandum to Bill No. L 157/2003-04, para. 3 in fine, and sections 26-27 of the 2006 EU Order.

140 Act No. 283 of 26 April 2004 (see chapter VIII).

141 Explanatory memorandum to Bill No. L 157/2003-04, paras. 1.2 and 3.

142 It should be noted, however, that the general requirement of economic support for the sponsors of spouses was made more lenient as of 1 February 2007, due to the amendment of section 9 (3) by Act No. 89 of 30 January 2007. The 2007 report will describe this amendment in detail and analyse its possible implications for the issue of discrimination against EU workers.

Cessation of residence right

The time limited residence right of a family member of an EU citizen ceases in the same situations as that of the principal EU citizen, i.e. if the conditions according to the relevant provisions on the right of residence are no longer met, cf. section 26 (1) of the 2006 EU Order (see also chapter I.C above).

The special rule in section 26 (2) of the EU Order applies to family members having the right to remain after the sponsoring EU citizen's death or departure or after divorce, according to sections 11 and 12, respectively (see below). The time limited residence right of such family members ceases if they give up their residence in Denmark or stay outside the country for more than 12 months.

Sections 11 and 12 of the 2006 EU Order lay down detailed rules on family members' right to remain in Denmark after the sponsoring EU citizen's death or departure and after the dissolution of marriage.

In case of the principal person's *death or departure* from Denmark,

- Family members being EU citizens maintain the right of residence, cf. section 11 (1).
- Family members being third country citizens maintain the right of residence, provided they have been staying in Denmark for at least 1 year before the death of the principal person, cf. section 11 (2). The continued residence right is, however, conditioned on the family member(s) being in paid employment or self-employed and proving his or her ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system, as well as taking out a health insurance.
- The latter economic requirements can be dispensed with, according to section 11 (3), if
  - the principal person had resided in Denmark for at least 2 years at his or her death, or
  - the death of the principal person was due to an industrial accident or an occupational illness, or
  - the family member was the principal person's spouse and lost his or her Danish citizenship by marriage to the principal person.

The right to *continued residence* for the family member(s) of an EU citizen which under certain circumstances can be derived from the ECJ judgment in the *Baumbast* case[143] did hitherto not seem to be covered by specific Danish rules. This has changed as a result of the 2006 EU Order, section 11 (4) stipulating that a third country citizen being the child of an EU citizen maintains the right of residence in case of the EU parent's death or departure, provided that the child is staying in the country and is registered with an educational institution. The residence right continues until the child has finalised the actual education. The person holding custody – defined as 'actual' or 'de facto' custody – of the child has a right to stay with the child.

In case of dissolution of an EU citizen's marriage by way of *divorce or annulment*,

- Family members being EU citizens maintain the right of residence, cf. section 12 (1).
- Family members being third country citizens maintain the right of residence according to section 12 (2), if
  - the marriage has existed for at least 3 years, of which at least 1 year within Denmark, at the point in time when the dissolution proceedings begin, or
  - custody of the principal person's child(ren) has been transferred to the third country spouse, or
  - particularly difficult circumstances exist, e.g. as the result of domestic violence during the time of marriage, or
  - the third country spouse has the right of access to a minor child and such access has to be exercised in Denmark.
- According to section 12 (3), however, the continued residence right as described under section 12 (2) is conditioned on the third country spouse being in paid employment or

143 ECJ judgment of 17 September 2002 *Baumbast* (C-413/99).

self-employed and proving his or her ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system, as well as taking out a health insurance.

Right of residence for third country spouses of Danish citizens

The ECJ judgments in the *Singh* and *Akrich* cases[144] have gained attention and importance due to the tightening of the general Danish rules on family reunification over the past few years, especially in 2002 (see chapter VII for an overview of these domestic rules). The reason for this was that a number of Danish citizens who were unable to fulfil the requirements under Danish law for being reunited with family members, in particular spouses, were hoping to rely on the EU rules on free movement as these rules allow for persons exercising the right to free movement to bring with them their family. Such a right also applies to EU citizens upon return to their own country after having resided in another Member State, as stated by the ECJ in the abovementioned judgments.

A Danish citizen with a third country spouse will therefore be entitled to bring his or her spouse to Denmark in order to reside here, if the couple have been living together in another EU Member State and the Danish citizen has had employment or other *relevant status under EU law* there, as specified and discussed below. In this respect it makes no difference whether the couple would be unable to fulfil the strict requirements for family reunification in the Danish Aliens Act (see chapter VII).

The rules guiding the administrative practice concerning the scope of the *Singh* principles were modified in 2006 with a view to adapting them to the 2006 EU Order and in particular to the categories of persons under Directive 2004/38, while maintaining the narrow scope of application. According to the prevailing guidelines, a residence permit will be granted on the basis of EU law in the following circumstances:[145]

- The Danish spouse has resided in another EU Member State or EEA State as a *worker, self-employed person or service provider* or as *retired* from activity in one of these categories,
- The Danish spouse returns to Denmark and takes up economic activity here that would qualify for residence as a *worker, self-employed person or service provider* or as *retired* from activity in one of these categories, if he/she had taken up residence in a third EU/EEA State instead,
- The couple must be married by the time they enter Denmark and during the third country spouse's continued residence in the country,[146] and
- The foreign spouse must have stayed lawfully in the EU/EEA State in which the Danish spouse exercised the right to residence as a worker, self-employed person or service provider or as retired from activity in one of these categories.

Although the background of many of the applications for residence for third country citizens under EU law is the fact that they would not fulfil the general requirements pursuant to the Aliens Act for being reunified with their Danish spouses – and their stay in another EU country could thus be considered an attempt to evade restrictions in domestic law – it has been made clear by the Danish Immigration Service that the Danish spouse's motives for moving in order to be able to invoke EU law are not a relevant consideration. Abuse of EU residence rights will only be an issue in case of marriage of convenience or forced marriage.[147]

144 ECJ judgments of 7 July 1992 *Singh* (C-370/90) and 23 September 2003 *Akrich* (C-109/01).

145 Danish Immigration Service, Family Reunification Guidelines No. 1/06 of 4 October 2006 on applications for family reunification with Danish citizens applying the right to free movement under the EC Treaty, pp. 2-3. These Guidelines replaced Residence Guidelines No. 16/06 of 7 July 2006 (not available) replacing Guidelines No. 3/06 of 9 January 2006, the latter being essentially the same as the previous guidelines.

146 As an alternative to marriage, regular cohabitation of prolonged duration also qualifies as a basis for family reunification, see above on section 13 of the 2006 EU Order.

147 Danish Immigration Service, Family Reunification Guidelines No. 1/06 of 4 October 2006, p. 5 and 9.

As an important administrative difference, applications for family reunification with third country spouses of Danish citizens according to the *Singh* principles are dealt with by the Danish Immigration Service, whereas the implementation of residence rights under EU law normally takes place through the Regional Government Administration offices issuing residence certificates under the EU Order. This is formally motivated by the fact that the EU Order only applies to the family members of non-Danish EU citizens. In case of a positive decision by the Danish Immigration Service, the applicant will be issued a residence permit pursuant to section 9 c (1) of the Aliens Act, yet on more lenient conditions than normally required under this provision, in order to adhere to EU law.[148]

Again in 2006, the scope of application of the *Singh* principles was discussed and examined. The main issue still seems to be whether the right to residence for a third country spouse upon the Danish citizen's exercise of the right to free movement is limited to workers, self-employed persons and other *economically active persons*, or this right also applies to the spouses of students, pensioners and persons with sufficient means who have exercised their right to free movement on the basis of the Directives 93/96, 90/365 and 90/364, respectively, or the successor Directive 2004/38. The primary reason for the emergence of this issue is a number of cases concerning Danish citizens who moved to Sweden but kept their job in Denmark, and who were invoking EU law and the *Singh* principles in their applications to bring third country spouses with them upon removal back to Denmark.

In December 2004 the Ministry of Refugee, Immigration and Integration Affairs noted in a general statement on the issue that the ECJ had not answered the question whether the *Singh* principles can be extended to the groups mentioned above, and that the judgment seemed to be interpreted in different ways in different Member States (Germany: extension in practice, United Kingdom: non-extension, according to the Ministry). The Ministry concluded by stating that the right to family reunification will be administered in such a way that the domestic requirements for residence permits under the Aliens Act will apply to family members of Danish citizens belonging to the three latter groups mentioned above. In other words, the principles derived from the *Singh* judgment do not apply in such cases.[149]

This ministerial interpretation of the scope of application is now being implemented in practice by the Danish Immigration Service.[150] However, the most recent guidelines include an additional restriction, since Danish citizens having been *recipients of services* are no longer considered as qualifying for family reunification under the *Singh* principles upon return to Denmark.[151] As an extension of their scope of application, on the other hand, Danish citizens returning to Denmark for *retirement* are now being considered as covered by the *Singh* principles.[152]

The restrictive implementation of the residence rights under EU law has been challenged before the European Commission by some Danish NGOs. On behalf of three organisations of Danish-foreign couples, the Documentation and Advisory Centre on Racial Discrimination (DACoRD) in February 2005 complained about the restriction of the scope of application of the *Singh* principles, arguing that the ministerial interpretation described above implies a change of administrative practice, since previously at least Danish students have been allowed to bring third country spouses with them at return to Denmark under EU law, and that the restricted practice is an impediment to the right of free movement for the affected groups of citizens.[153] In a subsequent letter of complaint, DACoRD has brought the

148 Danish Immigration Service, Family Reunification Guidelines No. 1/06 of 4 October 2006, p. 6 and 9.

149 Ministry of Refugee, Immigration and Integration Affairs, statement regarding the scope of the *Singh* and *Akrich* judgments, 21 December 2004.

150 Danish Immigration Service, Family Reunification Guidelines No. 1/06 of 4 October 2006, p. 4.

151 Danish Immigration Service, Family Reunification Guidelines No. 1/06 of 4 October 2006, p. 3.

152 See Danish Immigration Service, Family Reunification Guidelines No. 1/06 of 4 October 2006, p. 3 (quoted above). While this extension was expressly noted by the Danish Ministry of Employment in its letter of 30 March 2007 to the European Commission, commenting on the European Report 2005, the letter does not seem to include information about the aforementioned restriction of the *Singh* principles.

