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

Rapporteur: Prof. Rudolf Feik
University of Salzburg

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 family
Chapter VII Relevance/Influence/Follow-up of recent Court of Justice judgments
Chapter VIII Application of transitional measures
Chapter IX Miscellaneous

Introduction

Free Movement of Workers isn't a 'priority topic' in Austria, neither in politics nor in science. Of course there are political discussions about foreigners – but they do not concern Union citizens or their family members. The discussion focuses on asylum seekers and unqualified immigrants. Even the fact, that Germans are the largest group of foreign workers in Austria, was hardly mentioned (or even discussed).

There was no discussion about the prolongation of the transitional periods. At the end of April 2009, there was a short note in the newspapers about the fact that the Austrian Minister for Labour notified the prolongation to the Commission; but obviously there was no need for discussion. Not on political level because all Austrian Parties (except the Greens) are voting for prolongation (and mainly base that on labour market-reasons under the specific situation of the current economic crisis); the economy as well as the trade unions favour the prolongation.

There have been amendments to the Austrian Immigration Law but they only concern Third Country Nationals.

Chapter I
Entry, Residence, Departure

The Austrian Immigration Law is codified in the Austrian Police Act 2005 ('Fremdenpolizeigesetz' [FPG]; Federal Law Gazette I 100/2005; in the following quoted as 'APA 2005'), the Settlement and Residence Act 2005 ('Niederlassungs- und Aufenthaltsgesetz' [NAG]; Federal Law Gazette I 100/2005; in the following quoted as 'SRA') and the Asylum Act 2005 ('AsylG'; Federal Law Gazette I 100/2005); these Acts have been supplemented by implementation orders: 'Fremdenpolzei-Durchführungsverordnung' (Federal Law Gazette II 450/2005; in the following quoted as 'APA-IO') and 'Niederlassungs- und Aufenthaltsgesetz-Durchführungsverordnung' (Federal Law Gazette II 451/2005; in the following quoted as 'SRA-IO').

The Immigration Acts have been amended twice: At the beginning of 2008, the Act on the Austrian Asylum Court was published (Federal Law Gazette I 4/2008). This Act adapted the national provisions to the existence of the new Court. But it didn't change any provisions which are relevant for free movement of workers. The second amendment was published by Federal Law Gazette I 29/2009: This Act was necessary because the Austrian Constitutional Court stated that there has to be the possibility to apply for a residence permit on humanitarian reasons. Additionally the so called 'Boultif'-criteria (as regards Art. 8 ECHR) have been implemented. But again: This Act didn't change any provisions which are relevant for free movement of workers. The same counts for Federal Law Gazette I 38/2009, which was published one week later and implemented additional provisions on a 'stay permit for specific protection'.

As far as I found out, there is no English translation for the APA 2005 available. You'll find the German version of the APA 2005 and the SRA on the Federal Minister for Interior Affairs' homepage (http://www.bmi.gv.at/gesetzesvorlagen/) or in the Republic's online law ressource http://www.ris.bka.gv.at.

An English version of the SRA issued by the Federal Ministry for the Interior is ready to download at: http://www.bmi.gv.at/downloadarea/niederlassung/rechtsgrundlagen/NAG-eng.pdf.

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

The Commission is interested in the implementation of Art. 7 (1a), 7 (3a-d), 8 (3a), 14 (4a-b), 17 and 24 (2) Directive 2004/38. The situation in Austria seems to be as follows: Art. 7 § 1/a has the same wording as Sect. 51 pt. 1 SRA and the legislative materials to Sect. 51 SRA[1] explicitly refer to Art. 7 § 1. But it seems that there is no equivalent for Art. 7 § 3. Art. 8 § 3 is implemented by Sect. 53 § 2 SRA but there is no national provision transposing Art.

1 Sect. 51 SRA reads as follows:
EEA nationals who are entitled to free movement under EU law and who reside in the federal territory for longer then three months, shall have the right to settle if 1. they are Austrian nationals or self-employed, or 2. they have sufficient sickness insurance for themselves and for their family, and disposes of enough means to support themselves and the members if their family, without recourse to the social assistance system or 3. they complete an education from a legal accredited public or private school or educational institution and meet the requirements under Point 2.

14 § 4. The implementation of Art. 17 is missing as well as an explicit provision about Art. 24 § 2.

2. SITUATION OF JOB-SEEKERS

Union citizens who look for a job in Austria have to register within three days if they take a residence. Probably this is not in line with ECJ C-265/88, Messner: a three-days-period for registering is too short. According to that, union citizens, who have to register in Austria for the first time, do not violate Sect. 3 registration Act ('Meldegesetz', Federal Law Gazette 9/1992 as amended by I 151/2004) if they need a little bit more than three days for registering.

According to Art 69 Regulation 1408/71 the foreign unemployment benefit can be exported to Austria (for three months maximum) if the job-seeker applies for export before he comes to Austria. The foreigner has to have the E303-formular. Since the export of the benefit is handled by the State's employment agencies, the foreigner has to register there within seven days even if he/she does not use the agencies' services (the concrete procedure is stipulated by EC-Regulation 574/72 and internal 'procedural guidelines').

If foreigners without foreign unemployment benefits look for a job with the help of the State's employment agencies, they have to register there and will receive job offers.

If the foreign job-seeker is not entitled to a foreign unemployment benefit, he/she usually is not entitled to an Austrian (financial) unemployment benefit. But the same counts for Austrians: If they are no more entitled to unemployment payments, they can apply for 'Notstandshilfe', which is only granted when there was a claim on unemployment payments before. If the Austrian wasn't entitled to an unemployment payment, he/she is not entitled to 'Notstandshilfe' afterwards. He/she has to apply for 'social welfare'-payments which are within the responsibility of the provinces. These payments do (usually) not depend on citizenship. But then we have the problem of 'being self-maintaining' as a prerequisite of free movement of union citizens.

