

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

Rapporteurs: Nuno Piçarra
and Francisco Pereira Coutinho
University Nova of Lisbon

October 2009

Contents

Introduction

Chapter I Entry, residence and departure

Chapter II Access to employment

Chapter III Equality of treatment on the basis of nationality

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

Chapter V Employment in the public sector

Chapter VI Members of the worker's family and treatment of third country
family members

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

Chapter VIII Application of transitional measures

Chapter IX Miscellaneous

Introduction

Concerning the free movement of workers, the year of 2008 was marked in Portugal by two relevant facts.

The first was the adoption of several important legislative acts with direct and immediate repercussion in that field, such as the rules on the access to the public sector (Law 12-A/2008, of 27 February) and the amended labour code (Law 7/2009, of 12 February).

The second relevant fact in this context was the legal suppression of the obstacle affecting the free movement of Spanish cross-border workers detected in the report of 2007 [Law 44/2008, of 27 August].

Chapter I

Entry, Residence, Departure

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

1.1. Art. 7 (1a) of Directive 2004/38/CE

All Union citizens have the right of residence on the Portuguese territory for a period longer than three months if they work or are self-employed in Portugal (article 7(1)(a) of Law 37/2006 of 9 August).

1.2. Art. 7 (3 a-d) of Directive 2004/38/CE

According to Article 7(3) of Law 37/2006, the Union citizen who no longer works or is self-employed retains the status of worker or self-employed person and therefore the right of residence, where he/she: (a) is temporarily unable to work as a result of an illness or accident; (b) is in duly recorded involuntary unemployment and has registered as a *job-seeker* with the Institute of Employment and Vocational Training; (c) embarks on vocational training provided that this training is related to the previous employment, unless he/she is involuntary unemployed.

1.3. Art. 8 (3a) of Directive 2004/38/CE

The Union citizens whose permanence in the national territory is longer than three months must register with the Town Hall of the residence area within thirty days after a period of time of three months from the date of entry in the national territory. A registration certificate is issued immediately, stating the name and the address of the person registering and the date of registration. For the registration certificate to be issued it is required a valid identity card or passport, as well as a declaration under compromise of honour that the applicant works on the Portuguese territory [Article 14(1) to (5) of Law 37/2006].

1.4. Art. 14 (4 a-b) of Directive 2004/38/CE

Without prejudice of the restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health, an expulsion measure may in no case be adopted against Union citizens if they: (a) are workers or self-employed; (b) entered the Portuguese territory in order to seek employment and can provide evidence that they are continuing to seek employment [Article 9(4) of Law 37/2006].

1.5. Art. 17 of Directive 2004/38/CE

The right of permanent residence in Portugal shall be enjoyed before completion of a continuous period of five years of residence by: (a) workers or self-employed persons who have reached the age laid down by the Portuguese law for entitlement to an old age pension or who cease paid employment to take early retirement, provided that they have been working in Portu-

gal for at least the preceding twelve months and have resided in Portugal continuously for more than three years; (b) workers or self-employed persons who have resided continuously in Portugal for more than two years and stop working as a result of permanent incapacity to work; (c) workers or self-employed persons who, after three years of continuous employment and residence in Portugal, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in Portugal, where they return, as a rule, each day or at least once a week [Article 11(1) of Law 37/2006].

For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in Portugal [Article 11(2) of Law 37/2006]. Unemployment periods duly registered by the Institute of Employment and Vocational Training, periods of suspension of activities not imputable to the person and the absence or termination of work caused by illness or accident are considered as periods of employment [Article 11(3) of Law 37/2006].

The conditions as to length of residence and employment laid down in point (a) and the condition as to length of residence laid down in point (b) shall not apply if the worker's or the self-employed person's spouse or partner is a Portuguese national or has lost the Portuguese nationality by marriage [Article 11(4) of Law 37/2006].

For the purposes of entitlement to the rights referred to in point (a), if the worker has exercised a non paid employment for which is not recognized an old age pension, the age condition shall be deemed to have been met once the person concerned has reached the age of 60 [Article 11(5) of Law 37/2006].

For the purposes of entitlement to the rights referred to in point (b), if the incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by a Portuguese institution, no condition shall be imposed as to length of residence [Article 11(6) of Law 37/2006].

1.6. Art. 24 (2) of Directive 2004/38/CE

Article 20(1) of Law 37/2006 provides that the Union citizens residing in the Portuguese territory enjoy equal treatment with the national citizens, without prejudice of the restrictions admitted by Community law. According to Article 20(3), by way of derogation, Portugal does not confer to the Union citizens entitlement to benefits granted by the solidarity sub-system (non-contributory) during the first three months of residence or during a longer period if the Union citizen entered Portugal in order to seek a job on the basis of Article 9(4)(b). Neither does it grant, prior to acquisition of the right of permanent residence, scholarships, student loans or any other maintenance aid for studies, including vocational training, to persons other than workers, self-employed persons or persons who retain such status and members of their families [Article 20(4) and (5)].

1.7. Judicial practice

An examination of the available case-law databases of the Administrative Courts (limited to the Administrative Courts of Appeal and to the Administrative Supreme Court) revealed that in 2008 there was no case-law pertaining to the referred specific provisions for workers.

In 19-4-2007, the Supreme Court of Justice, in a criminal case (06P4701, available in www.dgsi.pt) applied Law 37/2006 to sanction the expulsion of a European citizen. The court

stated that the nationality of that person excluded him from the ambit of the Aliens Act (at that time Decree-Law n.º 244/98) and thus from the regime applicable to third country nationals.

Also in 2007, the Public Ministry issued the legal opinion P000032007, available in www.dgsi.pt. According to the Public Ministry, European citizens can only marry before the Portuguese authorities if at least one of them resided in Portugal for at least a month. This is a mandatory obligation that results from Art. 134 of the Civil Registration Code that has the scope of (i) allowing the public notice of the marriage and (ii) allowing the public authorities to verify impediments to the conclusion of the marriage.

1.8. Administrative practices

Administrative practices are limited to implementing current legislation on the entry of Union citizens.

Recent Legal Literature

The entry, residence and departure of Union citizens are not a subject which has arisen a great deal of interest amongst Portuguese scholars. Hence, there is no legal literature specifically devoted to such subject. It is covered in general terms by some textbooks on Community Law and certain monographs, referred to in Chapter XI of the Portuguese report of 2002/2003. The textbook which deals with such subject is the one of Miguel Gorjão-Henriques, *Direito Comunitário* (Community Law) 5th edition, Coimbra 2008. See also Rui Moura Ramos, Da Livre Circulação de Pessoas à Cidadania Europeia, in : Marta Tavares de Almeida & Nuno Piçarra (eds), *50 Anos do Tratado de Roma*, Lisbon 2007.

2. SITUATION OF JOB-SEEKERS

2.1. Legislation in force

Union citizens have the right of residence on the Portuguese territory for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport [Article 6 (1) of Law 37/2006].