153 Letter of 28 February 2005 from DACoRD to the European Commission's Representation Office in Denmark.

Commission's attention to the problem of delays in processing applications for family reunification, resulting from the procedures followed by the Danish Immigraton Service due to the different legal basis for the residence permit issued to third country spouses in such cases, as compared to the smooth procedure under the EU/EEA Order.[154]

In March 2006 the European Commission submitted the matters complained of to the Permanent Representation of Denmark before the EU in order to have the Danish Government's comments.[155] The Government responded in October 2006.[156] The abovementioned extension of the scope of application of the *Singh* principles to cover Danish citizens returning for retirement resulted from the administrative contemplations in connection with the preparation of this response to the Commission, in particular on the advice of the Ministry of Justice to the Ministry of Refugee, Immigration and Integration Affairs. Criticism of the latter has subsequently been raised by the Parliament's Ombudsman due to the lack of publicly available information about this change of administrative practice concerning the implementation of EU law.[157]

Public interest in the issue continued in 2006, and a number of Danish citizens are likely to become affected by the general policy thus adopted by the Ministry. Hence, cases may still occur in which the restrictive practice and the underlying legal reasoning will be challenged before the courts. Given that the primary basis of the Ministry's statement is the absence of ECJ precedents and the reference to diverging practices in other Member States, there seems to be a high degree of probability that Danish courts will refer this question to the ECJ in a preliminary ruling request.

In addition, there has been parliamentary action against the policy change that took place in 2004. Following the newspaper disclosure of internal discussions and reservations within the Ministry of Refugee, Immigration and Integration Affairs during the preparation of the change of administrative practice in 2004, questions were raised to the Minister by opposition party members in December 2006 and January 2007.[158] In a recent attempt to disclose possible divergences between the two Ministries involved in the matter, the Minister of Justice was questioned in a parliamentary committee hearing on 12 March 2007, yet with no detailed information about the internal discussions between the two Ministries.[159]

Judicial practice

As a rather rare example of judicial review of administrative decisions concerning aliens' residence rights, the High Court of Eastern Denmark in 2005 had to examine certain aspects of the administrative practices through which the Danish Immigration Service is implementing the *Singh* principles as described below.[160] In the case brought before the High Court, a US citizen and her Danish husband had been living in London, UK. Having moved with her husband to Denmark, she applied for a residence permit in July 2002, and in February 2003 the permit was issued pursuant to the general rules on family reunification, cf. section 9 of the Aliens Act. Following a submission from her lawyer who claimed that the case was falling

154 Letter of April 2005 from DACoRD to the European Commission's Representation Office in Denmark.

155 Cf. letter of 20 April 2006 from the European Commission to DACoRD. See also letter of 11 May 2006 from the European Commission to staff reporter Henrik Vinther Olesen at the Danish newspaper Morgenavisen Jyllands-Posten.

156 Letter of 19 October 2006 from the Permanent Representation of Denmark to the European Commission.

157 Danish Parliament's Ombudsman, statement of 7 May 2007 to the Ministry of Refugee, Immigration and Integration Affairs. The Ombudsman made it explicit that his examination of the matter had not dealt with the issue of legality of the change of administrative practice.

158 Cf. transcript of the Minister hearing by the Parliamentary Committee on Aliens and Integration, 14 December 2006, question J, and the Minister's answers of 4 January 2007 to questions No. S 1625, S 1626, S 1627, S 1629, S 1630, S 1633, S 1634, and S 1635, raised by MP Morten Østergaard, FT 2006-07.

159 Cf. transcript of the Minister of Justice hearing by the Parliamentary Committee on Aliens and Integration, 12 March 2007, question P.

160 High Court of Eastern Denmark, judgment of 16 November 2005, *Alison Ward Petersen v. Danish Immigration Service*. Published in UfR (Weekly Legal Magazine) 2006, p. 711.

within the scope of the principles laid down by the ECJ in the *Singh* judgment, as well as media reports on the case, the Immigration Service reopened the case in May 2003, and changed the conditions of the applicant's residence permit, now referring to section 9 c (1) of the Aliens Act as the legal basis of the permit. At the same time, the Immigration Service regretted that it had been unaware that the applicant might be entitled to a residence permit according to EU law, and offered to reimburse her husband's expenses connected to establishing the bank guarantee that had been required pursuant to section 9 of the Aliens Act, but which was no longer necessary under section 9 c (1), as applied in accordance with the relevant principles of EU law.

The new residence permit was valid for 2 years, reckoned from the initial application in 2002, and renewable for a period of 3 years to be followed by the possibility to apply for permanent residence. In July 2004 the Immigration Service extended the residence permit until 2007, still conditioned on the applicant's cohabitation with her Danish husband. This condition was abandoned in February 2005, the Immigration Service again regretting its error in issuing the residence permit.

Already in October 2003, however, the third country spouse had opened a court case against the Danish Immigration Service, claiming official recognition of the erroneous decisions violating applicable EU law as well as a compensation of 30.000 DKK (approx. 4.000 euros). The High Court rejected the first part of the claim for recognition as inadmissible, holding that the applicant no longer had a legal interest ('concrete and actual interest') in judicial review of the matter, due to the Immigration Service's expression of regrets and payment of reimbursement. The second part of the claim for recognition – which had also been held inadmissible by the City Court – was accepted by the High Court, finding that the residence permit issued in May 2003 was containing provisions on validity, right to work and extension which were incompatible with EU law. Thus, the applicant had been unable to calculate her legal position correctly. The claims for compensation, on the other hand, were fully dismissed, the High Court arguing that the applicant had not from the outset indicated to the Danish Immigration Service that she considered herself being within the scope of EU law. Notably, however, the High Court at the same time expressed the opinion that, based on the information provided in the initial application for residence in Denmark, the Immigration Service should have assumed that the applicant third country spouse was to be assessed under the *Singh* principles.

Hence, it seems that in this case the Danish courts – in particular the City Court, but to a significant degree even the High Court – demonstrated a somewhat reluctant approach to scrutinizing the administration's effective compliance with EU law concerning mobility rights.

Subsequent to the High Court judgment in November 2005, the Danish Immigration Service published a change of practice concerning the period of validity of residence permits being issued to spouses or cohabiting partners of Danish citizens who move back to Denmark after having lived and worked in another EU Member State. According to the new guidelines, residence permits issued in such cases will be valid for a period of 5 years.[161]

SIS checks on third country family members

According to section 10 (2)(iv) of the Aliens Act, a foreigner who is not a citizen of an EU Member State or a Schengen country cannot – unless particular reasons, such as respect for family unity, make it appropriate – be granted a residence permit if an alert on the person has been entered into the Schengen Information System (SIS). This led in 2003 to an instruction from the Danish Immigration Service to the state county offices to make sure that an SIS check is carried out before a residence certificate is issued to EU citizens' family members who are third country citizens.[162]

161 Danish Immigration Service, news release 21 March 2006: "Ny dom ændrer udlændingemyndighedernes praksis" (available at www.udlst.dk/Nyheder).

162 Information letters from Danish Immigration Service to the state county offices No. 1/2003 and No. 9/2003.

In 2004 the Danish Immigration Service issued a letter of instruction to the state county offices specifying the conditions for denying the issue of a residence certificate or for revoking a residence certificate on the basis of an alert in SIS,[163] when the person in question is a family member of an EU citizen performing his or her right to free movement. The main point of the instruction is that the mere fact that an alert on the third country citizen has been entered into SIS cannot in itself lead to the denial or revocation of a residence certificate. Such a decision must be made on a case-by-case basis taking into account the actual situation with regard to the threat that the person poses in relation to public order, security and health. That threat must be current, genuine and sufficiently serious in order to serve as the basis for a negative decision with regard to a residence certificate.[164]

2. Access to work

According to the Aliens Act section 14 (1) (ii) aliens are exempt from the requirement of a work permit if they are encompassed by the EU rules on free movement of persons, as described in sections 2 and 6 of the Act. This exemption does not apply to EU-8 citizens.

Section 15 of the 2006 EU Order, by contrast, exempts from the requirement to hold a work permit all persons who have the right of residence under the EU Order. Given that section 15 includes a reference to section 14 (1) (ii) of the Aliens Act, the exceptional rule for EU-8 citizens laid down in the Act seems to prevail, despite the fact that EU-8 citizens may in some circumstances qualify for residence right under the EU Order.

3. Access to education (study grants)

Tuition is free for all EU/EEA students as well as for students participating in an exchange programme. As from 2006 all other students normally have to pay a tuition fee.[165]

By Act No. 312 of 18 April 2006 the Act on the State Education Grant ('Lov om statens uddannelsestøtte') was amended to implement parts of Directive 2004/38 among other factors.[166] The relevant provisions are section 2a (2) and (3), cf. Executive Order No. 349 of 20 April 2006 ('SU-bekendtgørelsen') section 67-69, issued by the Ministry of Education in accordance with section 2a (4) of the Act authorizing the Minister to lay down rules on aliens' right to study grants. The Act and the Executive Order limit access to study grants for EU/EEA citizens who are *not economically active* in Denmark.[167]

According to section 2a (2) of the Act on the State Education Grant, students who are EU/EEA citizens and their family members can obtain study grants for education in Denmark and abroad on the conditions following from the EU rules or the EEA agreement. EU/EEA citizens who are not workers or self-employed and their family members do not acquire the right to study grants until they have resided for 5 consecutive years in Denmark, cf. section 2a (3).[168]

Aliens who are not Danish citizens or EU/EEA citizens

According to Executive Order No. 349 of 20 April 2006 section 66, students who are not Danish citizens or EU/EEA citizens can obtain study grants on equal conditions as for Danish citizens when the alien either

163 It should be mentioned that the Danish authorities do not seem to distinguish between third country citizens who are family members of EU citizens and other third country citizens with respect to *entering* alerts on persons into SIS.

164 Information letter from Danish Immigration Service to the state county offices No. 3/2004, 28 June 2004.

165 Cf. Act No. 337 of 18 May 2005 amending the University Act, cf. Consolidation Act No. 280 of 21 March 2006.

166 Consolidation Act No. 628 of 23 June 2005. The amending Act entered into force on 30 April 2006 as regards the relevant provisions.

167 Cf. the explanatory memorandum to Bill No. L 95/2005-06, and see below.

168 See further below.

- is a German citizen belonging to the Danish minority in Southern Slesvig, or
- is an Icelandic citizen having resided in Denmark the 6 March 1946 or within 10 years before that date, or
- is encompassed by the Act on Integration, or
- upon entry in Denmark was below 20 and together with his/her parents took up residence in Denmark and the family still resides in Denmark, or
- just prior to the application has resided in Denmark for 2 consecutive years and has been, and still is, married or in a registered partnership with a Danish citizen for minimum 2 years, or
- just prior to the start of the education has resided in Denmark for minimum 2 years as a main rule and been working as an employee or self-employed for a minimum of 30 hours a week, or
- just prior to the application has resided in Denmark for 5 consecutive years when the stay in Denmark was not with the object of studying.