3. JUDICIAL PRACTICE

There is no specific case law dealing with the above mentioned articles. The Administrative Court's judgments mainly refer to the Directive's provisions when the term 'family member' is in dispute (see e.g. 24.2.2009, 2008/22/0215; 27.1.2009, 2008/22/0190; 14.10.2008, 2008/22/0774; 28.8.2008, 2008/22/0673; 28.5.2008, 2007/09/0109; 28.5.2008, 2006/09/0102).

The Administrative Court (29.4.2008, 2008/21/0072 and 17.6.2008, 2008/22/0009) mentioned that Turkish workers and Union citizens have to be treated equally as regards residence bans; Sect. 86 § 1 APA, which implements Directive 2004/38 and stipulates the prerequisites for that measure, is applicable to both groups.

Recent legal literature

There are two articles to be mentioned:

Heißl, Aufenthaltsverbote – Gemeinschaftsrechtliche Vorgaben und Regelungen des FPG 2005, *migralex* 2008, p. 46-53, is about the EC law requirements for expulsion measures.

He describes the ECJ-case law on Directive 64/221 and the contents of Art. 27, 28 and 31 Directive 2004/38. Then he focuses on domestic law, especially on Sect. 60 APA (general clause on residence prohibition), Sect. 61 APA (inadmissibility of these measures [e.g. for 'the second generation']), Sect. 66 APA (consideration of Art. 8 ECHR) and Sect. 86 APA (special provision for Union citizens, implementing Art. 27 Directive 2004/38 by using the same words). The Administrative Court uses Sect. 60 APA as a benchmark to judge the Union citizen's dangerousness. *Heißl* states that the case law gives the impression that imprisonment always approves dangerousness; because ECJ-judgment Orfanopoulos (C-482/01) mentions that a residence ban is ultima ration in exceptional cases, he suggests a preliminary procedure. Additionally he points on the fact, that a residence ban can be revoked (Sect. 65 § 2 APA); but there is no hint on the three-years-threshold of Art. 32 Directive 2004/38.

Khakzadeh-Leiler, Vorläufiger Rechtsschutz: Zur Schubhaft während eines Vorabentscheidungsverfahrens, *migralex* 2009, p. 9-12, is about the following, very specific question: A Slovenian citizen was subject to a residence prohibition and additionally to a detention for deportation. But is it in line with EC law to implement the deportation when relevant preliminary procedures are pending (C-136/03, Dörr and Ünal [competent authority])? The Administrative Court (20.12.2007, 2004/21/0319) stated that the authorities are not allowed to set a fait accompli by deporting an Union citizen. *Khakzadeh-Leiler* discusses the Administrative Court's arguments based on interim legal protection and effet utile.

Chapter II
Access to Employment

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

Sect. 1 § 2 lit l of the Aliens Employment Act (Federal Law Gazette 218/1975 as amended by I 78/2007) stipulates, that EEA citizens do not have to apply for a working permit.[2] But according to the transitional arrangements for EU8 and Bulgaria and Romania, this doesn't count for that group (see Chapter VIII).

The Equal Treatment Act (Federal Law Gazette I 66/2004) has a specific provision about non-discrimination in the field of employment. According to Sect. 17 § 1/1 nobody is to be discriminated, especially as regards access to an employment. And Sect. 18 stipulates non-discrimination as regards access to careers guidance, vocational training, further training or retraining. Nevertheless it has to be kept in mind that the mentioned provisions refer to discrimination on ethnical reasons, religion, age or sexual orientation and not on nationality.

The Act on the State's employment agencies ('Arbeitsmarktservicegesetz', Federal Law Gazette 313/1994 as amended by I 104/2007) has no specific provision about non-discrimination. Sect. 29 and 31 stipulate the guidelines for the assistance.[3]

---

2 Sect . 1 § 2 and 3 Aliens Employment Act read as follows:
§ 2 Die Bestimmungen dieses Bundesgesetzes sind nicht anzuwenden auf …
l) Freizügigkeitsberechtigte EWR-Bürger, deren drittstaatsangehörige Ehegatten und Kinder (einschließlich Adoptiv- und Stiefkinder), die noch nicht 21 Jahre alt sind oder denen der EWR-Bürger oder der Ehegatte Unterhalt gewährt, sowie drittstaatsangehörige Eltern des EWR-Bürgers und seines Ehegatten, denen der EWR-Bürger oder der Ehegatte Unterhalt gewährt, sofern sie zur Niederlassung nach dem Niederlassungs- und Aufenthaltsgesetz (NAG), BGBl. I Nr. 100/2005 berechtigt sind;
m) EWR-Bürger, die ihr Recht auf Freizügigkeit nicht in Anspruch nehmen, deren drittstaatsangehörige Ehegatten und Kinder (einschließlich Adoptiv- und Stiefkinder) sowie die drittstaatsangehörigen Ehegatten und Kinder österreichischer Staatsbürger, sofern der Ehegatte bzw. das Kind zur Niederlassung nach dem NAG berechtigt ist.
§ 3 Zwischenstaatliche Vereinbarungen über die Beschäftigung von Ausländern werden durch die Bestimmungen dieses Bundesgesetzes nicht berührt.