Union citizen job-seekers whose permanence in the national territory is longer than three months must register with the Town Hall of the residence area within thirty days after a period of time of three months from the date of entry in the national territory [Article 14(1) of Law 37/2006]. For the registration certificate to be issued it is required a valid identity card or passport, as well as a declaration under compromise of honour that the job-seekers have sufficient resources for themselves and their family members, as well as a sickness insurance, provided that this is required in the Member State of their nationality to the Portuguese citizens [Article 7(1) (b) of Law 37/2006]. The notion of ‘sufficient resources’ is defined by Article 2(f) of Law 37/2006 as follows: ‘the resources of the citizen which are not lower than the threshold below which the Portuguese State may grant social rights and supports to Portuguese nationals, taking into account the personal situation of the citizen concerned and, as the case may be, the situation of his/her family members’. Portuguese law does not establish any time limit for the stay of the job-seeker, which means that they can remain in Portugal as long as they can prove that they are seeking an employment [Article 7(1)(b) of Law 37/2006].

Although all Union citizens residing in the Portuguese territory enjoy equal treatment with the Portuguese nationals [article 20(1) of Law 37/2006], Article 20(3) of Law 37/2006 states

that job-seekers do not enjoy entitlement to the benefits of the solidarity sub-system (non-contributory). This is an exception to the principle of equal treatment, which in any case is not subject to the residence in Portugal, but to affiliation in and payment of contributions to the insurance sub-system (the only benefit of this sub-system that is subject to residence in Portugal is the unemployment benefit). Moreover, Portuguese social system does not foresee tide-over allowances for young people seeking their first employment or social security allowances paid to job-seekers similar to those discussed in ECJ cases *Collins* and *Ioannidis*.

Without prejudice of the restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health, an expulsion measure may in no case be adopted against Union citizens if they entered the Portuguese territory in order to seek employment and can provide evidence that they are continuing to seek employment [Article 9(4) of Law 37/2006].

2.2. Judicial practice

An examination of the case-law databases of the Administrative Courts revealed that in 2008 there was no case-law pertaining to situation of job-seekers.

2.3. Administrative practices

According to the model of registration certificate for periods of residence in Portugal longer than three months approved by the Portaria 1637/2006 of 2nd of September (execution regulation of the Law 37/2006), job-seekers must declare in point 14 (employment details) that they are 'seeking first job'.

Chapter II

Access to Employment

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

Pursuant to Article 20(1) of Law 37/2006, all Union citizens residing in the Portuguese territory enjoy equal treatment with the Portuguese nationals, without prejudice of the restrictions admitted by Community law. The Portuguese Employment Law consecrates the principle of equal treatment in access to employment.¹

Several Acts governing a particular profession open it implicitly or explicitly to EU citizens. One case is that of private notaries, which according to Article 25 of Decree-Law 26/2004 of 4 February is open to individuals, regardless of nationality, who hold a degree in Law or an equivalent qualification (for example, an equivalent qualification in legal studies in another EU Member-State).

Private security is an example of explicit openness to Union workers. According to Decree-Law 35/2004, of 21 February, amended by Decree-Law 198/2005, of 11 November, the professional card can be acquired by all citizens of the European Union that meet the admission requisites to the profession (Article 8) or that prove to have these requisites in accordance with the verification made in their country of origin.

The same applies to being a solicitor or a psychologist. According to Article 75(1) of Decree-Law 88/2003, of 26 April, and Article 50 of the Decree-Law 57/2008, of 4 of September, enrolment in the Chamber of Solicitors and in the Chamber of Psychologists is compulsory for exercising those professions. Not only Portuguese citizens, but also EU citizens may apply to enrol, in accordance with Article 77 (1) (a) and Article 51 (1) (c).

Concerning the access to employment through the employment agencies, Law 19/2007, of 22nd May, on Temporary Employment, forbids the insertion in the labour market of foreign citizens not possessing a residence permit valid in Portugal.

The agencies are under the communication duty to the Border and Immigration Service in what concerns the requests made by foreign citizens possessing a residence permit. These dispositions are not applicable to the Union citizens, when they enter in Portugal looking for work, because they benefit of equal treatment in access to employment, except in what concerns entitlement to the non-contributory benefits, in accordance with Article 20(3) of Law 37/2006.

Our examination of case-law databases and collections available revealed that in 2008 there was no case-law pertaining specifically to equal treatment and access to employment of Community workers.

During 2008 there is no legislation or circular being drafted which specifically refers to equal treatment and access to employment of Community workers.

2. *Language requirement (private sector)*

There are no express legal provisions concerning linguistic abilities, but in practice it is often demandable that the level of the linguistic knowledge be the reasonably necessary for the proper fulfillment of the duties.

¹ Concerning this subject, Resolution 13/2001 of the Assembly of the Republic approved Convention 181 of ILO, which in its Article 5 prohibits the discrimination in the access to employment.

Chapter III

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS

1.1. Legislation in force

According to Article 13 ('Principle of equality') of the Constitution of the Portuguese Republic (CPR):

- '(1) all citizens have the same social rank and are equal before the
- (2) no one shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, by reason of his or her ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation or social circumstances.'

According to Article 15 ('Aliens, stateless persons, European citizens') of the CPR,

- '(1) Aliens and stateless persons that reside or are temporarily in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens.'

In principle, equality extends to all rights, and not just those guaranteed by the Constitution, but also those enshrined in ordinary legislation.

The principle of equality is not absolute, since Article 15(2) of the CPR provides exceptions and allows the law to establish others:

- 'Paragraph 1 does not apply to political rights, to the performance of public functions that are not predominantly technical or to rights and duties that, under this Constitution or the law, are restricted to Portuguese citizens.'

However, Article 15(3) provides that, in conditions of reciprocity, the citizens of the Portuguese-speaking States with permanent residence in Portugal enjoy rights not conferred to aliens, except the access to the position of President of the Republic, President of the Assembly of the Republic, Prime Minister, Presidents of the Supreme Courts and to the service in the armed forces and the diplomatic career.

Article 15(4) foresees that, provided that there is reciprocity, the law may confer upon aliens who reside in the national territory the right to vote for, and to stand for election as, members of the organs of local authorities. According to Article 15(5), the law may also confer upon citizens of the Member States of the EU, who reside in Portugal, the right to vote for, and to stand for election as, Members of the European Parliament.

Finally, the CPR itself defines the conditions under which legislative acts may exclude foreign citizens from enjoying certain rights and thus establish legal exceptions to the principle of equality:

- Such exceptions may only be set by law passed by Parliament (and not by Government).
- They do not cover the rights which cannot be suspended even in a curfew or state of emergency (Article 19 of the CPR);

- Any legal clause which reserves a certain right for the Portuguese must be objectively justified by the safeguard of an interest or right which is constitutionally protected, and be necessary for such a purpose.²
- Any restriction must be explicitly foreseen in the CPR and be limited to what is necessary for pursuing a constitutionally-relevant interest, leaving the basic nucleus of the right in question untouched.

Pursuant to Article 15(3) to (5), several legislative acts allow the foreign citizens residents in Portugal to exercise some political rights, namely:

- The right to petition to defend their rights and legally-protected interests (Article 4, Law 43/90, amended by Laws 6/93 and 15/2003);
- The right to form associations to represent their interests (Law 115/99);
- The right to take part in a local referendum, on a reciprocal basis (Article 35, Framework Law 4/2000).