In cases of more than 2 years consecutive stay abroad, the right to study grants ceases until one of the above – or below - mentioned conditions once again are fulfilled, cf. section 68 (3).

Students who are not Danish citizens cannot receive study grants if they can receive study grants in their home country, unless they are EU/EEA citizens, neither can foreign students receive study grants if they actually do receive study grants in their homeland, cf. section 69.

Aliens who are EU/EEA citizens

According to Executive Order No. 349 of 20 April 2006 section 67, EU/EEA citizens can obtain study grants on equal conditions as for Danish citizens when the alien is either

- considered a *worker or self-employed person* under the EU rules
  The following categories are also considered encompassed by the concepts of worker or self-employed:
  - an EU/EEA citizen who has been working in Denmark as an employee or self-employed person, when there is relation between the education and the former work in terms of contents and time
  - an EU citizen who is involuntarily unemployed and as a consequence of health grounds or structural circumstances in the labour market is in need of re-education with the purpose of employment in a profession without relation to the former work in Denmark in terms of contents and time, or
- a *spouse* of an EU/EEA citizen who is considered a *worker or self-employed* under the EU rules, if he/she is or has been living with the EU/EEA citizen in the period of time when the EU/EEA citizen was a worker or self-employed in Denmark, or
- a *child* of an EU/EEA citizen who is considered a *worker or self-employed* under the EU rules, if the child resided in Denmark with the EU/EEA citizen and is or has been living with the EU/EEA citizen in the period of time when the EU/EEA citizen was a worker or self-employed in Denmark. It is a condition that the student is not of such age or status making it unreasonable to put emphasis on the parent's circumstances. If the child is not residing in Denmark at the time of the beginning of the education, the child is only entitled to study grants if the EU/EEA citizen is considered a worker or self-employed under the EU rules and has provided for the child until the time for the beginning of the education, or
- a *parent* to an EU/EEA citizen who is considered a *worker or self-employed* under the EU rules, if the parent is provided for by and lives with or has lived with the EU/EEA citizen in a period of time when the EU/EEA citizen is or was a worker or self-employed in Denmark, or
- an *EU/EEA citizen or family member* thereof who has resided for *5 consecutive years* in Denmark:

- According to Act No. 312 of 18 April 2006 section 2a (3), the stay in Denmark is not considered interrupted due to temporary stays outside the country when these stays in total do not exceed 6 months a year or when the stay abroad is of longer duration due to obligatory military service or if one stay of maximum 12 consecutive months is caused by special circumstances, such as pregnancy and birth, serious illness, studies or foreign assignment. In cases of more than 2 years consecutive stay abroad, the right to study grants cannot be required until a following stay in Denmark of 5 consecutive years.

4. Other issues concerning equal treatment (social and tax advantages)

Nothing to report with specific bearing on family members of EU citizens. See generally chapters III, IV, and VI.

Recent legal literature

Henrik Thomassen and Pernille Breinholdt Mikkelsen, 'Indrejse og ophold for udlændinge omfattet af EU-reglerne', in L.B. Christensen et al., *Udlændingeret*, 3. edition, Copenhagen 2006, pp. 261-71.

CHAPTER VI. RELEVANCE/INFLUENCE/FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGMENTS

1. Right of residence for third country spouses of Danish citizens

The impact of the ECJ judgments in *Singh*, *Akrich* and *Jia* is described and discussed above in chapter V.

2. Jobseekers' entitlement to social advantages

According to section 12 a of the Act on Active Social Policy,[169] EU/EEA citizens residing in Denmark on the basis of Community law on jobseekers' right to residence are entitled to no other economical assistance under the Act than coverage of costs related to the return to their home country. This special provision was inserted into the Act in implementation of the political agreement on access to the labour market following the EU enlargement.[170] As the amendment was proposed to the Parliament in February 2004, before the ECJ delivered its judgments in the *Collins* and *Trojani* cases,[171] the possible impact of these judgments was not discussed in the explanatory memorandum, nor elsewhere in the preparatory works. It was, however, argued that the new provision aimed at emphasising that this category of EU citizens – whose right of residence under EU law is conditioned on economic self-sustainability – should not be entitled to receive public assistance on a current basis during their stay in Denmark as first-time jobseekers.[172]

According to the available information, the National Appeals Board on Social Welfare had still not by the end of 2006 examined any cases concerning section 12 a of the Act on Active Social Policy.[173] Thus, the impact of *Collins*, *Trojani* and the more recent *Ioannidis* judgments[174] on the application of that provision has not yet been clarified.

3. Social cash benefits for Danish citizens returning from another EU country

Section 11 (3) of the Act on Active Social Policy makes it a requirement for the payment of full cash benefits ('kontanthjælp') that the recipient has resided in Denmark during a total period of 7 years within the past 8 years. If this requirement is not fulfilled, the significantly lower amount of the so-called *introductory aid* ('starthjælp') will be paid out instead. The provisions on this reduced benefit and the residence requirement to obtain full cash benefits were adopted in 2002 for the primary, yet only implicit purpose of making it less attractive for refugees and other third country aliens to come to Denmark and apply for asylum or other kinds of residence permit.[175]

The distinctive target of the introductory aid is demonstrated by section 11 (4) of the Act on Active Social Policy, providing that the requirement of 7 years of residence in Denmark does not apply to EU/EEA citizens insofar as they are entitled to cash benefits under EU law. The somewhat unclear scope of this exemption was clarified in the explanatory memorandum. Reference was here made to Regulation No. 1612/68 and the EEA Agreement, and the ECJ caselaw according similar rights to self-employed persons as to workers under these instruments. It was further explained that the requirement of 7 years of residence therefore does not apply to workers and self-employed persons, nor to Danish citizens comprised by

169 Consolidation Act No. 1009 of 24 October 2005.
170 Act No. 282 of 26 April 2004. The transitional arrangements are described in chapter VIII.
171 ECJ judgments of 23 March 2004 *Collins* (C-138/02) and 7 September 2004 *Trojani* (C-456/02).
172 Explanatory memorandum to Bill No. L 153/2003-04, paras. II.1 and IX and specific comments on section 12 a.
173 Search result from the list of appeals cases examined by the National Appeals Board on Social Welfare ('Ankestyrelsen'), available at http://www.dsa.dk/afgoerelser/principafgoerelser/default.asp?mode=search_result.
174 ECJ judgment of 15 September 2005 *Ioannidis* (C-258/04).
175 Act No. 361 of 6 June 2002 amending the Act on Active Social Policy and the Integration Act.

Regulation No. 1612/68, such as Danish citizens having resided as workers in another EU/EEA country.[176] Against this background, section 11 (4) seems to imply that Danes and other EU/EEA citizens would only rarely, due to residence periods outside the EU/EEA countries, be referred to the introductory aid.

A couple of recent decisions from the National Appeals Board on Social Welfare have created doubts regarding the scope of this EU/EEA exemption, in particular regarding Danish citizens who have resided under the EU rules in another Member State.

In the first case the applicant had returned to Denmark after a number of years of residence and work in another EU/EEA country. Upon return he applied for cash benefits, but was only granted the lower introductory aid. The reason given for this was that he did not fulfil the residence requirement in section 11 (3) of the Act on Active Social Policy, and that his period of residence in the other Member State did not count towards the 7 years rule because he had not acquired the *status of worker* in Denmark. This conclusion, as well as the line of reasoning, was upheld by the National Appeals Board on Social Welfare. The Appeals Board referred to the caselaw of the ECJ, in particular para. 11 in the *Tsiotras* judgment,[177] invoking this as a basis of the assumption that the status of worker is lost in case of cessation of an employment contract unless it is documented that the EU citizen is genuinely jobseeking in the Member State in which he or she got unemployed.[178]

The National Appeals Board's decision cannot be considered legally sustainable, as it seems to be based on a misinterpretation of the EU rules involved. Not only was the ECJ in *Tsiotras* dealing with a particular situation regarding the transitional arrangements upon the accession of Greece to the EC, but the Appeal Board also confused the requirement of previous employment and actual jobseeking in a host Member State with the issue of seeking employment in the Member State of origin upon return to that country. No mention was made of the possible relevance of more recent ECJ caselaw such as *Collins* or *Trojani*. Remarkably, already a month after the publication of this decision the National Appeals Board admitted another case concerning introductory aid in order to carry out a new principled examination "as a supplement" to the abovementioned decision.[179]

In its decision on the latter case, the National Appeals Board on Social Welfare maintained focus on the issue of having *acquired the status of worker* upon the Danish citizen's return to Denmark from abroad.[180] While that criterion was rather obviously met in this case, it seems at the same time to detract attention from the more pertinent question of whether the person actually has had such status while staying in another EU Member State. In the most recent appeals case the Danish citizen who applied for cash benefits had been living in Germany as a housewife for 21 years, when returning to Denmark with her four children. Although she might have been eligible for residence right under EU law in Germany, and she perhaps actually did hold an EU residence certificate there, that issue was never highlighted in the appeals case, and it did not appear to be considered relevant at all by the National Appeals Board. While the latter decision is therefore questionable under Danish social welfare law for similar reasons as the abovementioned decision from December 2005 – and possibly also raises problems of principle under EU law – it cannot be considered an impediment to the free movement of workers between Member States.

4. SIS checks on third country family members

The guidelines described above in chapter V.1 seem to comply with the recent judgment in *Commission v. Spain*.[181]

176 Explanatory memorandum to Bill No. L 126/2001-02 (2. Session), para. 5.4 and specific comments on section 11 (4).
177 ECJ judgment of 26 May 2003 *Tsiotras* (C-171/91).
178 National Appeals Board on Social Welfare ('Ankestyrelsen'), decision of 14 December 2005. Reported in SM A-1-06, 3 February 2006.
179 National Appeals Board on Social Welfare ('Ankestyrelsen'), admissibility decision of 3 March 2006.
180 National Appeals Board on Social Welfare ('Ankestyrelsen'), decision of 30 August 2006. Reported in SM A-34-06, 1 December 2006.
181 ECJ judgment of 31 January 2006 *Commission v. Spain* (C-503/03).