3 *Sect. 29 Act on the State's employment agencies* reads as follows:
§ 1 Ziel des Arbeitsmarktservice ist, im Rahmen der Vollbeschäftigungspolitik der Bundesregierung zur Verhütung und Beseitigung von Arbeitslosigkeit unter Wahrung sozialer und ökonomischer Grundsätze im Sinne einer aktiven Arbeitsmarktpolitik auf ein möglichst vollständiges, wirtschaftlich sinnvolles und nachhaltiges Zusammenführen von Arbeitskräfteangebot und -nachfrage hinzuwirken, und dadurch die Versorgung der Wirtschaft mit Arbeitskräften und die Beschäftigung aller Personen, die dem österreichischen Arbeitsmarkt zur Verfügung stehen, bestmöglich zu sichern. Dies schließt die Sicherung der wirtschaftlichen Existenz während der Arbeitslosigkeit im Rahmen der gesetzlichen Bestimmungen ein.
§ 2 Das Arbeitsmarktservice hat zur Erreichung dieses Zieles im Rahmen der gesetzlichen Bestimmungen Leistungen zu erbringen, die darauf gerichtet sind, 1. auf effiziente Weise die Vermittlung von geeigneten Arbeitskräften auf Arbeitsplätze herbeizuführen, die möglichst eine den Vermittlungswünschen des Arbeitsuchenden entsprechende Beschäftigung bieten, 2. die Auswirkungen von Umständen, die eine unmittelbare Vermittlung im Sinne der Z 1 behindern, überwinden zu helfen, 3. der Unübersichtlichkeit des Arbeitsmarktes entgegenzuwirken, 4. quantitative oder qualitative Ungleichgewichte zwischen Arbeitskräfteangebot und Arbeitskräftenachfrage zu verringern, 5. die Erhaltung von Arbeitsplätzen, wenn sie im Sinne des Abs. 1 sinnvoll ist, zu ermöglichen und 6. die wirtschaftliche Existenz der Arbeitslosen zu sichern.
The core contents of this provision: The main goal of the employment agencies is to bring together 'supply and demand'. It should be ensured that the economy finds employees, that all persons available on the Austrian labour market get employed and that there are subsidies for the time of unemployment. Therefore the agencies should 1. find jobs according to the qualification of the job seekers, 2. reduce obstacles to

2. LANGUAGE REQUIREMENT

There are no specific provisions about language requirements. There haven't been reported any problems.

---

placements, 3. simplify the labour market, 4. reduce the unbalance of job-seekers and job offers, 5. contribute to the securing of jobs and 6. secure the existence of unemployed people.
Sect. 31 Act on the State's employment agencies reads as follows:
§ 1 Die Leistungen des Arbeitsmarktservice, die nicht im behördlichen Verfahren erbracht werden, kann jedermann bei allen Geschäftsstellen und Einrichtungen des Arbeitsmarktservice in Anspruch nehmen, die diese Leistungen anbieten, sofern dem die in Abs. 5 genannten Grundsätze nicht entgegenstehen.
§ 2 Sofern auf Leistungen des Arbeitsmarktservice kein Rechtsanspruch besteht, haben sich Wahl, Art und erforderlichenfalls Kombination der eingesetzten Leistungen nach den Erfordernissen des Einzelfalles unter dem Gesichtspunkt zu richten, dass sie dem in § 29 genannten Ziel bestmöglich entsprechen. Bei Erfüllung seiner Aufgaben hat das Arbeitsmarktservice auf einen angemessenen Ausgleich der Interessen der Arbeitgeber und der Arbeitnehmer zu achten.
§ 3 Für Personen, die entweder wegen ihrer persönlichen Verhältnisse oder ihrer Zugehörigkeit zu einer auf dem Arbeitsmarkt benachteiligten Gruppe bei der Erlangung oder Erhaltung eines Arbeitsplatzes besondere Schwierigkeiten haben, sind die Leistungen des Arbeitsmarktservice im Sinn des Abs. 2 so zu gestalten und erforderlichenfalls so verstärkt einzusetzen, dass eine weitestmögliche Chancengleichheit mit anderen Arbeitskräften hergestellt wird. Insbesondere ist durch einen entsprechenden Einsatz der Leistungen der geschlechtsspezifischen Teilung des Arbeitsmarktes sowie der Diskriminierung der Frauen auf dem Arbeitsmarkt entgegenzuwirken.
§ 4 Die Tätigkeit des Arbeitsmarktservice ist, soweit es die Sicherstellung der Beachtung und Umsetzung der Arbeitsmarktpolitik der Bundesregierung, die Gleichbehandlung gleichartiger Angelegenheiten, die notwendige Einheitlichkeit des Vorgehens und die Erreichung höchstmöglicher Effizienz und Zweckmäßigkeit der Leistungserbringung erlauben, dezentral durchzuführen. Die Leistungen des Arbeitsmarktservice sind, soweit nicht ausdrücklich etwas anderes bestimmt ist, durch die regionalen Organisationen zu erbringen.
§ 5 Bei allen Tätigkeiten hat das Arbeitsmarktservice auf die Grundsätze der Sparsamkeit, Wirtschaftlichkeit und Zweckmäßigkeit unter dem Gesichtspunkt der bestmöglichen Erreichung des in § 29 genannten Zieles Bedacht zu nehmen. Zur Bewertung der Effizienz der Tätigkeit des Arbeitsmarktservice ist ein internes Controlling einzurichten.
The core contents of this provision: Everybody can make use of the agencies'services (§ 1). According to § 2, the services depend on the affords of the single case in the light of Sect. 29. Members of a disadvantaged group should receive specific help (§ 3). The agencies are decentralized (§ 4). According to § 5, the agencies have to work in an economic and effective way, taking into account the goals of Sect. 29.

Chapter III
Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS

There are no hints on discrimination in the recent literature as regards working conditions. This was confirmed by labour law experts and social law experts who have been consulted by the rapporteur.

2. SOCIAL AND TAX ADVANTAGES

There are no hints on discrimination in the recent literature as regards social or tax advantages. This was confirmed by labour law experts and social law experts who have been consulted by the rapporteur.

3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS?

There is no public debate about any obstacles (aside the transitional agreements).

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

4.1 Frontier workers

Frontier workers haven't been a topic in academic discussion or in the media. As regards a residence clause there are three bilateral agreements which entitle the frontier worker to unemployment benefits in the country of residence: Austria-Germany (Federal Law Gazette 392/1979); Austria-Switzerland (Federal Law Gazette 515/1979); Austria-Liechtenstein (Federal Law Gazette 76/1982).