The new Labour Code (Law 7/2009) follows the solutions already foreseen in Law 99/2003 mentioned in other reports. It continues to ensure equal treatment regarding access to employment, vocational training, promotion and working conditions, and prohibits discriminations on the grounds of nationality (Article 24). Moreover, employers are expressly prohibited from any form of discrimination (Article 25), and the worker or applicant who is the subject of a discriminatory act is entitled to compensation for material and moral damages (Article 28). Some special clauses on the work of foreign citizens in Portugal, such as the ones foreseeing the written form for the labour contract or the obligation to inform the authorities of an employment contract signed with a foreign citizen, are not applicable to EU workers (Article 5)

Mention should also be made to the Law 18/2004, of 11 May, which transposes the Directive 2000/43/CE implementing the principle of equal treatment between persons irrespective of racial or ethnic origins, and establishes a legal framework for combating direct or indirect discrimination on the grounds of racial or ethnic origin. This Act completes and strengthens Law 134/99, of 28 of August, which bans and punishes, namely with fines, discriminatory practices, such as refusing to hire a worker solely for reasons of race, colour, family background, ethnic origin or nationality, or refusing or restricting access or exercising basic rights and economic and social rights (access to housing, health, education) for the same reasons.

1.2. Judicial practice

Our examination of case-law databases and collections available revealed that in 2008 there is no case-law pertaining to equal treatment of Community workers and pertaining to frontier workers.

2. SOCIAL AND TAX ADVANTAGES

2.1. Legislation in force

Law 18/2004, of 11 May, implements the principle of equal treatment between persons irrespective of racial or ethnic origins. This law applies to the public and private sectors in relation to

² In this sense see Order 72/2002 of the Constitutional Court, dated 20 February 2002 (case nr 769/99), *Official Journal* I, Series-A, nr. 62, dated 14 March 2002, p. 2318, and jurisprudence quoted therein.

social protection, including social security and health care, social advantages, education and access to and supply of goods and services available to the public, including housing.

Article 20(1) of Law 37/2006 also provides that Union citizens residing in the Portuguese territory enjoy equal treatment with the national citizens, without prejudice of the restrictions admitted by Community law. According to Article 20(3), by way of derogation, Portugal does not confer to the Union citizens entitlement to the benefits granted by the solidarity sub-system (non-contributory) during the first three months of residence or during a longer period if the Union citizen entered in Portugal in order to seek a job on the basis of Article 9(4)(b). Neither does it grant, prior to acquisition of the right of permanent residence, scholarships, student loans or any other maintenance aid for studies, including vocational training, to persons other than workers, self-employed persons, persons who retain such status and members of their families [Article 20(4) and (5)].

The Decree-Law 220/2006, of 3 November, establishes a system of employment protection for the employees, but its Article 8 demands for the attribution of the unemployment benefit that the worker (i) has a labour contract and (ii) resides in the national territory. However, the demand of a valid residence permit is not applicable to EU workers.

In the field of social security, the Law 4/2007 (Framework Law of Social Security), of 16 January establishes the principle of non-discrimination on the grounds of nationality of the beneficiaries of the systems of social protection, subject to residence and reciprocity requirements.

2.2. Judicial practice

Our examination of case-law databases and collections available revealed that in 2008 there is no case-law pertaining to equal treatment of Community workers and pertaining to frontier workers.

3. Obstacles to free movement of frontier workers

3.1. Background

The Decree-Law 264/93, of 30 July, established a car tax exemption regime applicable to the transference to Portugal of vehicles from another Member State and the regime of temporary admission of vehicles registered in other Member States.

Article 1 established an exemption from car tax granted to vehicles for private use of non-resident persons in regime of temporary admission proceeding from other Member States.

The application of this exemption regime was dependent on the following conditions:

- The vehicle should be registered in the name of a person which is neither established nor resident in the Portuguese territory;
- The vehicle should be introduced in Portugal by its owner or legal holder;
- The use of the vehicle should be for particular aims;
- The vehicle documents should be presented.

Article 1(5) considered as resident the person who:

- remained in the national territory during periods of time equal or superior to 180 days, consecutive or interpolated, for each calendar year;

- exercised a remunerated professional activity or possess a residence permit in the Portuguese territory.

Thus, the vehicles temporarily admitted could only remain in the Portuguese territory during a period of 180 days in the course of a calendar year.

Article 8 of the Decree-Law 264/93 provided also that a person who exercises a professional activity in Portugal could not use a vehicle with a foreign registration number.

In the course of 2007 and 2008 several Spanish workers, especially doctors and nurses working in Portuguese hospitals, were fined for using vehicles with Spanish registration number in their daily displacement to their working place. According to Decree-Law 264/93, such workers could not benefit from the regime of temporary admission because they are exercising a professional activity in Portugal, and so they were subject to the fines foreseen in Article 35 of the Decree -Law 376-A/89, of 25 October.

3.2. Current Situation

In order to remove the mentioned obstacle to the free movement of Spanish workers, Law 22-A/2007, of 29 June, extended the exemption regime benefit to cross-border workers residing in Spain who move daily to their working place from an 'adjacent locality' in Spain.

However, the interpretation of this new provision and in particular the term 'adjacent' was not clear. Because of that, several Spanish cross-border workers continued to be fined.

Subsequently, Article 66 of the Budget Law for 2008, approved in 31 December 2007, defined 'adjacent locality' as a locality within 60 Km from the border. However, this provision did not cover all Spanish cross-border workers who reside beyond that limit and circulate in Portugal with vehicles registered in Spain. Therefore, Law 44/2008, of 27 of August, amended Law 22-A/2007, of 29 June, and extended the exemption regime to all cross-border workers residing in Spain who move daily to their working places in Portugal. The 60 Km limit was abandoned, which means that the exemption regime now covers any cross-border workers residing in Spain, with effects from 1 July 2007.

4. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES), SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, ARTISTS, RESEARCHERS AND ACCESS TO STUDY GRANTS

4.1. Frontier workers

Besides the legal scheme mentioned in point 3, we are unaware of other administrative or legal schemes for frontier workers in addition to the EU rules.

We are unaware of any bilateral agreements or transnational cooperation developed in order to facilitate frontier mobility.

4.2. Sportsmen/sportswomen

4.2.1. Legislation in force

Sports are organized in Portugal within the general framework of the Law on Physical Activities and Sports – Law 5/2007, of 16 of January – and, specifically, in the Decree-Law 248-B/2008, of 31 of December, that develops the framework law. According to Article 2 of Law 5/2007, of 16 of January, (Principles of universality and of equality), everyone has a right to physical activity and sport, regardless of their origins, sex, race, ethnicity, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social conditions or sexual orientation.

Art. 48(2) of the Decree-Law 144/93, of 26 of April, established that individual sports could only be practiced in Portugal by Portuguese citizens. This provision was revoked by Art. 62(2) of Decree-Law 248-B/2008, that now establishes that in individual sports national titles can only be granted to Portuguese citizens.