5. Foreign company vehicles

As a consequence of the judgments in *Commission v. Denmark* and *van Lent*,[182] the Ministry of Taxation made a proposal to amend the Danish Act on Registration Tax on Motor Vehicles[183] in order for the Act to comply with these ECJ judgments.[184]

The amendment proposed that motor vehicles made available to an employee resident in Denmark by a company which has its registered office or principal establishment in another EU/EEA country, and vehicles used by a self-employed person resident in Denmark, such person being established or providing services in another EU/EEA country, for the performance of that person's business activities in another EU/EEA country, shall not be liable to taxation under this Act, unless the vehicle is intended to be used essentially in Denmark on a permanent basis or is in fact used in that manner.

In order to decide whether the motor vehicle is used essentially in Denmark on a permanent basis, two objective criteria have been introduced: a day-criterion and a kilometer-criterion, both working within a period of 12 months. The day-criterion applies when the vehicle is used for 183 days in Denmark within 12 months and the kilometer-criterion when the vehicle is used less abroad than in Denmark in terms of kilometers within 12 months. Dispensation has been made possible.

The proposed amendment was adopted by the Parliament in June 2006, and entered into force shortly after.[185]

182 ECJ judgments of 2 October 2003 *Hans van Lent* (C-232/01) and 15 September 2005 *Commission v. Denmark* (C-464/02).

183 Consolidation Act No. 977 of 2 December 2002 with amendments.

184 Bill No. L 225/2005-06.

185 Act No. 519 of 7 June 2006 (entered into force on the second day upon official promulgation of the amendment), cf. Consolidation Act No. 305 of 26 March 2007.

CHAPTER VII: POLICIES, TEXTS AND/OR PRACTICES OF A GENERAL NATURE WITH REPERCUSSIONS ON FREE MOVEMENT OF WORKERS

1. Family reunification

The general rules on family reunification, as laid down in the Aliens Act, have been amended and tightened several times over the past few years. In 2006 only less important amendments of the Aliens Act were adopted with regard to family reunification.

These rules do not apply to EU citizens exercising their right to free movement, as the residence right of family members of such persons will be decided in accordance with the EU Order (see chapter V above). Nevertheless, there is a link between the general Danish rules and EU law on free movement, because quite many persons being unable to fulfil the strict requirements in the Aliens Act, or unwilling to go through the cumbersome procedures under the Aliens Act, are invoking EU law in this field. For that reason an overview shall be given of the most important general requirements concerning family reunification, primarily focusing on the reunification of spouses:[186]

- For *spouses* there is a minimum age of 24 years for both parties. The same applies to *cohabiting partners* in a stable relationship (normally at least 1½ years of duration). There is no right to family reunification with *parents* except for situations where a negative decision in such a case would be contrary to Denmark's international obligations. *Children* must, as a starting point, be under the age of 15 in order to be granted residence for the purpose of family reunification.
- *Immigrants* must have had a permanent residence permit in Denmark for 3 years in order to be granted family reunification with a spouse. A permanent residence permit will normally require a lawful stay of at least 7 years in Denmark.
- An *economic support requirement* must be met.[187]
- A *housing requirement* must be met.
- An *economic guarantee* of approx. 53.000 DKK (approx. 7.000 euros) must be provided by the sponsor to cover any future public expenses to support the spouse.
- The sponsor must *not* have received *public financial assistance* for a period of 1 year prior to the decision on the application for family reunification, except for minor special benefits and benefits comparable to, or in substitution of, salary or pension.
- The so-called *attachment requirement* must be met, meaning that the aggregate attachment to Denmark of the spouses must be *stronger* than their aggregate attachment to any other country. Thus, if the two spouses' cumulative attachment to another country is stronger than, or just as strong as, their aggregate attachment to Denmark, a permit for family reunification in Denmark will not be granted.
- A residence permit cannot be granted if there is reasonable doubt about either of the spouses' *full consent* to enter into the marriage.
- The marriage must not be one of assumed convenience (*pro forma).*
- Both the applicant and the spouse already living in Denmark must sign a so-called *integration declaration* regarding active participation in the applicant's and, if relevant, the accompanying children's training of Danish language, culture etc. While signing such a declaration is an indispensable requirement for the issue of a permit for family reunification under the Aliens Act, it cannot be enforced by specific means directed towards the residence permit once the applicant has taken up residence in Denmark.

186 Section 9 of the Aliens (Consolidation) Act No. 945 of 1 September 2006. It should be noted that most of the requirements mentioned above can be dispensed with in exceptional cases, yet generally under very restrictive criteria.

187 This requirement was made more lenient as of 1 February 2007, cf. Amending Act No. 89 of 30 January 2007. Instead, the spouses will normally be excluded from cash benefits under social welfare legislation during a number of years upon the family reunification.

An amendment of the Aliens Act in 2005 aimed to accommodate parts of the criticism of the Danish rules on family reunification pronounced in 2004 by the Council of Europe's Commissioner for Human Rights. In a number of provisions of the Aliens Act wording was inserted in order to put emphasis on the particular weight to be given to *family unity considerations* in various cases involving the possible issue of a residence permit for a family member, mostly as regards the criteria for dispensing with the normal requirements for family reunification.[188] Since family unity should already be taken into account in such cases, the amendment may appear to be mostly symbolic, even though it did result in more liberal practices concerning family members of refugees who have been granted asylum in Denmark.

Judicial practice

Judgment of 16 November 2005 from the High Court of Eastern Denmark, *Alison Ward Petersen v. Danish Immigration Service*.[189]

Recent legal literature

Jens Vedsted-Hansen, 'Familiesammenføring', in L.B. Christensen et al., *Udlændingeret*, 3. edition, Copenhagen 2006, pp. 121-201.

2. Initiatives to prevent illegal work

Against the background of a Parliament decision to step up the fight against illegal work, a number of initiatives have been launched in recent years, including reinforced police surveillance and setting up regional networks to monitor the situation. The Aliens Act was amended in 2004 to increase the level of punishment for *illegal employment* of aliens, which can now lead to imprisonment of up to 2 years.[190] In order to accompany the measures taken against persons employing aliens illegally, an additional amendment was adopted in 2005 stepping up the level of punishment for aliens *taking up employment illegally*. Such employment can now be punished by up to 1 year of imprisonment.[191]

188 Act No. 324 of 18 May 2005 amending the Aliens Act.
189 Published in UfR (Weekly Legal Magazine) 2006, p. 711. The judgment is summarised and discussed above in chapter V.
190 Act No. 428 of 9 June 2004 amending the Aliens Act.
191 Act No. 324 of 18 May 2005 amending the Aliens Act.

CHAPTER VIII: EU ENLARGEMENT

1. Transitional arrangements regarding EU-8 Member States

The EU enlargement as of 1 May 2004 was a major political focal point throughout 2004, and still has been in 2005 and 2006. Before the enlargement took effect, the interest was focusing on the possible pressure on the Danish labour market and the risk of unintended use of the social benefits under the Danish welfare system. This concern has continued, even though Denmark has applied transitional arrangements in accordance with the Accession Treaty for the express purpose to avoid such problems, and experience so far indicates that they only occur to a limited extent in practice.

After the enlargement took effect on 1 May 2004, new questions emerged regarding the transitional arrangements. Much attention has been directed towards possible ways in which the transitional arrangements are or can be circumvented. This risk led to a number of initiatives from the Government in order to tackle the potential problem of circumvention. One such initiative was the clarification of rules and administrative procedures through a publication from the Ministry of Employment. A new edition of this manual was published in 2005.[192] Questions have also been raised by the European Commission regarding the contents of the transitional arrangements. As a result, some of the transitional provisions were amended in 2005.

The background of the transitional arrangements, as well as their content, will be described below. First, the initial political framework will be outlined, followed by the legislation that was adopted in 2004. Second, the legislative clarifications and modifications adopted in 2005 will be described. And finally, the political agreement to revise the transitional arrangements for access to the Danish labour market and the changes of legislation adopted in 2006 will be presented. In addition, chapter IX will include statistical information illustrating the effects of the EU enlargement and the Danish transitional arrangements with regard to free movement of workers.

The political framework and the legislative changes in 2004

Against the background of the findings of ministerial working groups, the Government and the main part of the political parties represented in the Parliament concluded in December 2003 an agreement on transitional arrangements for the access of workers, who are citizens of the EU-8 Member States, to the Danish labour market, and their access to social benefits.[193] The political agreement was implemented by a number of legislative and administrative changes in the first months of 2004.

Amendments of the Aliens Act

The Aliens Act was amended by an act in April 2004, taking effect on 1 May 2004.[194] The main new provisions in section 9 a (5)-(11) stipulate the conditions for granting residence permits to citizens from Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, the Czech Republic and Hungary on the basis of employment.

The basic condition was that the EU-8 citizen in question must have been offered a full-time job with an employer based in Denmark in accordance with the terms and conditions applying on the Danish labour market. The employment must be based either on a collective

192 *Rules on residence and work in Denmark for citizens from the new East European EU Member States*, Manual published by the Ministry of Employment, 3. edition, October 2005 (available at www.bm.dk/graphics/Dokumenter/Temaer/EU). The 4. edition was published in Danish in September 2006.

193 The agreement is available in an English version at the website of the Danish Ministry of Employment (www.bm.dk). At this website the development with regard to the number of residence permits issued to workers from the EU-8 Member States, the impact on the labour market etc. can also be followed.

194 Act No. 283 of 26 April 2004.

agreement, on an individual contract for researchers, specialists etc., or for other employees on individual contract conditions that can be considered usual, cf. section 9 a (5) (i)-(iii) of the Aliens Act:

> (5) Upon application, a residence permit may be issued to an alien who is a national of Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, the Czech Republic or Hungary if:
> (i) the alien has concluded a contract of or has been offered ordinary full-time employment with an employer in Denmark pursuant to a Danish collective agreement applicable to the employer and covering the work in question,
> and where the party to the collective agreement representing the employees is at least a local trade union which is a member of a national employee association;
> (ii) the alien, in a field of work where conditions of pay and employment are usually only governed by an individual employment contract, has concluded a contract of or has been offered ordinary full-time employment with an employer in Denmark as a researcher, teacher, salaried executive or as a specialist, etc.; or
> (iii) the alien, in cases other than those mentioned in paragraphs (i) and (ii), has concluded a contract of or has been offered ordinary full-time employment with an employer in Denmark on usual conditions of pay and employment.

The employer must be registered with the customs and tax authorities and must not be the subject of a strike, boycott or lockout, cf. section 9 a (6) and (7). In the situations falling within section 9 a (5) (iii), the employer must also see to that the job offer contains specific information on a number of things, including a work description, rights with respect to holidays etc., and the employer is obliged to make a declaration on the fulfilment of all of the conditions mentioned above to the Danish Immigration Service which processes the applications for residence permits under this scheme, cf. section 9 a (8) and (9).