And there are double-tax-agreements with Germany, Czech Republic, Hungary, Slovenia and Switzerland. E.g. in the Austria-Germany-agreement you find a provision about frontier workers: Employees who work near the border and live near the border have to pay taxes in their residence state if the person returns back daily.

There also exist some regulations relating to social insurance within these agreements. But this is mainly tackled by Regulation 1408/71. But according to information given by officials of the employment agencies, there are nearly no requests concerning job seeking or residence rights; in most cases it is about health insurance and pensions. But this is subject to Regulation 1408/71 (and its successor Regulation 883/2004). And there the main problem is the separation of frontier workers in the sense of Art. 1 lit. b ('real frontier workers'), 'unreal frontier workers' (Art. 71; see ECJ Reibold (216/89), Aubin (227/81), Knoch (102/91)) and 'untypical frontier workers' (see ECJ Miethe (1/85)).

But as mentioned at the beginning: There are no problems reported; neither the academic discussion nor the media focussed on frontier workers within the last few years. Perhaps this will change, when unlimited free movement of workers is granted to the citizens of the Czech Republic, Slovakia, Hungary and Slovenia in May 2011 – but today it is no topic. As far as I was told by civil servants of employment agencies, there are no specific administrative or legal schemes available and there are no agreements promoting frontier work.

4.2 Sportsmen/sportswomen

Football: It is possible to download the 'Durchführungsbestimmungen' for 'official matches within the Austrian leagues' at the Austrian Football Association's homepage (ÖFB) http://www.bundesliga.at/blinfo. This document includes a 'fee for training' (§ 9) and subsidies for using Austrian players (§§ 10 and 11). § 9 does not refer to nationality but to age, division and number of matches. On the other hand, §§ 10 and 11 are means to promote Austrian players. A second-division-club is entitled to receive ÖFB's money if it nominates at least 13 players allowed to play for the Austrian national team or being Austrian citizen or being equally treated according to ÖFB-rules but younger than 21. A first-division-club has to nominate 9 Austrian citizens per match to be entitled. This system might be a factual discrimination as regards the first division: any club in need of these subsidies is forced to restrict the number of non-Austrian EEA-citizens – or the other way round: 'poor' clubs are forced to have interest in Austrian players. In other words: Only very rich clubs are able to have a team with a majority of non-Austrians. Therefore the labour market for EEA nationals is restricted (see e.g. Resch, Spielerbewertungssysteme zur Herstellung von Chancengleichheit, in: Grundei/Karollus (Hrsg), *Berufssportrecht I* (2008), p. 137-151).

Basketball: Karollus (Karollus, Ausländerklauseln im Sport und Drittstaatsangehörige, WBl 2005, pp. 497-505) stated a violation of EC law as regards basketball (Sect. 4.4.2 Transfer- und Meldeordnung; available at http://www.oebl.at), fistball (point 2.2.3 Österreichischer Faustball-Bund; available at http://www.vereinsmeier.at/real/48942/doku/Best_OEFBB_7_2004.pdf) and tennis (Sect. 8 Staatsliga and Sect. 8 Herren-Superliga; available at http://www.oetv.at).

Volleyball and Handball: The provisions concerning volleyball and handball are in accordance with EC law.

Ice-hockey: There are new rules applicable since September 2007 (see http://www.eishockey.at). The new regime works with 'points'. Every club is allowed to nominate 22 players for a match. These players represent a specific number of points: up to 22 years old = 1 point; 23 years old = 1.5 points; 24 years old = 2 points, transfer card player = 4 points. With this system young players are promoted. And this is a legitimate goal according to the ECJ (case Bosmans). *Resch*, Spielerbewertungssysteme zur Herstellung von Chancengleichheit, in: *Grundei/Karollus* (Hrsg), Berufssportrecht I (2008), pp. 137-151) attests EC law conformity.

4.3 The Maritime sector

Working conditions in the maritime sector are not relevant for Austria.

4.4 Researchers/artists

Besides immigration law, foreign EU nationals are treated equally as national researchers or artists. The Aliens Employment Act is not applicable to them (Sect. 1 § 2 Aliens Employment Act). At the Universities and other research units, the conditions do not depend on nationality; there are no reservations for Austrians or restrictions to foreign EU researchers. Cases like ECJ C-276/07, Delay, haven't been reported until now.

Researchers are entitled to temporary limited stay permits only ('stay permit – researcher' [Sect. 67 SRA]); since 2005 they are no more entitled to residence permits (Sect. 62 SRA). Family members have free access to the labour market since the beginning of 2008 (if they are entitled to stay in Austria). According to a draft which is pending in parliamtent, researchers should receive a two-years-stay permit. Following they can apply for an unlimited 'Niederlassungsbewilligung-unbeschränkt'.

4.5 Access to study grants

EEA citizens are equated with Austrians as regards access to study grants (Sect. 4 Study Grants Act ('Studienförderungsgesetz'), Federal Law Gazette 305/1992 as amended by I 46/2007).

Study grants are given to Austrians for doing studies at Austrian universities (there are specific programmes for studying abroad). The requirements are stipulated in Sect. 6 Studies Grants Act: need of subsidies, no completed studies, good success, younger than 30 (with exceptions. But there are no residence conditions – neither for Austrians nor for EEA citizens.

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

According to information given by social law experts as well as to the observation of the academic literature and the newspapers and data base research, there is nothing to report.

The Administrative Court (27.11.2008, 2008/08/0189) released a decision implementing ECJ-judgment C-228/07, *Petersen*. In accordance with the ECJ, the Court decided that the benefit in question is an ‘unemployment benefit’ in the sense of Art. 4 Regulation 1408/71; Art. 39 EC Treaty prohibits residence clauses for that benefit.

Pfeil/Felten, Arbeit und Soziales, in: Eilmansberger/Herzig (eds), *Jahrbuch Europarecht 09* (2009), p. 237-250, give an overview about the European and Austrian case law in the field of labour law and social security law.