4.2.2. Administrative Practices

Concerning professional and non-professional sports, there are some federations regulations that discriminate against Union citizens:

- a) The Competition Regulation adopted by the Portuguese Volleyball Federation establishes that a team can only play simultaneously with two or three players that have an international transfer certificate (Art. 24 C of the Volleyball Competition Regulation). That means that players from EU Member States that were transferred to Portugal are included in this quota. This quota system seeks to guarantee that home-grown players get playing time.
- b) Article 37 of the Competition Regulation adopted by the Football Professional League establishes that football clubs must register a minimum of 8 ‘locally trained players’. A player is considered to be trained locally if registered in the Portuguese Football Federation for at least three seasons between the ages of 15 and 21. This restriction does not lead to a direct discrimination on the basis of nationality as these players can have any nationality. Nonetheless, there is a risk of indirect discrimination on the basis of nationality as access to clubs’ training facilities is easier for the young Portuguese players rather than players from the other member states.
- c) A much known case of restriction based on nationality was revealed in the autumn of 2008 by the Portuguese media. This case concern a regulation of the Portuguese Football Federation that established much higher registration fees for international transfers than for national transfers and that discriminated against non Portuguese players (Official Communication n.º 1 of the Portuguese Football Federation for the season 2008/2009). A 14 year old German boy, who played in a German club and whose parents moved to Portugal to work, wanted to play for a Portuguese football club. The Portuguese Football Federation required the payment of a mandatory 1320 € registration fee. According to the Portuguese Football Federation regulations, if the transfer occurred between national clubs, the registration fee would be of only 37,50 €, almost 4000% less than an international transfer. This reduced fee is also applicable ‘to Portuguese national players who transfer from foreign clubs to Portuguese clubs’ (Point 4 of Chapter 9 of the Official Communication n.º 1 of the Portuguese Football Federation for the season 2008/2009’). This discrimination was considered to be ‘shocking’ and in breach of EU law by the Portuguese Ombudsman (case R-3682/08 (A6), of 6 of October 2008). This kind of registration fees are also in force in several other sports federations. For instance, in the Portuguese Volleyball Federation the registration fee for in-

ternational transfers is 650€ and the registration fee for internal transfers is 30€ (Point 4.2. of the Official Communication n.º 17 of the Portuguese Volleyball Federation for the season 2008/2009’).

Recent legal literature

Two articles contain some references to the application of free movement legislation in the sports sector:

João Leal Amado, ‘Das ‘cláusulas de nacionalidade’ às ‘cláusulas de formação local’: uma diferença insuficiente?’, *Revista Jurídica do Desporto*, nº 10, Setembro/Dezembro 2006.

José Manuel Meirim, ‘Bosman was in the Convention? The Europe searching for the Sport’, *O Direito*, 2006.

4.3. Maritime sector, artists, researchers and access to study grants

According to Decree Law 104/89, of 6 of April, the access to posts in the maritime sector is subject to an inscription. Article 4 opens such an inscription also to EU citizens, without excluding the posts of master, chief master and master of vessels of merchant ships flying Portuguese flag. Equal treatment is thus granted as regards employment in this sector and also as regards working conditions and pay.

In what regards study grants, according to Article 17 of the scholarship regulation of the Technology and Science Foundation – the public Portuguese scholarship granting institution –, Portuguese citizens, as well as EU citizens with residence permits granted accordingly to Article 16 (1) of Law 37/2006, can apply to Portuguese scholarship.

There is no specific legislation regarding artists and researchers. Art. 15 of the Constitution grants them the same rights as the Portuguese artists and researchers.

Chapter IV

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

Regulation 1408/71 on the application of social security schemes to employed persons, to self employed persons and to members of their families moving within the Community has a more specific and limited scope than Regulation 1612/68 on freedom of movement for workers within the Community. It follows that in some cases the basic principle of equal treatment established by the latter regulation implementing Article 39 of the EC Treaty leads to derogations to the application of the former regulation.

A good example of this is the *Hendrix* judgment (C-287/05), where the Court of Justice decided that, although Article 39 EC and Article 7 of Regulation 1612/68 must be interpreted as not precluding national legislation which applies Article 4(2a) and Article 10a of Regulation 1408/71 and provides that a special non-contributory benefit listed in Annex IIa to the latter Regulation may be granted only to persons who are resident in the national territory, in cases where, for example, the person in question has maintained all of his economic and social links to the Member State of origin, such non-contributory benefit should continue to be granted to him/her, even if he/she changed his residence to another Member State. In such case, Article 7 of Regulation 1612/68 will prevail against Article 4(2a) and Article 10a combined with Annex IIa of Regulation 1408/71, in conformity with the protection of the rights of the person and the principle of proportionality.

In the Portuguese legal order no similar cases were found where Article 39 EC and Regulation 1612/68 must prevail against Regulation 1408/71.

In accordance to Article 39 of EC Treaty and Article 7 of Regulation 1612/68, EU workers in Portugal have the same social security rights, including health care, as Portuguese citizens, regardless of being residents. This is confirmed by Article 20(1) of Law 37/2006. On the other side, Article 7 of the Basic Law on Social Security was adopted – Law 4/2007, of 16 January – establishes the principle of equality and prohibits any discrimination of the beneficiaries, specifically for reasons such as gender and nationality, without prejudice, in this context, of conditions of reciprocity.

Despite the consultation of the several data bases available, we were unable to find any jurisprudence or specific literature on social security regarding Community workers in 2008.

Chapter V

Employment in the Public Sector

1. ACCESS TO THE PUBLIC SECTOR

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

Pursuant to Article 47(2) of the CPR, ‘All citizens have the right, equally and without restriction, to become a public official, by means of general public competition’. However, article 15(2) of the Constitution of the Portuguese Republic (CPR) restricts the performance of public functions that are not predominantly technical to Portuguese citizens. The latter is generally considered compatible with Article 39 of the EC Treaty. That means that EU workers’ and foreign citizens’ access to public sector employment, as a public official or an employee, is restricted to predominantly technical posts that exclude the exercise of public authority or sovereignty powers.

Law 12-A/2008, of 27 February, establishes the general regime of access to positions in the public sector. Article 8 sets out general requirements for admission to open competitions and recruitment to public sector posts, such as:

- 1) a minimum age of 18 years;
- 2) completion of the mandatory vaccination laws;
- 3) physical and psychological capability;
- 4) absence of any impediment or ban from carrying out public functions;
- 5) Portuguese nationality of the applicants, *except when exempted by the Constitution, specific legislation or international convention.*

Article 8 of Law 12-A/2008, of 27 February, revokes Article 29(2)(a) of the Decree-Law 204/98, which did not include any reference to the Constitution. Therefore, in order to be compatible with Article 15(2) of the CRP, the nationality requirement foreseen in Article 8 must be interpreted in the sense that applies exclusively to public posts implying the exercise of authority or sovereignty powers. Only these can be reserved to Portuguese citizens.³ Beyond the posts specified in article 15(3) of the Constitution (e.g. President of the Republic, President of the Parliament, Prime Minister, Presidents of the Supreme Courts), they include

- 1) Judicial Magistrates and Public Prosecutors (Article 33 of Law 16/98 amended by Law 3/2000 of 20 Mars and by Decree-Law 11/2002 of 24 January),
- 2) Diplomatic Corps (Article 10 of Decree-Law 40-A/98),
- 3) Police (Law 53/2007 of 31 August, which approved the Organic Law on Public Security Force),
- 4) Armed Forces, and
- 5) Tax Administration.