When needed, the Danish Immigration Service can ask the Regional Labour Market Council to certify that the conditions listed in section 9 a (5) and (8) are fulfilled, and the Immigration Service can transmit relevant information on the issue of a residence permit to an EU-8 citizen, without his or her consent, to the Regional Labour Market Council, cf. section 9 a (10) and (16).

Another amendment was made in section 14 (1) (ii) of the Aliens Act, stating that the exemption from the requirement of a work permit, which is granted to foreigners falling under the EU rules, does not apply to EU-8 citizens.

When the situation for EU-8 workers was compared to that of workers from the EU-15 Member States, as well as from Cyprus and Malta, and third country citizens, respectively, the picture was like this:

- *Citizens from the EU-15 Member States, Cyprus and Malta*: Enjoy full free movement under the rules of the EU/EEA Order, as described in chapter I.
- *Third country citizens*: A residence permit on the basis of employment will only be granted when essential employment considerations make it appropriate, cf. Aliens Act section 9 a (1).
- *Citizens from the EU-8 Member States*: Are not encompassed by the EU/EEA Order's provisions on workers. The Aliens Act section 9 a (5) - (11) applies, which means on the one hand that no labour market test will be applied, but on the other hand that a full-time job on the terms described above is required in order to be granted a residence permit, cf. section 9 a (5) (i)-(iii). On certain points – especially with regard to the full-time requirement – the conditions under section 9 a (5) will be stricter than those under section 9 a (1). Therefore, EU-8 citizens, whose application under section 9 a (5) has been rejected, are entitled to have their application examined under section 9 a (1) as well.

Amendments of the legislation on social benefits

As mentioned above one of the possible risks entailed to the EU enlargement was an unintended use of social welfare schemes. This led to a couple of changes in the laws on social benefits, which apply to all EU citizens, including Danish citizens.

The Act on Parental Leave[195] was amended by inserting a requirement, according to which persons wanting to take leave under this Act should notify the authorities before 1 April 2004.[196] It should be noted that this kind of leave was to be phased out in any event.

The Act on Allowances in Relation to Sickness and Birth[197] was amended to specify that an EU citizen who is reported ill and receives Danish sickness allowances abroad, can be called in for a so-called "sickness follow up" in Denmark in order to discuss the situation and possible initiatives to enable faster recovery and continued employment.[198]

The Act on Active Social Policy[199] was amended to specify that EU citizens on a short term stay in Denmark, including persons seeking work, will not be eligible for cash benefits except for help in relation to the return to the home country.[200]

Amendments of the EU/EEA Order and the Aliens Order

The EU enlargement was the main background to some of the amendments of the EU/EEA Order that took place in 2004, especially the introduction of housing and support requirements in relation to family reunification.[201] It was also inserted expressly into the EU/EEA Order that its provisions on the issue of residence certificates on the basis of paid employment do not apply to EU-8 citizens, see in particular section 1 of the Order.

As another result of the transitional arrangements, the general Aliens Order[202] was amended in order to clarify the administrative question as to where applications for residence permits from citizens of Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, the Czech Republic and Hungary can be filed.[203]

Legislative amendments in 2005

In 2004 a number of legal and administrative questions were raised as a result of the experiences with the Danish transitional arrangements during the first months after the EU enlargement . In response to some of these questions, the transitional rules were amended and partly modified in 2005 with regard to three different matters.

First, the EU/EEA Order was amended as regards the right to take up employment for other groups of EU-8 citizens than workers. While section 13 (1) contains the general rule that a person eligible for an EU/EEA residence certificate is exempt from any requirement of a work permit, the new provision in section 13 (2) expressly states that, notwithstanding this general rule, citizens from the EU-8 Member States who are eligible for a residence certificate solely on the basis of the provisions concerning students, persons of sufficient means, and persons entitled to remain after cessation of activities as a worker or self-employed person (sections 2-4 of the EU/EEA Order) are *not* exempt from the requirement of a work permit in respect of paid employment.[204]

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195 Act No. 402 of 31 May 2000 (see Consolidation Act No. 193 of 23 March 2004).

196 Act No. 135 of 2 March 2004.

197 Consolidation Act No. 761 of 11 September 2002 (later version: Consolidation Act No. 1047 of 28 October 2004).

198 Act No. 282 of 26 April 2004. These amendments have been specified in Executive Order No. 306 of 3 May 2004.

199 Consolidation Act No. 709 of 13 August 2003 (later version: Consolidation Act No. 1009 of 24 October 2005).

200 Act No. 282 of 26 April 2004. See also chapter VI above.

201 See chapter V above, referring to the explanatory memorandum to Bill No. L 157/2003-04 which presented the Government's statement of the political and legal reasons for the subsequent amendments of the EU/EEA Order.

202 Executive Order No. 581 on aliens' right to enter Denmark (the Aliens Order), Ministry of Refugee, Immigration and Integration Affairs, 10 July 2002 (later version: Executive Order No. 943 of 5 October 2005).

203 Executive Order No. 293 of 29 April 2004, amending section 26 of the Aliens Order.

204 Executive Order No. 655 of 29 June 2005, amending section 13 of the 2004 EU/EEA Order (in force 1 July 2005).

Second, as a special rule concerning students from the EU-8 Member States, the new section 13 (3) of the EU/EEA Order stated that a work permit *shall* be issued to an EU-8 citizen who is entitled to an EU residence certificate as a student (pursuant to section 2 of the EU/EEA Order, implementing Directive 93/96) for the purpose of employment up to 15 hours a week, and full-time employment in the months of June, July and August.[205]

Third, a *12 months limitation* of the concrete effects of the transitional arrangements on the individual EU-8 worker was adopted in response to a question raised by the European Commission. This meant that the exception from the scope of the general provisions concerning the issue of residence certificates under the EU/EEA Order on the basis of paid employment for EU-8 citizens should cease to apply if the individual worker has been active on the Danish labour market for a minimum period of 12 consecutive months.[206]

The 2006 EU Order upholds the 12 months limitation by positively stating that EU-8 workers acquire the right of residence in accordance with general EU free movement rules at the time when they have been affiliated with the Danish labour market during the past 12 consecutive months.[207]

Administrative processing of applications

The duration of the administrative processing of EU-8 citizens' applications for a residence permit varied considerably, depending on the types and complexity of the application. In early 2006 the average processing time was as follows:

- 25 days for permits issued pursuant to section 9 a (5) (i) on enterprises covered by collective agreements,
- 52 days for permits issued pursuant to section 9 a (5) (ii) on individual contracts for researchers, specialists etc.,
- 74 days for permits issued pursuant to section 9 a (5) (iii) on employees with individual contracts providing usual conditions of pay and employment.[208]

According to the Danish Immigration Service, the duration of processing of EU-8 applications was reduced by the half during the first months of 2006. As a result, by May 2006 it was only 13 days as an average for all types of cases.[209]

2. Revision of the transitional arrangements for the second phase in 2006

On 5 April 2006 the political parties behind the 2003 agreement on transitional arrangements for the access of workers from the EU-8 Member States to the Danish labour market, and to social benefits, concluded a political agreement revising the transitional arrangements with a view to liberalising access to the Danish labour market for EU-8 citizens. The Ministry of Employment has published the following overview of the revision agreement:

205 Executive Order No. 655 of 29 June 2005, amending section 13 of the 2004 EU/EEA Order (in force 1 July 2005).

206 Executive Order No. 1255 on Residence in Denmark for aliens comprised by the rules of the European Union or by the Agreement on the European Economic Area (the EU/EEA Order), Ministry of Refugee, Immigration and Integration Affairs, 28 November 2005 (in force 1 January 2006), section 1 *in fine*. See also section 11 (1) and (2) on trans-border workers and seasonal workers, and section 13 (2) on exemption from the requirement of work permits for students, persons of sufficient means, and persons entitled to remain after cessation of activities as a worker or self-employed person, cf. sections 2-4 of the EU/EEA Order (the initial adoption of section 13 (2) is described above).

207 Executive Order No. 358 on Residence in Denmark for aliens comprised by the rules of the European Union (the EU Residence Order), Ministry of Refugee, Immigration and Integration Affairs, 21 April 2006, section 3 (1).

208 Explanatory memorandum to Bill No. L 235/2005-06, Ministry of Refugee, Immigration and Integration Affairs, 27 April 2006, para. 3.2.

209 Danish Immigration Service, Newsletter No. 4, 2 May 2006: "Hurtigere adgang for østarbejdere" (available at www.udlst.dk/Publikationer).

Revision of the Agreement concerning access to the Danish labour market for citizens of the East European EU countries

On the 5th of April 2006 the Liberal Party, the Conservative Party, the Social Democrats, the Socialist People's Party, and the Social Liberal Party concluded a political agreement that will liberalise the Danish transitional arrangement for migrant workers from the East European EU countries further.

While Denmark will continue to have a transitional arrangement in order to ensure proper pay and working conditions, it will now become even easier to employ workers from the East European EU countries. The Danish authorities will also take steps to help enterprises recruit foreign workers to sectors that experience a shortage of labour.

In the next three-year period the parties to the Agreement will discuss the possibilities of gradually phasing out the transitional arrangement.

Objectives of the Agreement

- It should become easier to recruit labour from the East European EU Member States for job vacancies on the Danish labour market.
- It should also in the future be ensured that employment takes place on pay and working conditions that are laid down by collective agreements or that are otherwise ordinary on the Danish labour market.
- The Danish labour market must be prepared to cope with a future situation without any transitional arrangement. The aim is to gradually phase out the transitional arrangement over the coming three-year period.

New initiatives in the Agreement

1. Easier access for East European workers

Enterprises covered by a collective agreement may, in the future, obtain prior approval for employment of citizens from the East European EU Member States. This means that they will then no longer have to apply for a work permit for each individual worker they wish to employ.

The political parties behind the Agreement will consider whether it will be possible in a longer perspective to extend this arrangement to include enterprises that are not covered by any collective agreement.

Workers from the East European EU Member States may, in the future, be employed also in part-time jobs with a working time of at least 30 hours per week. Students from these countries will, in the future, have the same right to work as students from other EU Member States.

A worker may continue to work during the time an application for a prolongation of the work permit is being dealt with by the authorities.

It will, in the future, be possible to employ lorry drivers and other workers from the East European EU Member States who are residing abroad. Documentation must be provided showing that the wage is covered by a collective agreement or otherwise is in accordance with what is ordinary for the work concerned.