Chapter V
Employment in the Public Sector

There have not been any reforms concerning applicable rules in the field of the public sector.

1. ACCESS TO PUBLIC SECTOR

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

The situation is the same as in the last years: According to Sect. 4 and Sect. 42a Civil Servants Act ('Beamten-Dienstrechtsgesetz'; Federal Law Gazette 333/1979) the applicant has to be Austrian citizen if he/she applies for a job reserved to Austrians or to 'a citizen of a state, who has – due to an international treaty within the scope of European integration – to get an equal legal position in access to an employment than Austrian have'. Sect. 42 Civil Servants Act defines which jobs are reserved to Austrians: jobs requiring a special solidarity with Austria, especially those using state power for general purposes. The same applies to contractual employees for civil services (Sect. 3 and Sect. 6c Contractual Employed Civil Servants Act ('Vertragsbedienstetengesetz'; Federal Law Gazette 86/1948). But there is a specific exception regarding citizenship: Sect. 3 § 2 states that if there is no Austrian applicant for the job, the employer can refrain from citizenship in justified cases).

That means that in principle civil service is restricted to Austrian citizen and those who have an equal position according to EC Law.

1.2. Language requirement

As regards language skills, Sect. 4 § 1a Civil Servants Act / Sect. 3 § 1a Contractual Employed Civil Servants Act asks for 'good command in word and writing; if the job requires less, an adequate command has to be shown'.

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

For becoming an employee within the public sector, you have to meet the appointment requirements (see above Sect. 4 § 1/3, § 2 and § 3 Civil Servants Act or Sect. 3 § 1/3 Contractual Employed Civil Servants Act). According to the job description, professional experience might be required (and therefore is a condition for application or a bonus for the appointment [- see e.g. Sect. 4 § 3 Civil Servants Act: the best candidate has to be appointed]) but there is no need for 'Austrian experience'.

2. WORKING CONDITIONS

Civil servants and contractual employees to public service receive an automatic salary increase all two years. The exact date is fixed by the so called 'Vorrückungsstichtag'. This date is ascertained in a complicate procedure which is laid down in Sect. 12 Gehaltsgesetz (Salary Act for Civil Servants; Federal Law Gazette 54/1956). Specific times in other jobs are counted (e.g. military service or scientific work). The similar provision is Sect. 26 Contractual Employed Civil Servants Act. § 2f of these provisions deal with employment abroad. Following the ECJ-judgment C-195/98, Österreichischer Gewerkschaftsbund, these provisions have been amended (Federal Law Gazette I 165/2005). But limitations regarding working periods in Turkey or in Switzerland remained unchanged. The provision regarding Switzerland has been modified in 2007 (Federal Law Gazette I 53/2007); additionally prior periods of employment within EU-institutions are taken into account now. The question of Turkish working periods is still unsolved.[4]

In May 2007 the Administrative Court started a preliminary ruling procedure as regards Swiss working periods under Sect. 12 Salary Act and the direct effect of Art. 9 Free Movement Agreement EC-Switzerland (see ECJ C-332/07). But in February 2008 the procedure was withdrawn because Sect. 12 § 2f Salary Act was amended by Federal Law Gazette I 53/2007 (the limitation 'after 1st June 2002' was abolished).

Sect. 50a § 4 Salary Act for Civil Servants ('Gehaltsgesetz') regarding the special benefit for university professors after 15 years was modified by Federal Law Gazette I 53/2007. As regards employment times as a professor within the EEA, the limitation of 'after 7th November 1968' was eliminated; as regards times in Switzerland or in Turkey, the problematic limitation has been left unchanged.[5]

---

4 Sect. 12 Salary Act for Civil Servants / Sect. 26 Contractual Employed Civil Servants Act:
(2f) Soweit Abs. 2 die Berücksichtigung von Dienstzeiten oder Zeiten im Lehrberuf von der Zurücklegung bei einer inländischen Gebietskörperschaft, einer inländischen Schule oder sonst genannten inländischen Einrichtung abhängig macht, sind diese Zeiten auch dann zur Gänze für den Vorrückungsstichtag zu berücksichtigen, wenn sie
1. bei einer vergleichbaren Einrichtung eines Staates zurückgelegt worden sind, der oder dessen Rechtsnachfolger nunmehr Mitgliedstaat des Europäischen Wirtschaftsraumes oder der Europäischen Union ist, oder
2. nach dem 31. Dezember 1979 bei einer vergleichbaren Einrichtung des Staates zurückgelegt worden sind, mit dem das Assoziierungsabkommen vom 29. 12. 1964, 1229/1964, geschlossen worden ist, oder
3. bei einer vergleichbaren Einrichtung der Schweiz (Abkommen zwischen der Europäischen Gemeinschaft und ihren Mitgliedstaaten einerseits und der Schweizerischen Eidgenossenschaft andererseits über die Freizügigkeit, BGBl. III Nr. 133/2002) zurückgelegt worden sind,
4. bei einer Einrichtung der Europäischen Union oder bei einer sonstigen zwischenstaatlichen Einrichtung, der Österreich angehört, zurückgelegt worden sind.