Acts governing access to certain public sector careers or announcements of open competitions frequently mention that applicants may be nationals of a Member State of the EU. This is the case, for example, of Article 22(1)(a) of Decree-Law 139-A/90 (Career Statutes for nursery school, teachers for primary and secondary school levels), which expressly foresees EU citizens’ access to the teaching profession in State schools.

³ The Decree-Law 437/91 of 8 November, amended by Decree-Law 414/98 and Decree-Law 411/99, concerning the legal regime for the nursing career, wrongfully foresees Portuguese nationality as a condition to be admitted in the competition (Article 27).

In cases where Portuguese legislation foreseeing specific public competitions does not mention the requirement of nationality of the applicants, it should be interpreted as opening the competition to both Portuguese and EU citizens.

Law 23/2004, of 22 June, establishing the legal regime of the individual labour contract of the Public Service prohibits ‘activities that involve the direct exercise of authority powers or the exercise of sovereignty powers’ from being the subject of a labour contract in the ambit of the direct Administration of the State.

Judicial Practice

An examination of the case-law databases of the Administrative Courts revealed that in 2008 there was no case-law pertaining to nationality condition for access to the public sector.

Administrative practices

Administrative practices are limited to implementing current legislation. For instance, the public job offer for a technical job in the Portuguese Parliament, published in the Journal *Diário de Notícias*, of 14 November 2008, p. 3, did not mention as an admission requirement the Portuguese nationality.

1.2. Language requirement

There are no express legal provisions concerning linguistic abilities, but it is demandable that the level of the linguistic knowledge be the reasonably necessary for the proper fulfillment of the duties. For instance, the public job offer for a technical job in the Portuguese Parliament, published in the Journal *Diário de Notícias*, from 14 November 2008, p. 3, mentioned as an admission requirement proficiency in the French and English languages.

1.3. Recognition of professional experience for the purposes of access to the public sector and for the purposes of progression in the Civil Service career

The Portuguese legal system includes general rules on the taking into account of professional experience and seniority for the purposes of access to public sector and for the purposes of progression in the Civil Service career, including the determination of professional advantages such as salary and grade.

These rules can be found in the several acts regulating the Civil Service and mainly in Article 51 (2) of Law 12-A/2008 of 27 February, which allows the public competition for the access to a public post to foresee the application of a person who does not have the required qualifications but has enough professional experience for that post, and in Article 53 (2) (a) which determines that the selection of candidates for public posts must be made through a curricular evaluation.

None of such rules considers specifically the case of professional experience and seniority obtained in another Member State.

However, the interpretation of such rules according to Community law imposes taking into account the professional experience and seniority achieved in another Member State for those purposes. And the administrative practice goes in that sense.

Until recently, the number of citizens of another Member States working in the Portuguese public sector was very tiny, and no real questions on this subject arose. In the late years things have changed. Nowadays, there are a large number of Spanish doctors and nurses working in the public hospitals and centres of the National Health Service. In the absence of specific legislation that takes into account professional experience and seniority acquired in another Member State, it is plausible that the number of administrative and judicial controversies on this subject become significant.

In any case, the absence of specific legislation on that matter does not release the Portuguese administration from the obligation of taking into account the professional experience and seniority acquired in another Member State, as imposed by Community law. Without prejudice of the adoption of legislation on this specific point, the use of administrative circulars and instructions could contribute to achieve such a result.

Obviously, Article 20(1) of Law 37/2006, providing that all Union citizens residing in Portugal on the basis of this Act enjoy equal treatment with the Portuguese nationals, strengthens the obligation for the Portuguese State to take into account the professional experience and seniority acquired in another Member State in conditions equivalent to those it takes into account professional experience and seniority acquired in Portugal. Every exception must be justified on mandatory requirements of general interest and must comply with the principle of proportionality.

Case Law

An examination of the case-law databases revealed that in 2008 there was no case-law on this matter.

Administrative Practices

The competition which gives access to a training and afterwards to a post in the public sector is a very common procedure in fields that are not open to the EU citizens, such as police forces and judicial bodies.

In the fields of activity of the public sector opened to EU citizens, because they are predominantly technical (mainly, teachers for primary and secondary school levels), Portuguese authorities take generally in consideration the principle of judgment *Burbaud*, according to which a EU worker who is already fully qualified in the field of activity concerned does not have to participate in a competition procedure which gives access to a training and afterwards to a post in the public sector.

Recent legal literature

Paulo Veiga e Moura e Cátia Arrimar, *Os novos regimes de vinculação, de carreiras e de remunerações dos trabalhadores da administração pública: comentário à Lei n.º 12-A/2008, de 27 de Fevereiro*, Coimbra: Coimbra Editora 2008.

Chapter VI

Members of the Worker's Family and Treatment of Third Country Family Members

1. FAMILY MEMBERS

According to Article 2(e) of Law 37/2006 family members of a Union citizen are: (i) his/her spouse; (ii) the partner with whom the Union citizen lives in a *de facto* union constituted in accordance with national legislation, or with whom the Union citizen holds a permanent relationship duly certified by the competent authority of the Member State where he/she resides; (iii) the direct descendants who are under the age of 21 or who are dependants of the Union citizen, as well as of his/her spouse or partner as defined in point (ii); (iv) the dependant direct relatives in the ascending line and those of the spouse or partner as defined in point (ii).

1.1. Situation of family members of job-seekers

1.1.2. Rights of family members

According to Article 4(2) of Law 37/2006, the family members of a Union citizen who are *third-country nationals* have the *right to enter* the Portuguese territory upon presentation of a valid passport. They are only submitted to visa requirements in accordance with the EU provisions in force, but they benefit from every facility to obtain the necessary visas, which are issued free of charge and on the basis of a special accelerated procedure. The practice of the Portuguese authorities when issuing visas to third country-family members of EU citizens moving to Portugal is in general consistent with the MRAX judgement.

Pursuant to Article 4(3) the family members of the Union citizen who are *third-country nationals* and are submitted to visa requirement in accordance with EU norms have the right to enter the Portuguese territory without visa if they possess a valid residence card. In such a case, no entry stamp is placed in their passport.

If such family members do not have the necessary travel documents or, if required, the necessary visas, they enjoy the possibility of obtaining the necessary documents or of having them brought to them within a reasonable period of time or of corroborating or proving by other means that they are covered by the right of free movement and residence [Article 4(4)].

According to Article 4(5), the member of the family of a Union citizen, who is a third-country national, must report his/her presence in the national territory in accordance with the law on the entry, permanence, exit and expulsion of foreigners (Aliens Act).