Specific targets will be set for the time it takes to deal with and decide cases concerning labour from the East European EU Member States. Efforts are made to constantly reduce the time it takes to make a decision in these cases.

2. Gradual phasing-out of the transitional scheme

The parties to the Agreement will on a current basis assess whether the transitional arrangement can be made even more flexible, for instance by abolishing the requirement for a work permit in sectors with bottleneck problems.

3. Recruitment of foreign labour

The labour market authorities will strengthen the cooperation with the social partners concerning recruitment of labour from the other EU Member States to jobs in sectors with shortages of Danish labour.

4. Prevention of illegal work

A number of initiatives will be taken in order to prevent illegal work. Special attention will be given to preventing illegal work involving lorry drivers.

The National Working Environment Authority will ensure a quick reaction in respect to foreign enterprises violating the legislation on safety and health at work.

Special measures in relation to problems with safety and health in the building and construction sector will be discussed by the parties behind the Agreement.

5. Monitoring of the labour market

The National Employment Council will at least once a year be requested to assess the development on the labour market in the light of the enlargement of the European Union.
A general analysis will be carried of the challenges facing the Danish labour market in the light of the phasing out of the transitional arrangement.[210]

3. The legal regime applicable for the second phase

As far as the residence rights of EU-8 citizens are concerned, the political agreement was followed up by amendments of the Aliens Act.[211] The main elements of the legislative amendments are the following:

- EU-8 workers may be employed in *part-time jobs* of at least 30 hours per week (amendment of section 9 a (5) (i)-(iii) of the Aliens Act, quoted above).
- Employers covered by a collective agreement may obtain *prior general approval* by the Danish Immigration Service for the employment of EU-8 citizens (new section 9 a (11) and (12) of the Aliens Act, referring to section 9 a (5) (i) and (ii), respectively). The requirement of a *collective agreement* may, however, be lifted subsequently by the Minister of Refugee, Immigration and Integration Affairs (cf. section 9 a (17)).
- An EU-8 citizen who has concluded a contract or has been offered employment with an employer having obtained such general approval, will be *allowed to reside and work upon registration* with the Danish Immigration Service. If and when issued, the residence permit must be taken out by the worker within a period of 30 days after notification of the issuance by the Immigration Service (new section 9 a (13) of the Aliens Act).
- EU-8 *students* will have the same *right to work* as students from other EU Member States (sections 4 and 15 of the 2006 EU Residence Order).

Subsequently, the Aliens Order has been amended in order to operationalise the revision agreement, in particular as regards the possibility for workers to obtain a work permit while residing abroad.[212] As an administrative follow-up, new guidelines have been issued on the processing of requests from the Danish Immigration Service to the Regional Employment Councils for information concerning workers from the new Member States.[213]

4. Transitional measures for workers from Bulgaria and Romania

It was already decided as part of the political agreement of 5 April 2006 that upon accession to the EU, Bulgaria and Romania would be encompassed by the same transitional arrangements as the EU-8 Member States, including the modifications adopted in 2006. As a result, section 9 a (19) was adopted, authorising the Minister of Refugee, Immigration and Integration Affairs to put the transitional provisions of section 9 a (5)-(18), as amended, into force for Bulgarian and Romanian citizens. Thus, it was left with the Minister to decide the date of entry into force, depending on the actual accession date for the two new Member States, as well as to limit the scope of these transitional arrangements by making the provisions only partly applicable to citizens from Bulgaria and Romania.[214]

As of 1 January the transitional rules were extended to cover citizens of Bulgaria and Romania on the same conditions as those applying to EU-8 workers.[215]

Judicial practice

210 Ministry of Employment, Overview of the revised agreement, 6 April 2006 (available in English at www.bm.dk/graphics/Dokumenter/Temaer/EU).
211 Act No. 532 of 8 June 2006 (in force on the second day upon official promulgation of the amendment). See also the explanatory memorandum to Bill No. L 235/2005-06.
212 Cf. Executive Order No. 63 of 22 January 2007 (Aliens Order), section 34 (6).
213 Guidelines No. 9758 on the Regional Employment Councils' processing of information requests from the Danish Immigration Service, Ministry of Employment, 6 July 2007.
214 Section 2 (2) of Act No. 532 of 8 June 2006, amending the Aliens Act.
215 Executive Order No. 1265 of 4 December 2006.

No court decisions have been publicised concerning the interpretation of the transitional rules in the Aliens Act. As it appears from the above, this should not be taken to suggest that the application of these rules do not raise any practical problems.
According to a High Court judgment from January 2006, an employer was sentenced a fine of 50.000 DKK for the illegal employment of a Latvian worker from November 2004 until March 2005 and again for some weeks in May 2005.[216] Since the employer admitted to have been aware of the fact that the Latvian had no work permit, but unaware that such permit was required under the Aliens Act, the judgment does not settle any principled legal issues relating to the application of the transitional rules.

Recent legal literature

Henrik Thomassen and Pernille Breinholdt Mikkelsen, 'Indrejse og ophold for udlændinge omfattet af EU-reglerne', in L.B. Christensen et al., *Udlændingeret*, 3. edition, Copenhagen 2006, pp. 257-58.

[216] High Court of Western Denmark, judgment of 16 January 2006. Published in UfR (Weekly Legal Magazine) 2006, p. 1323.

CHAPTER IX: STATISTICS

General statistics on EU/EEA citizens

12,802 new residence certificates were issued pursuant to the EU/EEA Order in 2006, as compared to 9,916 in 2005. The basis of these certificates varied according to these main categories: Paid employment 29 %, students 45 %, family members 15 %, and others 11 %.[217]

In absolute figures, the various categories of certificates and the main EU countries of origin were the following:[218]

EU/EEA residence certificates issued

Category	2006 Total	Germany	Poland	France	2005 Total
Residence certificates	**12,802**	**3,048**	**1,648**	**1,212**	**9,916**
▪ *Persons in paid employment*	*3,684*	*1,397*	*0*	*346*	*2,516*
▪ *Students enrolled in recognised education*	5,753	*936*	*988*	*659*	*4,593*
▪ *Family members of EU/EEA citizens*	1,941	*439*	*334*	*115*	*1,642*
▪ *Others, including*					
o Self-employed persons	*1,424* 197				
o Students	306	*276*	*326*	*92*	*1,165*
o Persons of sufficient means	908				
o Retired persons	13				
Refusal of certificate	**136**	**12**	**30**	**7**	**107**
Total	**12,938**	**3,060**	**1,678**	**1,219**	**10,023**

Next to Germany, Poland and France, the main EU countries of origin were UK, Spain, Italy, Netherlands, Lithuania, Austria, Portugal, Latvia, Hungary, Belgium, the Czech Republic, Greece, Switzerland, Estonia, Ireland, Slovakia and Slovenia.[219]

Statistics pertaining to the EU enlargement

10,353 new residence (and work) permits were issued pursuant to section 9 a (5) of the Aliens Act to workers from the EU-8 Member States in 2006, as compared to 4,923 in 2005. Among these a number of 'new' residence permits were issued to EU-8 workers who previously held a residence permit based on another employment contract. Thus, between 1 January 2005 and 31 December 2006 13,305 EU-8 citizens obtained a total of 15,245 residence permits under this transitional provision, due to the fact that 11,495 persons got one residence permit, 1,675 persons got two separate residence permits, 116 persons got three, and 13 persons got four separate residence permits.[220]

217 *Tal og fakta på udlændingeområdet 2006* (Statistical Overview, Migration and asylum 2006), Danish Immigration Service, May 2007, p. 18 (available at: http://www.nyidanmark.dk/NR/rdonlyres/86C56774-CAC9-42A5-BBC4-F28B3629078B/0/statistical_overview_2006_aug.pdf).
218 *Ibid.*, p. 21 (author's translation).
219 *Ibid.*, p. 22.
220 *Ibid.*, p. 16.

The residence permits in 2006 varied according to their basis and the countries of origin of the applicant EU-8 workers as follows:[221]

Section 9 a (5) residence permits issued

Category **Nationality**	**2006 total**	Employers covered by collective agreement (section 9 a (5) (i))	Individual contracts (section 9 a (5) (ii))	Usual conditions of pay and employment (section 9 a (5) (iii))
Estonia	110	81	7	22
Latvia	662	467	13	182
Lithuania	2,005	1,575	44	386
Poland	7,072	6,362	82	628
Slovakia	244	167	10	67
Slovenia	14	12	1	1
Czech Republic	93	62	9	22
Hungary	153	106	15	32
Total	**10,353**	**8,832**	**181**	**1,340**

The 10,353 residence permits to EU-8 workers issued in 2006 were based on the three different types of employment under section 9 a (5) of the Aliens Act (see chapter VIII) as follows:

- 85% (8,832 permits) were issued pursuant to section 9 a (5) (i) on employers covered by collective agreements,
- 2% (181 permits) were issued pursuant to section 9 a (5) (ii) on individual contracts for researchers, specialists etc.,
- 13% (1,340 permits) were issued pursuant to section 9 a (5) (iii) on employees with individual contracts providing usual conditions of pay and employment.

In 2006, the residence permits issued to persons actually working in Denmark were divided on the following branches of the labour market: Agriculture, gardening and forestry, construction, business service, hotels and restaurants, food, beverage and tobacco, associations, culture and renovation and health care. Next to agriculture, gardening and forestry, the main branches were construction and business service.[222]

221 *Ibid.*, p. 16 (author's translation).
222 *Ibid.*, p. 17 showing a graph illustrating the branches prioritized beginning with the branches having the largest numbers of residence permits.

CHAPTER X: SOCIAL SECURITY

Relationship between Regulation No. 1408/71 and Directive 2004/38

Various legal problems concerning both principled and practical aspects of the impact of Regulation No. 1408/71 on Danish social welfare legislation may seem to be unsolved. Such problems are probably most frequent in respect of the delimitation of which domestic benefits are covered by the Regulation. However, focus on these problems in the social welfare administration at higher level is likely to be increasing, while lacking awareness of the potential impact of the Regulation may still be a practical problem at lower administrative levels.