5 Sect. 50a Salary Act:
(1) Einem Universitätsprofessor, der eine fünfzehnjährige Dienstzeit in dieser Verwendungsgruppe im Dienststand an österreichischen Universitäten aufweist und vier Jahre im Dienststand im Bezug der Dienstalterszulage gemäß § 50 Abs. 4 gestanden ist, gebührt ab dem Zusammentreffen beider Voraussetzungen eine ruhegenussfähige besondere Dienstalterszulage in der Höhe der Dienstalterszulage gemäß § 50 Abs. 4.
(2) § 48 Abs. 3 und 5 ist auf die besondere Dienstalterszulage nicht anzuwenden.
(3) Mit dem Anfall dieser besonderen Dienstalterszulage vermindert sich eine gemäß § 52 Abs. 1 Z 2 in der bis 28. Februar 1998 geltenden Fassung zuerkannte Kollegiengeldabgeltung um den siebenfachen Betrag der besonderen Dienstalterszulage, höchstens jedoch auf die gemäß den §§ 51 und 51a gebührende Kollegiengeldabgeltung.
(4) Bei der Berechnung der fünfzehnjährigen Dienstzeit gemäß Abs. 1 sind auch Zeiten heranzuziehen, die 1. in einer vergleichbaren Verwendung an einer Universität eines Staates, der oder dessen Rechtsnachfolger nunmehr Mitgliedstaat des Europäischen Wirtschaftsraumes ist oder 2. nach dem 31. Dezember 1979 in

In December 2008, the Administrative Court started a new preliminary procedure as regards the benefits for (foreign) university professors: The ECJ (C-542/08) is asked to decide about a statutory period of limitation of three years for that claim (or for periods before 30th September 2003 [ECJ-decision Köbler (C-224/01)]).

There is no information available whether or not these Salary Act-rules are applied in practice in a discriminatory way for other Union citizens.

einer vergleichbaren Verwendung an einer Universität des Staates, mit dem das Assoziierungsabkommen vom 29. Dezember 1964, 1229/1964, geschlossen worden ist oder 3. nach dem 1. Juni 2002 in einer vergleichbaren Verwendung an einer Universität der Schweiz (Abkommen zwischen der Europäischen Gemeinschaft und ihren Mitgliedstaaten einerseits und der Schweizerischen Eidgenossenschaft andererseits über die Freizügigkeit, BGBl III 133/2002) zurückgelegt worden sind.

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

1. RESIDENCE RIGHTS-TRANSPOSITION OF DIRECTIVE 2004/38

1.1. Situation of family members of job-seekers

There are no specific provisions on family members of job-seekers. If the job seeker is Union citizen, he/she is entitled to come to Austria to look for a job. His/her third country-familiy members are allowed to stay for three months but have to apply for a visa (Sect. 85 APA). If they want to stay for a longer period, they have to apply for a residence permit. But it is to notice that this preferred treatment of family members depends on the fact, that the Union citizen is 'entitled to free movement'. That points on sufficient financial means. Therefore it is doubtful whether or not a family member of a job-seeker benefits from that provision. But it has to be stated, that – although the Germans are by now the largest group of foreign employees – there have no cases been reported as regards EC-job-seekers or their family members. Neither in the academic literature nor in the media.

Third country-family members of a non-EC-job-seeker have to apply for a residence permit by themselves. They are treated as a foreigner who wants to come to Austria; therefore he/she has to meet the requirements of SRA. That leads – inter alia – to the fact, that their application has to meet the quotas fixed for specific issues (family member, employment, …).

1.2. Application of Metock-judgment

The *Metock*-judgment (C-127/08) was quoted by the Austrian Administrative Court a few times.

Administrative Court 2.4.2009, 2007/18/0131: A Turkish citizen applied for asylum but he withdraw his application a few days after his marriage with an Austrian woman. The Administrative court stated that Metock-judgment is applicable only for cases with free movement-elements ('grenzüberschreitender Bezug').

Administrative Court 17.3.2009, 2009/21/0027: A man from Kosova was adopted by a German citizen who lived in Austria. Referring to ECJ-Metock and ECJ-Sahin, the Administrative Court stated that 'becoming a family member after entering the territory' is sufficient as along as there is maintenance. (Similar Administrative Court 27.1.2009, 2008/22/0190: A man from Nigeria was adopted by an Austria; since there is no connex to EC law, the ECJ-Metock-judgment is not applicable.)

Administrative Court 17.3.2009, 2009/21/0030: A man from Nigeria came to Austria and married an Italian woman, who was born in Austria and works in Austria. The criteria for applying the *Metock*-judgment are met.

Administrative Court 18.2.2009, 2008/21/0033: In 2007, a Croatian citizen married a German woman, who was working in Austria since 2006. They have a common child (born in 2007). According to the Court, he is entitled to refer to the *ECJ-Metock*-judgment.

Administrative Court 2.12.2008, 2007/18/0391: A man from Nigeria applied for asylum but this application was dismissed in February 2006. In August 2005 he was sentenced for drugs selling (one month unsuspended, six month suspended for three years); additionally a residence ban for ten years was enacted. In May 2006 he married an Hungarian woman, who worked and lived in Austria. Therefore the Nigerian has to be accepted as a favoured Third Country National; whether or not the marriage was a marriage of convenience is irrelevant (Art. 35 and 31 Directive 2004/38/EC). (Similar Administrative Court 28.10.2008, 2007/18/0254: A Turkish citizen married a German woman who worked and lived in Austria.)

Even more interesting seems to be the *Sahin*-judgment (C-551/07) which bases on an Austrian preliminary request. The ECJ had to decide about domestic requirements for a residence card which are not stipulated in Art. 9 and 10 Directive 2004/38/EC. The Court stated that EC law does not allow additional requirements for family members. And therefore Sect. 1 § 2 SRA[6] – which excludes asylum seekers – is not in line with EC Law.[7] The judgment was published in December 2008. There haven't been any parliamentarian activities until now. But the Administrative Court (22.1.2009, 2008/21/0671) completed the procedure which was postponed for the preliminary ruling. The Court stated that – in accordance with ECJ – that the family relationship must not be given before the foreigner immigrates; the fact that the foreigner's stay in a Member State is based on asylum law and therefore only tentative, is irrelevant. The Court stated: 'The fact that the German wife made use of free movement of worker, when the applicant already lived in Austria, makes evident that the requirement 'accompany or follow' is not met; nevertheless this is not relevant. The specific date of establishing a family live is irrelevant. Art. 9 and 10 Directive 2004/38 have direct effect; contradicting domestic law – like Sect. 1 § 2 SRA – is suppressed due to the precedence of EC law over national law.