It follows that the family members of a Union citizen who are third country nationals are not under the scope of the Aliens Act, except in the cases where the Law 37/2006 expressly refers to that Act (Law 23/2007 on the Entry, Residence, Departure and Expulsion of Foreigners), as e. g. it does its Article 4(5).

Law 37/2006 does not provide that the right of a third-country national, who is accompanying or joining a Union citizen as a spouse, to enter and to reside in Portugal depends, in any circumstance, on the lawfully residence of this third-country national in another Member State when he/she moves to Portugal, accompanying or joining the Union citizen who is migrating or has migrated to Portugal. It follows that there was never a legal pretext for the application of the Akrich judgement and it has never been applied by the competent authorities.

Finally, Article 5 of Law 37/2006 provides that, without prejudice to the provisions on travel documents applicable to national border controls, all family members of a Union citizen who are third-country nationals and who hold a valid passport (at least for all Member States and for countries through which the holder must pass when travelling between Member States) have the right to leave the Portuguese territory, without exit visa or equivalent formality. If they present a residence card no exit stamp is placed in their passport.

Last but not least, it should be stressed in this context that Art. 31 of Law 37/2006 states that the residence permits and other social rights granted by this law are refused and withdrawn in case of abuse of rights or fraud, such as marriages of convenience.

1.1.3. Right of residence for up to three months

Concerning the *right of residence for up to three months*, Article 6(2) of Law 37/2006 provides that family members in possession of a valid passport who are third-country nationals and who accompany or join the Union citizen have such right in Portugal without any other conditions or formalities.

Article 7(2) of Law 37/2006 provides that family members who are *third-country nationals*, accompanying or joining a Union citizen, have the *right of residence for more than three months* on the Portuguese territory if such Union citizen meets one of the requirements set forth by the above quoted Article 7(1)(a), (b) or (c): he/she is a worker or a self-employed person in Portugal; has sufficient resources for him/herself and his/her family members, as well as a sickness insurance, provided that this is required in the Member State of his/her nationality to the Portuguese citizens; is enrolled at a public or private educational establishment officially accredited, provided that he/she proves, by means of a declaration or by such equivalent means as he/she may choose, that he/she has sufficient financial resources for him/herself and his/her family members, as well as a sickness insurance, if this is required in the Member State of his/her nationality to the Portuguese citizens.

1.1.4. Right of residence for more than three months

According to Article 15, the family members of the Union citizen who are *third-country nationals* and whose planned period of residence in the Portuguese territory is for more than three months must apply for a *residence card* before the Border and Immigration Service (BIS) within thirty days after three months from the date of arrival. For the residence card to be issued, the presentation of the following documents is required:

- a) a valid passport;
- b) a document attesting the existence of a family relationship or the quality of partner as defined in Article 2(e)(ii), quoted above;
- c) the registration certificate of the Union citizen whom they are accompanying or joining in Portugal;
- d) in cases falling under Article 2(e)(iii) and (iv) quoted above, documentary evidence that they are dependant of the Union citizen;
- e) in cases falling under Article 3(2), a document issued by the competent authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen.

The residence card is issued no later than three months from the date on which the application was submitted. Such card is valid for five years from the date of issue or for the envisaged pe-

riod of residence of the Union citizen, if this period is less than five years. The right of residence of these family members is not affected by

- a) temporary absences not exceeding six consecutive months a year;
- b) absences of a longer duration for compulsory military service or (c) one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country for professional reasons.

Pursuant to Article 14(6) for the registration certificate to be issued to family members who are themselves Union citizens, the presentation of the following documents is required:

- a) a valid identity card or passport;
- b) a document attesting the existence of a family relationship or of the partner quality as defined in Article 2(e)(ii), if this relationship or quality do not result evident from the identity card or passport;
- c) the registration certificate of the Union citizen whom they are accompanying or joining;
- d) in cases falling under Article 2(e)(iii) and (iv) quoted above, documentary evidence that they are dependant of the Union citizen;
- e) in cases falling under Article 3(2), a document issued by the competent authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen.

According to Article 17, the BIS shall issue a permanent residence card to the family members of a Union citizen job-seeker who are *third-country nationals* within three months from the submission of the application. Such application must be submitted before the residence card expires and must be accompanied by the presentation of the family member of a Union citizen's residence card.

1.1.5. Right of permanent residence

Concerning the *right of permanent residence*, Article 10(2) of Law 37/2006 states that the family members of the Union citizen who are *third-country nationals* and have legally resided with him/her in Portugal for a continuous period of five years benefit of such right.

Continuity of residence shall not be affected by temporary absences not exceeding a total of six consecutive months a year, or by absences of a longer duration for compulsory military service, or by the absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country. The family members of the Union citizen who are *third-country nationals* and acquired a right of permanent residence in Portugal shall lose such right only through absence from its territory for a period exceeding two consecutive years [Article 10(4) and (5)].

Pursuant to Article 12(1) if the Union citizen worker or self-employed acquired the right of permanent residence in Portugal in accordance with Article 11 quoted above, his/her family members who are residing with him shall also have such right, irrespective of their nationality. If, however, the worker or self-employed Union citizen dies while still working but before acquiring the right of permanent residence in Portugal on the basis of Article 11, his/her family members who resided with him shall acquire the right of permanent residence in Portugal provided that they meet one of the following conditions: (

- a) the worker or self-employed Union citizen had resided continuously in the Portuguese territory for two years;
- b) the death resulted from an accident at work or an occupational disease, in which case a minimum period of residence is not required;
- c) the surviving spouse lost the Portuguese nationality following marriage to the worker or self-employed Union citizen [Article 12(2)].

On the other hand, the family members who are *third-country nationals* and did not lose their right of residence following the Union citizen's departure from Portugal or his/her death, as well as divorce, annulment of marriage or termination of *de facto* union, because they met the conditions set forth in Article 8(3) [(a) they are workers or self-employed on the Portuguese territory; (b) they have sufficient resources for themselves and their family members, as well as a sickness insurance; (c) they are family members of a person who meets the conditions referred to in points (a) or (b), provided that the family has been constituted on the Portuguese territory], shall acquire the right of permanent residence after residing legally for a period of five consecutive years in Portugal (Article 13).

According to Article 23(2) the family members of a Union citizen, irrespective of nationality, who have the right of permanent residence on Portuguese territory, may not be deported from it, except on serious grounds of public policy or public security. Before taking an expulsion decision on such grounds, the court shall take into account of considerations such

- i) as how long the individual concerned has resided in the national territory,
- ii) his/her age,
- iii) state of health family and economic situation, (iv) social and cultural integration in Portugal, and
- v) extent of his/her links with the country of origin [Article 23(1)].

In order to ascertain whether the family members of the Union citizen who are *third country nationals* represent a danger for public policy or public security, when issuing the correspondent residence card, the Portuguese competent authority (BIS) may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous criminal records the person concerned may have. Such enquiries may not be made as a matter of routine [Article 22(4) and (5) and (6)] of Law 37/2006.