In 2005 the National Appeals Board on Social Welfare examined three cases of a principled nature pertaining to Regulation No. 1408/71. The first case concerned a Spanish citizen receiving partial Danish old-age pension who had applied for a social pension supplement under Danish law, which was to be calculated in accordance with Regulation No. 1408/71.[223] In the second case, the National Appeals Board held that a Danish citizen, resident in Spain, was entitled to certain health-related benefits during his temporary stay in Denmark. Being formerly employed within the EU, and now receiving old-age pension from Denmark, he was eligible for benefits under Regulation No. 1408/71, and the specific kind of benefit was to be delivered by Denmark during his stay here, according to art. 31 of the Regulation.[224] The third case also involved mobility issues, the National Appeals Board here finding that an EU citizen who had resided in Denmark for 22 years and who was now receiving Danish old-age pension, would be entitled to continued receipt of this social pension upon removal to an African country, since art. 3 (1) of Regulation No. 1408/71 had been amended and residence within the territory of the EU Member States was therefore no longer required.[225]

In 2006 two decisions from the National Appeals Board were published regarding Regulation No. 1408/71. Both decisions, however, raised issues of a very specific nature. The first case in principle pertained to issues of free movement, yet it dealt with a specific question regarding the geographical delimitation between Danish and German legislation in connection with the particular conditions for frontier workers according to arts. 4 and 13 (2) of the Regulation.[226] The second appeals decision was based *ex contrario* on the listing of social security benefits in the Regulation.[227]

Additional reference is made to chapter VI.3 above regarding the issue of social cash benefits for Danish citizens returning from another EU country.

With a view to the particular problems concerning medical assistance, health insurance and hospital treatment, the Ministry of the Interior and Health has issued guidelines on the EU rules on social security.[228]

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223 National Appeals Board on Social Welfare ('Ankestyrelsen'), decision of 17 November 2004. Reported in SM P-2-05, 8 March 2005 (available at http://cms.ast.dk/dokumenter/Afgoerelser/smb.asp).

224 National Appeals Board on Social Welfare ('Ankestyrelsen'), decision of 15 June 2005. Reported in SM C-30-05, 6 July 2005. In its decision, the Appeals Board makes reference to two statements from the Ministry of Social Affairs.

225 National Appeals Board on Social Welfare ('Ankestyrelsen'), decision of 19 October 2005. Reported in SM P-30-05, 1 December 2005.

226 National Appeals Board on Social Welfare ('Ankestyrelsen'), decision of 23 November 2005. Reported in SM N-2-06, 3 February 2006.

227 National Appeals Board on Social Welfare ('Ankestyrelsen'), decision of 26 April 2006. Reported in SM S-1-06, 29 September 2006.

228 Vejledning om EF-regler m.m. om social sikring. Sygehjælp, sygesikring og sygehusbehandling, Ministry of the Interior and Health, October 2005 (available at http://www.im.dk/publikationer/sygehjaelp/index.htm).

Supplementary pension schemes

Directive 98/49/EC has not led to any changes in the Danish legislation concerning supplementary private pension schemes as the rules and practices were considered to be compatible with the contents of the Directive.

As regards taxation, Denmark is one of the countries in which pension schemes and life assurance established outside the country are treated differently from those established in the country.[229] Regarding the free movement of workers, the different treatment occurs when contributions paid to pension institutions not established in Denmark are not tax deductible.[230]

Regarding the freedom to provide services and freedom of establishment, the different treatment occurs due to the requirement of the pension institute to be established in Denmark in order for the contributions to be deductible.

In a report from 2002 on the pension system the Ministry of Social Affairs, in the chapter on the importance of the pension systems for the mobility on the labour market, dealt with the transfer of a pension scheme when moving abroad, but did not specifically deal with the transfer to other EU Member States. The conclusion in this chapter was, however: "Hence, the Danish pension system seems to create no unnecessary obstacles to labour market mobility."[231]

In its 2005 report on the pension system, the Ministry of Social Affairs mentions the possibility of transferring a pension scheme and taxation in Denmark when moving abroad, but is still not dealing specifically with transfer to other EU Member States.[232]

On 23 March 2004 the Commission filed a case against Denmark before the ECJ, claiming a breach of the EC Treaty.[233] On 1 June 2006, the Advocate General proposed the ECJ to rule against Denmark for breaching the Treaty.

On 30 January 2007 the ECJ gave judgment in the case, ruling that the Danish rules are in breach of Articles 39, 43 and 49 in the EC treaty:

> "Consequently, it must be held that, by introducing and maintaining in force a system for life assurance and pensions under which tax deductions and tax exemptions for payments are granted only for payments under contracts entered into with pension institutions established in Denmark, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States, the Kingdom of Denmark has failed to fulfill its obligations under Articles 39 EC, 43 EC and 49 EC."[234]

Following this judgment the Ministry of Taxation announced that a proposal to amendment of the Act was expected to be made as soon as possible in order for the Act to comply with EC law.[235]

On 27 June 2007 a framework agreement on the future taxation of pension schemes was signed in the Parliament,[236] and a proposal amending the Act on Taxation of Pensions and other acts was made.[237]

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229 Consolidation Act No. 816 of 30 September 2003 on Taxation of Pensions etc. ('Pensionsbeskatningsloven'), present Consolidation Act No. 1120 of 10 November 2006. See also Communication of 19 April 2001 from the Commission on the elimination of tax obstacles to the cross-border provision of occupational pensions, and Communication of 30 April 2001from the Danish Ministry of Taxation to the Parliament (Skatteudvalget, Alm. Del bilag 519, EUU, alm. Del bilag 1137 (løbenr. 17406), available at www.folketinget.dk/Samling/20001/udvbilag/SAU/Almdel_bilag519.htm.

230 See also the Commission's decision of 9 July 2003 referring Denmark to the ECJ on discrimination.

231 The Ministry of Social Affairs: National strategy report on the Danish pension system, 2002.

232 The Ministry of Social Affairs: National strategy report on the Danish pension system, 2005, chapter 3.3, available at www.social.dk/tvaergaaende_indgange/udgivelser/Publikationsdatabase/SM/SM05/strategirapportpension. html.

233 C-150/04, *Commission v.Denmark*.

234 ECJ judgment of 30 January 2007, *Commission v. Denmark* (C-150/04), para. 77.

235 http://www.skm.dk/presse/pressemeddelelser/skatteministeriets/5328.html, accessed on 22 August 2007.

The proposal on amending the Act on Taxation of Pensions allows tax relief on contributions paid to pension institutions not established in Denmark according to a 'bargaining model'.

The bargaining model has the effect that foreign pension institutions must enter into a binding agreement on conducting reporting, withholding and payment of tax on similar lines as Danish institutions. The agreement also involves the pension saver.

In more detail, tax relief is granted payments under contracts entered into with pension institutions established in other Member States, provided:

1. The pension provider
   - in its home country has a license to operate life assurance business, pension fund business or credit institution business; and
   - satisfies the conditions for pension institutes in the Danish Act on Taxation of Pensions; and
   - takes on the obligations specified for pension providers offering pension schemes encompassed by the Act on Taxation of Pensions ('bargaining model'); and
2. The pension scheme
   - fulfils the general conditions in the Act on Taxation of Pensions; and
   - is constructed in such a way that there is a clear relationship between the pension obligations and the ongoing pension contributions for every single member; and
3. The pension saver
   - agrees that payouts from the pension scheme received upon moving abroad are being taxed according to the Act on Taxation of Pensions; and
   - agrees to payouts being taxed according to the Act on Taxation of Pensions, regardless of whether the double taxation agreement with the country in which the scheme is established gives the country of source the right to taxation of the payout.

As for foreign pension schemes brought to Denmark by persons in connection with taking up residence in Denmark, special rules on favourable terms will apply, as tax relief may be granted even if the pension schemes do not fully satisfy the conditions in the Act on Taxation of Pensions.

The proposal is currently being treated in the Parliament by the parties of the framework agreement.

236 See http://www.skm.dk/presse/pressemeddelelser/ministeren/rammeaftaleompensionsbeskatningen.html, accessed on 22 August 2007. A summary is available on http://www.skm.dk/lovforslag/hoering/5723/5725/, accessed on 22 August 2007.

237 The proposal is available on http://www.skm.dk/public/billeder/lovforslag/pension07/pblforslag.pdf, accessed on 22 August 2007.

CHAPTER XI. ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS, OTHERS

To a large extent the rules, schemes etc. applicable for Community workers, which are described in the previous chapters, also apply to these groups of EU citizens.

With the adoption of the 2006 EU Order, EU citizens exercising the right to free movement related to *provision of services* are no longer mentioned in the EU Order. However, the rules in the Aliens Act – of course - continue to apply (see chapter I); see also above chapter II. 3. As service providers are no longer mentioned separately, this group will not be addressed further in this chapter. However, with regard to family reunification, it should be noted that there are limitations in the access to family reunification, as the application of the Singh-principles are limited to persons who have been economically active in another Member State, see chapter V.

With regards to EU citizens exercising the right to free movement related to *establishment* there are no difference from the rules applicable to Community workers (see chapter I and V).

The remaining groups regulated by specific rules are therefore *students, persons of sufficient means and persons with the possibility of continued residence upon ceased employment or self-employment*.

1. Students[238]

Residence

EU Order section 4 states that students from EU Member States have the right to reside provided he/she disposes of *sufficient means* for the support of himself/herself.
The right to reside is conditioned by a *health insurance*. This condition has been made mandatory with the 2006 Order, whereas it was discretionary in the 2005 Order.

EU Order section 18 states that the registration certificate is not issued for a certain *time period*, but lapses when the conditions for the right to reside are no longer present, cf. section 26.

In the older Orders the residence certificate was issued for a period corresponding to the length of the studies, but not for more than 1 year at a time.

EU Order 19 (2) states that the issuing of a registration certificate can - besides being conditioned by valid identity card or passport – be conditioned by *documentation for enrolment* at an institution, approved by or financed by the public, cf. section 4 (1), declaration of sufficient means and documentation for health insurance.

EU Order section 8 contains the rules on *family members*, cf. section 2 (see chapter V for an elaboration). Family members of an EU student encompassed by section 4 of the EU Order have the right of residence in Denmark, if they *accompany or join* the EU citizen and already have *permanent lawful residence* ("fast, lovligt ophold") in an EU Member State, cf. section 8 (1). According to section 8 (2) the residence right is, unless exceptional reasons make it inappropriate, conditioned on the EU citizen's ability to *dispose of such income or other means of support* that the family member(s) cannot be assumed to become a burden to the public welfare system.