And finally it is worth to report that the Administrative Court (2008/18/0507) asked the Constitutional Court to revoke some words in Sect. 57 SRA as unconstitutional. The dubious words are 'sofern sie ihr Recht auf Freizügigkeit in Anspruch genommen haben' ('provided that they made use of their right in free movement'). The application is mainly based on '*Metock*'-arguments. As to the facts: A citizen from India applied for asylum in December 2000; in July 2003 his application was dismissed. In April 2004 he married an Austrian woman and applied for a residence permit as favoured Third Country National. The authority denied because his wife wasn't a 'free movement'-using Union citizen. In April 2008 the authority enacted an expulsion. Contrary to that the complainant argued that his wife participated at a 'turtle-project' in Greece for seven months in 2006. The Administrative Court stated that the complainant lives in his wife's country of origin and therefore the *Metock*-case (Union citizen doesn't live in the country of origin but in another Member State) is not applicable. The *Carpenter*-principles (ECJ, C-60/00) aren't applicable either. So there is no

6 Sect. 1 § 2 SRA:
(2) This Act does not apply to aliens who 1. are entitled to reside in the federal territory pursuant to the Asylum Act (…), 2. possess an identity card with photograph and are entitled to privileges and immunities pursuant to Art 95 APA (…) or 3. are authorised to pursue a merely temporary occupation in accordance with Art 24 APA.

7 The Administrative Court (27.1.2009, 2008/22/0190) stated that according to the clear wording of Sect. 1 § 2/1 SRA, this Act is not applicable to asylum seekers. And that is true even for the case that an asylum seeker was adopted by an Austrian (who didn't realize a free movement-situation).

doubt that there isn't a transboundary issue in the sense of Art. 18 and 39 EC Treaty. But on the other hand, the *Metock*-decision causes doubts: is it justified to differentiate between Austrians making use of their right on free movement and Austrians not doing so? For the latter, this would cause a discriminatory situation because their family members would be treated worse. Without doubt, the *Metock*-judgment refers to transboundary issues. This would be given if the foreigner marries a German living in Austria – even if the German is born in Austria and never moved to another Member State. But then it depends on the citizenship of the family member whether or not a foreigner is able to require the status 'favoured Third Country National': If he marries a German (born in Austria), he is entitled, if he marries an Austrian living in Austria, he is not entitled. That leads to the conclusion that the requirement 'making use of the right on free movement' is not justified; it excludes foreigners from benefits just because of the 'wrong citizenship' of their husbands/wives. The Constitutional Court did not release a decision on that application until now.

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

According to Sect. 60 § 1 APA, a residence prohibition can be enacted when there are specific reasons to assume that the foreigner's stay endangers public order or security or violates other public interests in the sense of Art. 8 § 2 ECHR. As a 'specific reason' has to be taken the fact that a foreigner enters into a marriage or refers on a marriage for the issuing of a residence title or a working permit, when the foreigner never had a common family life in the sense of Art. 8 ECHR (Sect. 60 § 2/9 APA). It is not necessary that the spouse receives benefits or payments. For family members of Union citizens, Swiss citizens or Austrians, Sect. 86 and 87 APA state, that a residence prohibition is justified if their personal behaviour endangers public order or security. In constant jurisprudence the Administrative Court uses Sect. 60 § 2 APA as benchmark (see for a Turkish-Austrian couple e.g. Administrative Court 2.4.2009, 2007/28/0131; 19.3.2009, 2006/18/0172). In cases of Union citizens as a spouse of an Austrian, the Administrative Court is more generous: Since Union citizens have an independent right to stay in other Member States, it is not to worry that they enter into a marriage for residence reasons (see e.g. Bulgarian woman marries Austrian: 19.3.2009, 2008/18/0730; Romanian woman marries Austrian: 2.9.2008, 2007/18/0494).

Sect. 60 § 2/9 APA does not require that the marriage is declared null and avoid by authorities or courts (constant case law; see e.g. Administrative Court 2.10.2008, 2005/18/0605; 19.2.2009, 2006/18/0276).

The Administrative Court referred to Directive 2004/38 a few times: It stated that a marriage of convenience is – even on EC law-standards – a condemned behaviour justifying a residence ban (2.12.2008, 2005/18/0613). The question, whether or not the marriage of a Union citizen and the complainant is a marriage of convenience, is without relevance for deciding which authority or court is competent (2.12.2008, 2007/18/0391; 28.10.2008, 2007/18/0254).

2. ACCESS TO WORK

The Aliens Employment Act was amended by Federal Law Gazette I 78/2007. According to Sect. 1 § 2/l and § 2/m, husbands/wives and unmarried minors of EEA citizens or Austrians

have free access to the labour market. They do not have to apply for a working permit. But that is not true for family members of EU8-citizens, Romanians and Bulgarians; Sect. 32a § 1 Aliens Employment Act takes them back into the jurisdiction of that Act; at the same time Sect. 32a § 2 and § 3 stipulate the right to access to the labour market for some EU8- and EU2-citizens (e.g. those, who have been legally employed already) and their family members.

2.1. The situation of family members of job-seekers

As regards the residence rights of third country-family members of job seekers you have to separate: Family members of job seeking Union citizens have a better position than family members of a third country-job-seeker (see above 1.1). As regards other issues, it has to be stated, that 'claims' usually do not depend on being a family member but on being entitled by meeting some prerequisites. In that aspect, no problems have been discussed in the academic literature or in the media. [Annotation: A more specific inquiry would help.]

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

According to information given by social law experts and tax law experts as well as to the observation of the academic literature and the newspapers, there is nothing to report.