Whatever the case, expiry of the passport with which the *third-country national* who is a family member of a Union citizen entered the Portuguese territory may not constitute a ground for expulsion [Article 9(5)].

Finally, concerning public health grounds, diseases occurring after a three-month period from the arrival to Portugal may not constitute grounds for expulsion of family members who are *third-country nationals* from the Portuguese territory [Article 24(2)].

1.2. Application of the Metock judgement

As mentioned above, Law 37/2006 does not oblige a national of a national of a third country who is the spouse of a Union citizen residing in Portugal but not possessing Portuguese nationality to have previously been lawfully resident in another Member State before arriving in Portugal, in order to benefit from the provisions set forth in that law. Moreover, the rights foreseen in Law 37/2006 are granted to a national of a third country who is the spouse of a Union citizen residing in Portugal and who accompanies or joins that Union citizen, irrespective of when and

where their marriage took place and of how the national of a non-member country entered Portugal. Therefore, the Portuguese legislation is fully consistent with the Metock judgement.

2. ACCESS TO WORK

According to Article 19 of Law 37/2006, irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in Portugal are entitled to take up employment or self-employment.

Article 20(1) and (2) provides that the family members of a Union citizen residing in Portugal who are *third-country nationals* enjoy equal treatment with the Portuguese nationals, without prejudice of the restrictions admitted by Community law.

3. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

The legal framework explained in point 1 is also applicable to family members of job-seekers. That means that without prejudice of the restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health, an expulsion measure may in no case be adopted against family members of job-seekers, if the job-seeker has entered the Portuguese territory in order to seek employment and can provide evidence that they is seeking employment [Article 9(4) of Law 37/2006].

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

According to Article 20(3) of Law 37/2006 the family members of a Union citizen who are *third country nationals* (as well as those who are nationals of a Member State) are not entitled to the benefits granted by the solidarity sub-system (non-contributory) in Portugal during the first three months of residence or during a longer period, if the Union citizen whom they are accompanying or joining entered the Portuguese territory in order to seek employment.

Draft legislation, circulars

The Law 37/2006 imposes the adoption by the Minister of Home Affairs of three execution regulations concerning Union citizens' family members who are third country nationals: (1) an execution regulation laying down the model of a residence card for periods of residence in Portugal longer than three months [Article 15(1)]; (2) an execution regulation laying down the model of a permanent residence card [Article 17(1)]; (3) an execution regulation laying down the costs concerning the issuing of such documents [Article 29(1)]. All these execution regulations were adopted in 2006 through the Portaria 1637/2006, of 22 September.

Judicial practice

An examination of the case-law databases of the administrative courts revealed that in 2008 there was no case-law on this matter.

Administrative practices

Administrative practices during are limited to implementing current legislation.

Recent Legal Literature

Constança Urbano de Sousa, 'A Directiva n.º 2004/38/CE do Parlamento Europeu e do Conselho, de 29 de Abril de 2004, e o direito dos cidadãos comunitários ao reagrupamento familiar', in: *Estudos jurídicos e económicos em homenagem ao Prof. Doutor António de Sousa Franco*, Lisboa: Faculdade de Direito da Universidade de Lisboa 2006, p. 629-654.

Chapter VII

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

The ECJ judgments *Hendrix* (C-287/05) and *Renneberg* (C-527/06) deal with cases relating to frontier workers. The latter is surely more relevant to the Portuguese legal order than the former. As a matter of fact, there is a considerable number of Spanish citizens working in Portugal (especially in the National Health Service), where they receive all or almost all of their taxable income, without being residents in Portugal. By contrast, a situation similar to that described in the *Hendrix* judgement is surely very rare in Portugal.

Concerning, on one hand, the implementation at national level of the *Renneberg* judgment, it should be stressed, firstly, that the Portuguese tax law foresees that the interest on a debt taken on to finance a personal dwelling is deduced from gross work-related income and, consequently, from the taxable income of a resident taxpayer, even if the interest exceeds the advantage the taxpayer derives from living in his own dwelling. Secondly, there is a Convention between the Portuguese Republic and the Kingdom of Spain for the avoidance of double taxation and for the prevention of fiscal evasion in the field of taxes on income (Resolution of the Assembly of the Republic 6/95). It is not clear if such convention allows the deduction, for the purposes of determining the basis of assessment of the income in one of the States, the negative income relating to a house owned by the taxpayer and used as a dwelling in the other State, even if the non resident taxpayer receives all or almost all of his taxable income in the State where he works.

In any case, due to Article 39 of the EC Treaty as interpreted by the Court of Justice in case *Renneberg*, Portugal, as a Member State of employment, must accept that the negative income related to a dwelling in Spain is taken into account by its tax authorities for the purposes of determining the basis of assessment of taxable income, whereas the taxpayer derives all or almost all of his taxable income from salaried activity carried out in Portugal. Therefore, the above-mentioned convention must be interpreted in conformity with the *Renneberg* judgement.

On the other hand, concerning the implementation at national level of the *Hendrix* judgment, the Portuguese benefit to disabled young people equivalent to the Dutch one must be considered as a special non-contributory benefit within the meaning of Article 4(2a) of Regulation 1408/71 and a social advantage within the meaning of Article 7(2) of Regulation 1612/68, whose payment may validly be reserved to persons who reside in the Portuguese territory because it is closely linked to the socio-economic situation of Portugal, since it is based on the minimum wage and standard of living in that Member State. It does not exclude that in cases where the worker who moved to Spain has maintained all of his economic and social links to Portugal, he/she must keep receiving the benefit at issue. It is for the national administration, under the control of the national court, to take account, in particular, of such circumstance. This is imposed by Article 39 EC treaty and Article 7 of Regulation 1612/68.

Finally, the judgment *Raccanelli* is not related to a frontier worker case, but to the application of the principle of non-discrimination to non-governmental organisations established as a private law association operating in the public interest. The Court of Justice reaffirmed its jurisprudence according to which the prohibition of discrimination applies not only to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals but also to private-law associations.

In Portugal there are some private-law associations, equivalent to that at issue in case *Raccanelli*, which contract with researchers preparing their doctoral thesis or grant them subsidies for that purpose. According to this judgement, such private-law associations must observe the principle of non-discrimination in relation to workers within the meaning of Article 39 of the

PORTUGAL

EC Treaty. An infringement of such principle can entitle the worker in question to claim compensation pursuant to the national legislation applicable in relation to non-contractual liability.

Chapter VIII

Application of Transitional Measures

In the Treaty of Accession, Portugal negotiated a transitional period of two years starting from 1st of May 2004 and terminated on 1st of May 2006, with eight new Member States: Czech Republic, Slovakia, Estonia, Latvia, Lithuania, Hungary, Poland and Slovenia. There is no transitional period for Cyprus and Malta.

The employees of all the new Member States residing legally in Portugal before 1st of May 2004 were not affected by the transitional measures. Thus, they became subject to Decree-Law 60/93 and from 10 August 2006 to Law 37/2006.

Concerning the situation of self-employed and economically inactive citizens there was no transitional period and no measures were negotiated for these citizens of the ten new Member States. It means that from 1st of May 2004, the Decree-Law 60/93, and from 10th of August 2006, the Law 37/2006, also became applicable to them.