If the sponsor is a student, the issuance of a residence document ('registration certificate') for those family members defined in section 2 (1) no. (1), (2) and (6) can be conditioned on the sponsor's presentation of a *declaration* on his or her ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system, cf. sections 20 (2) and 22 (2) of the EU Order. The issuance of a residence document ('registration certificate') for those family members defined in section 2 (1) no. (3)-(5) can be conditioned on the sponsor's presentation of *documentation* for his or her ability to dispose of such income or other means of support that the

238 See www.studyindenmark.dk by CIRIUS.

family member(s) cannot be assumed to become a burden to the public welfare system, cf. sections 20 (3) and 22 (3).

Formerly the family concept was not as broad for this group as for the other groups, since only the EU citizen's spouse and their dependent descendents were included in the concept. This has now been changed with the issuance of the 2006 EU Order and the adoption of the common definition of family members in section 2.

Quotas for foreign students

In Denmark there has been an intensive debate about the high amount of especially Swedish students at the medical studies in particular, but also the dental studies, the veterinarian studies and the architecture studies.[239]

To reduce the amount of foreign students and increase the amount of Danish students at the higher educations, the government has now launched an action combined with initiatives, and a more basic reform of the admission system, which should be fully implemented in 2010.[240]

With Executive Order No. 448 of 18 May 2006 the Danish Ministry of Education introduced a new grade system corresponding to the ECTS scale; a 7-step scale instead of the 13-step scale.[241]

The system entered into force on 1 August 2006 for the gymnasiums. In all other education areas, the system was introduced on 1 August 2007.

The background for the introduction of the new system was the report from the Grade Committee.[242]

The main reason for introducing a new scale was to make the Danish grades more applicable and comparable at an international level.

The Danish scale should be applied with the same relative distribution as the ECTS scale, which means that 10 % of the Danish students should be granted the highest grade (12), 25 % should be granted the next highest (10), etc.[243] This will provide the Danish students with higher grades than under the 13 step scale and make them more competitive, for instance when applying for admission to institutions of higher educations.

According to the governmental memorandum regarding rules on admission of aliens with foreign exams at higher educations in Denmark,[244] the adjustment for 2007 are new tables of conversions for foreign exams and a change of the "bonus A-arrangement".

The design of the bonus A-arrangement means that students – upon application for admission to higher educations - will have their grade average multiplied by 1,03, provided they have an extra course at A-level/high-level beyond the mandatory A-level courses.

Since Danish students have 4 mandatory courses at A-level and Swedish students in general only have 2 mandatory courses at A-level, the Swedish students are favourized unintentionally.

The change of the bonus A-system means that foreign exams will be compared directly with a similar Danish exam. Hence, foreign students must have more than 4 courses on A-level to receive bonus, and the courses on A-level must at least be equivalent to the Danish A-level, cf. Executive Order No. 167 of 22 February 2007 on access, admission and leave etc. on certain higher educations, section 16 (4).[245]

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239 http://videnskabsministeriet.dk/site/forside/nyheder/pressemeddelelser/2006/dansk-svensk-vilje-til-at-loese-strid-om-laegestuderende.

240 http://videnskabsministeriet.dk/site/forside/nyheder/pressemeddelelser/2006/nyt-optagelsessystem-til-enkelte-videregaaende-uddannelser.

241 More information about the scale is found on www.uvm.dk/nyskala and www.uvm.dk/nyskala/documents/ om.pdf.

242 Report No. 1453, November 2004, available at http://pub.uvm.dk/2004/karakterer.

243 www.uvm.dk/nyskala/documents/om.pdf, p 2.

244 http://videnskabsministeriet.dk/portal/pls/pr01/docs/1/1180359.PDF.

245 Cf. Executive Order No. 151 of 19 February 2007 amending Executive Order No. 362 of 20 May 2005 section 19 (4) inter alia, cf. Executive Order No. 166 of 21 February 2007 amending Executive Order No. 1216 of 1 December 2006.

Private institute diplomas

The Executive Order[246] issued on the basis of the Act *on Evaluation of Alien Educational Qualifications*[247] regulates CIRIUS' evaluation of alien qualifications. The Order does not distinguish between private and public institute diplomas.

According to the Order, one of the elements of the evaluation is the recognition of the education in the alien's country, cf. section 1 (1) (i).

According to CIRIUS' guidance to verification of degree certificates, it is stated that an educational institution may be real and provide real educations despite the fact that the institution is not publicly recognized.[248]

Appeals committee in evaluations of alien educational qualifications

The Act on *Evaluation of Alien Educational Qualifications*[249]section 5a establishes an Appeals Committee ('Kvalifikationsnævnet').[250]

Within 4 weeks from the decision, aliens with foreign educational qualifications may appeal an educational institution's decision on whether the alien educational qualifications can replace parts of the institutions education (merit), cf. section 3 (6).[251]

2. Persons of sufficient means

EU Order section 5 states that EU citizens of sufficient means have a right to reside.

The right to reside is conditioned by *health insurance*. With the 2006 Order this condition was made mandatory, whereas in the 2005 Order it was discretionary.

EU Order section 19 (3) states that the issuing of a registration certificate can – besides being conditioned by valid passport or identity card – be conditioned by *documentation for health insurance and sufficient means*.

With regard to the concept of sufficient means, this is an *individual assessment* based on the person's individual needs.

However, if a person has at least the sum of the benefits for which the person would be eligible under the lowest rate in the Act on Active Social Policy,[252] this is always considered as sufficient means.

Section 18 states that the registration certificate is not issued for a certain *time period*, but lapses when the conditions for the right to reside are no longer present, cf. section 26.

In the older Orders the residence certificate was issued for 5 years, but if deemed necessary, it might be required that the certificate could be extended upon expiry of the first 2 years of residence.

EU Order section 9 contains the rules on *family members*, cf. section 2 (see chapter V for an elaboration). Family members of an EU citizen with sufficient means encompassed by section 5 of the EU Order have the right of residence in Denmark, if they *accompany or join* the EU citizen and already have *permanent lawful residence* ("fast, lovligt ophold") in an EU Member State, cf. section 9 (1). According to section 9 (2) the residence right is, unless exceptional reasons make it inappropriate, conditioned on the EU citizen's ability to *dispose of such income or other means of support* that the family member(s) cannot be assumed to become a burden to the public welfare

system.

If the sponsor is an EU citizen with sufficient means, the issuance of a residence document ('registration certificate') for all the family members defined in section 2 (1) can be conditioned on the sponsor's presentation of *documentation* for his or her ability to dispose

246 Executive Order No. 602 of 25 June 2003.
247 Act No. 74 of 24 January 2003, see chapter II.3.
248 www.ciriusonline.dk/Default.aspx?ID=4541.
249 Act No. 74 of 24 January 2003, see chapter II.3.
250 Cf. Executive Order No. 547 of 1 July 2002.
251 See above chapter II.3.
252 Consolidation Act No. 1009 of 24 October 2005.

of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system, cf. sections 20 (3) and 22 (3) of the EU Order.

The family concept was formerly narrower, since only the spouse, their dependent descendents and relatives in the ascending line – if they were dependent on the EU national – were considered to fall within the concept. With the issuance of the 2006 EU Order this has now been changed.

3. Continued residence upon ceased employment or self-employment

EU Order section 6 contains the rules regulating the EU citizen's right to reside beyond the 3/6 months in the Aliens Act section 2 (1) upon ceased employment or self-employment.

EU Order Section 6 (2) states that periods with involuntary unemployment which are confirmed by the competent employment agency, periods without work which the person in question has no influence on, and periods of absence from work or termination of work due to sickness or accident are considered as periods with occupation.

EU Order section 6 (1) (i) states that the right to continued residence exists when the EU citizen reaches *the age for entitlement to old-age pension* as fixed in the Pension Act[253] or takes *early retirement*, provided he/she has been working for 12 months up to this point and resided in Denmark for the previous 3 years.

The demands for the length of the stay and working period are annulled when the spouse has Danish citizenship or has lost it due to the marriage, cf. section 6 (4).

EU Order section 6 (1) (ii) states that the right to continued residence exists when the EU citizen is forced to cease work due to *permanent incapacity to work*, provided he/she has obtained residence in Denmark for the last 2 years or the permanent incapacity is due to an accident at work or an occupational illness entitling the person to permanent benefits.

The demands for the length of the stay are annulled when the spouse has Danish citizenship or has lost it due to the marriage, cf. section 6 (4).

EU Order section 6 (1) (iii) states that the right to continued residence exists when the EU citizen *takes up work in another Member State*, provided he/she has had residence and has been working in Denmark for the previous 3 years and returns to his/her residence in Denmark at least once a week.

Section 6 (3): The period of time working in another Member State is considered spent in Denmark with regard to the acquisition of the rights in section 6 (1) (i) and (ii).[254]

EU Order section 10 contains the rules on family members, cf. section 2 (see chapter V for an elaboration). Family members of an EU citizen encompassed by section 6 of the EU Order have the right of residence in Denmark, if they *accompany* or join the EU citizen and already have *permanent lawful residence* ("fast, lovligt ophold") in an EU Member State, cf. section 10 (1). According to section 10 (2) the residence right for those family members defined in section 2 (1) no. (3)-(5) is, unless exceptional reasons make it inappropriate, conditioned on the EU citizen's ability to *dispose of such income or other means of support* that the family member(s) cannot be assumed to become a burden to the public welfare system.

If the sponsor is a *pensioner* or another EU citizen encompassed by section 6 of the EU Order, the issuance of a residence document ('registration certificate') for those family members defined in section 2 (1) no. (3)-(5) can be conditioned on the sponsor's presentation of *documentation* for his or her ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system, cf. sections 20 (3) and 22 (3) of the EU Order.

Recent legal literature

Henrik Thomassen and Pernille Breinholdt Mikkelsen, 'Indrejse og ophold for udlændinge omfattet af EU-reglerne', in L.B. Christensen et al., *Udlændingeret*, 3. edition, Copenhagen 2006, pp. 253-256, 258-261 and 265-266.

253 Consolidation Act No. 759 of 2 August 2005.
254 See above chapter III.3 on frontier workers.

CHAPTER XII. MISCELLANEOUS

Legislation links

The Aliens Act, Consolidation Act No. 945 of 1 September 2006
- in Danish: http://147.29.40.91/_MAINRF_A759353402/1191
- in English: http://www.nyidanmark.dk/resources.ashx/Resources/Lovstof/Love/UK/aliens_act945_eng.pdf

The 2006 EU Residence Order, Executive Order No. 358 of 21 April 2006
- in Danish: http://147.29.40.91/_MAINRF_A759353402/1191

The 2007 Aliens Order, Executive Order No. 63 of 22 January 2007
- in Danish: http://147.29.40.91/_MAINRF_B767364091/1517