Thus, from 1st of May 2004 self-employed and economically inactive persons of the ten new Member States did not need a work visa or a residence visa in Portugal, contrarily to the employees of eight new Member States till 1st of May 2006.

Till this date, the entry and residence of *employees* coming from the EU 8 were regulated under the Aliens Act and not under the Act setting out the conditions of entry and stay for the citizens of the EU Member States and their family members.

It meant that, in the absence of a bilateral agreement between Portugal and one these new Member States establishing specific provisions on this matter, a citizen of these States could only exercise a subordinated professional activity in Portugal if he had a work visa or a residence permit. Such a citizen needed to accept an offer of employment and obtain a work visa in a Portuguese consular post in his country of origin.

The workers of those eight Member States exercising legally a subordinated activity in Portugal enjoyed equal treatment vis-à-vis the national workers, concerning namely working conditions, salaries and social security, since no derogation to Regulation 1408/71 was negotiated.

The members of the family who joined these workers from 1st of May 2004 – spouse, descendants under the age of 21 years or over 21 dependent on them – had access to the working market after a stay of six months in Portugal.

From 1st of May 2006, Portugal has not applied any longer transitional measures to citizens of the Member States who joined the EU in 2004. The main change in the position of such citizens moving to or residing in Portugal, is the fully application to them of the EC Regulation 1612/68 and of Law 37/2006. Thus, since that date there is no special regime applicable to them in Portugal.

From 1st of January 2007, Portugal is applying to Bulgarian and Romanian citizens national measures provided for in Annex VI and Annex VII of the Accession Act to EU of Bulgaria and of Romania, which correspond essentially to those Portugal applied to the EU 8 countries during a transitional period of two years.

It is also important to mention that from 2007, Romania and Bulgaria were not any longer included in the list of ‘target countries’ for the purpose of identification of citizens in illegal situation. At present, Bulgarian and Romanian citizens are not subject to administrative decisions of expulsion or notifications for voluntary departure which can affect third country nationals.

Chapter IX Miscellaneous

1. Legislation

Concerning the legislative modifications with repercussion in the movement of workers, it should be mentioned that the Aliens Act and Regulation 84/2007, of 5 November, establishes the legal regime of entry, stay and departure of foreigners (third country nationals) from the Portuguese territory.

The Aliens Act transposes the Directives 2003/110/CE, 2003/86/CE, 2003/109/CE, 2004/81/CE, 2004/81/CE, 2004/82/CE, 2004/114/ CE e 2005/71/CE. It has four main purposes: regulation of the migratory flows, promotion of the legal immigration, fighting against the illegal immigration and integration of immigrants. It also standardizes the permits that entitle the foreign citizens to reside in Portugal.

Article 4(2) of Law 23/2007, of 4 of July, excludes from its ambit of application nationals from the EU Member States, as well as members of their families who are third country nationals.

Article 59(1) imposes a preference in access to employment in Portugal for workers who are nationals of EU Member States.

The Decree-Law 368/2007, of 5 November, concerning protection of victims of trafficking in human beings completes the Law 23/2007 and establishes a special regime of residence for such victims.

The Plan for the immigrants' integration was approved by the Resolution of the Council of Ministers 63-A/2007, of 3 May, that establishes a national strategy concerning the reception and integration of immigrants. This plan includes measures in several fields such as the employment and the vocational training, residence and health, education, culture, sport, social benefits and justice.

2. Studies, seminars, reports, legal literature

Report on the activities of the Border and Immigration Service concerning 2008.

3. National bodies where citizens can launch complaints for violation of Community law on free movement of workers

- Assembly of the Republic, through petitions;
- Ombudsman, through complaints;
- Ministry of Home Affairs, through complaints concerning the action of the Border and Immigration Service and other entities hierarchically dependent on such Ministry.

4. List of internet sites of legislation and court judgments

www.portugal.gov.pt

www.mai.gov.pt

www.mne.publinet.com.pt

PORTUGAL

www.msst.gov.pt

www.sef.pt

www.seg-social.pt

www.inac.pt

www.dgsi.pt

www.dre.pt

www.pgr.pt

www.oa.pt

www.ordemdosmedicos.pt

www.ordemenfermeiros.pt

www.solicitadores.net

www.cnj.pt

www.idesporto.pt

www.cdp.pt

www.fdl.ul.pt

www.fd.uc.pt

www.unl.pt

COMMENTS

to the Report on the free movement of workers in Portugal in 2008-2009

I

Contents

Page 2 (line 5):

The title of Chapter IV “Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68” should be completed with the words “**of the EC Treaty**”, in order to be read as follows:

“Relationship between Regulation 1408/71 and Article 39 **of the EC Treaty** and Regulation 1612/68”

II

Chapter I - Entry, Residence, Departure

Situation of Job-Seekers

Legislation in force

The last sentence of the second paragraph – “Portuguese Law does not establish any time limit for the stay of the job-seeker, which means that they can remain in Portugal as long as they can prove that they are seeking an employment [Article 7 (1) (b) of Law 37/2006]” should refer not only to Article 7 but also to Article 9 of Law 37/2006. So we suggest the following text:

“Portuguese Law does not establish any time limit for the stay of the job-seekers [Article 7 (1) (b) of Law 37/2006], **and** it establishes that they can remain in Portugal as long as they can prove that they are seeking an employment [Article 9 (4) (b) of Law 37/2006]”.

Third paragraph, line 6: “...but to affiliation in and payment of contributions to the **insurance sub-system** (the only benefit of this **sub-system**...)”, must be replaced by “but to affiliation in and payment of contributions to the **insurance system** (the only benefit of this **system**...)”, according to the Framework Law of the Social Security System, Act n. 4/2007, January 16, in force.

III

Chapter III – Equality of Treatment on the Basis of Nationality

Page 9 (line 7):

The sentence should be completed with the word **law** in order to transcribe Article 13 (1) of the Constitution of the Portuguese Republic:

‘(1) all citizens have the same social rank and are equal before the **law**’.

IV

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

Title:

The title of Chapter IV “Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68” should be completed with the words “**of the EC Treaty**”, in order to be read as follows:

“Relationship between Regulation 1408/71 and Article 39 **of the EC Treaty** and Regulation 1612/68”

It should be underlined that the suggestion made in the Comments to the previous report in order to include Health Care, a fundamental branch of the social security which has a relevant impact on the free movement of persons, has been accepted.

Fourth paragraph, line 4:

The reference to the Law n. 4/2007 should be “**Framework Law of Social Security**” and not “Basic Law of Social Security”.

V

Chapter VI – Members of the Worker’s Family and Treatment of Third Country Family Members

1.2. Application of the Metock judgement

Line 1:

The words “of a national” are redundant and should be erased.

VI

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

Paragraph 4, line 7:

A small correction concerning the non contributory benefit granted to disabled young people should be made because it is based on the **Indexing Social Support (ISS)** and not on the **minimum wage**, and also on the standard of living assessed by the family income, per person.

Lisboa, 23 de Novembro de 2009