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

ECJ-judgment *Renneberg* (C-527/06) does not call for activity: According to Sect. 2 § 8 Income Tax Act (Einkommensteuergesetz) it is possible to take into account a loss abroad, if the person is subject to taxation in Austria without limitations. Tax law experts confirm that the decision has no impact on Austrian legislation.

The same is true for the *Hendrix*-judgment (C-287/05): According to information by social law experts and labour law experts as well as to data base research and newspaper observation, this decision hasn't any impact on the domestic law and practice.

The *Raccanelli*-decision (C-94/07) doesn't cause problems: As a doctoral student you are either a student only or an employee of the university (as a researcher or lecturer). Maybe there might be some misuse in specific disciplines where doctoral students have to work close together with the professor (e.g. because of the need to use a laboratory); then the student should be employed as a 'project staff': But usually doctoral students are not involved in university procedures in a way that calls for a qualification as 'employee'.

The Administrative Court (18.2.2009, 2008/21/0015) had to deal with the EC-Morocco-Agreement from 2000: A Moroccan was sentenced for drug selling and a ten-years-residence ban was enacted. He argued, that he lived in Austria for ten years, has relatives and friends and works in Austria. The Court referred to ECJ C-416/96 (*El-Yassini*) and C-97/05 (*Gattoussi*) to show that Art. 40 of the former cooperation agreement (from 1976) enacts a ban of discrimination, but its goal was not to realize free movement of workers. Art. 64 of the new European Mediterranean Agreement with Morocco is similar to the former provision and doesn't grant a position similar to that of Turkish workers.

ECJ-case *Cetinkaya* (C-467/02) was quoted by the Administrative Court (2.12.2008, 2007/18/0378). An unlimited residence ban was imposed against a Turkish citizen who was born in Austria and ever lived here. In accordance with ECJ, the Court stated that a person who is born in Austria and never left this country does not have to possess a permit to move to a Turkish worker; Art. 7 Decision 1/80 is applicable for this person.

Chapter VIII
Application of Transitional Measures

There have not been any public discussions about postponing the end of the transitional measures. At the beginning of 2009 there was a short note in the newspapers that Austria is going to keep the restrictions. And at the end of April 2009, there was another short note in the newspapers about the fact that the Austrian Minister for Labour notified the prolongation to Commissioner Spidla. Austria argued that nearly half of its territory is bordering EU8. Therefore it would be interesting (and easy) for EU8-citizens to work in Austria. Additionally it should be kept in mind that Austria has a high percentage of foreign population and that the labour market for foreigners is exceptional difficult. Obviously there was no need for discussion. Even the message, that Poland is thinking about taking Austria to the ECJ didn't cause public debate. There is consent among the Austrian political parties (except the Greens) about prolongation; and even the economy as well as the trade unions favour the prolongation.

The fact, that scientific research doesn't show appreciable impacts on the labour market, is oppressed in the discussion. As an older example of that research see e.g. Prettner/ Stiglbauer, Auswirkungen der vollständigen Öffnung des österreichischen Arbeitsmarktes gegenüber den EU-8-Staaten, in: *Geldpolitik & Wirtschaft* 4/07, p. 53-71; available at http://www.fiw.ac.at/fileadmin/Documents/PrettnerStiglbauer.pdf

For Romania and Bulgaria, Austria is applying the transitional measures as well.

According to a newspaper article there have been 16.100 EU8-citizens working in Austria (3.700 of them as skilled workers) in April 2009. Additionally there are 8.200 EU8-seasonal workers in tourism and agriculture.

The Austrian labour market is not absolutely closed for EU8-, Bulgarian or Romanian citizens. There is the so called 'Fachkräfte-Bundeshöchstzahlenüberziehungsverordnung' (an order about granting access for skilled workers, Federal Law Gazette II 350/2007 as amended by II 395/2008). This order enumerates 65 professions with a shortage of workers; these professions (e.g. bricklayer, paver, data engineer, airport staff or payroll clerk) are open for the new Union citizens. Since the list of professions is that long and includes 'classical jobs for migrants' (e.g. in the building sector) as well as jobs for highly educated migrants (e.g. data engineer) it seems that postponing the transitional measures is 'only for the public'. Foreign workers will get a job if they apply in sectors with shortages; and workers without specific knowledge or skills will not find a job at all. And that does not differ for EU citizens nor for Third Country Nationals. Additionally it has to be mentioned that there is another sector with possibilities for the new Union citizens: As mentioned in former reports, Austria is looking for health care professionals and for carers; the 'Bundeshöchstzahlenüberziehungsverordnung' (Federal Law Gazette 278/1995 as amended by II 55/2006) is the relevant order.

The Administrative Court had to deal with an employment in Poland in the 1970s. A retired civil servant asked for taking into account her employment in Poland (1973-1975) and justified that claim with the Polish accession. The Administrative Court (25.6.2008, 2005/12/0056) referred to decide about that question; it repealed the authority's decision because of procedural mistakes.

And the Administrative Court (29.1.2009, 2008/09/0275) released a judgment based on ECJ-case C-161/07 (*Commission/Austria*): Two citizens of Slovakia are the shareholders of a company offering construction works; the Austrian authority declined to accept the self-employment. The Administrative Court stated: ‘It contradicts Art. 43 EC Treaty when there is the requirement to apply for a notice of assessment if a foreign entrepreneur wants to do his business in Austria. This would be a disproportionate restriction and therefore the legal system of Sect. 2 § 4 Aliens Employment Act is not in line with EC law. This contradicting domestic law is suppressed due to the precedence of EC law over national law.’ Referring to ECJ-case Jany (C-268/99) and Asscher (C-107/94) the Court stated that the complainants’ occupation is – ‘in any case according to the ECJ-judgment C-161/07 not subject to prior approval as stipulated by Sect. 2 § 4 Aliens Employment Act’.

Literature

Rauter, EuGH: Österreichische Beschränkung der Niederlassungsfreiheit, *JAP* 2008/2009, p. 164-166, is a comment on ECJ-judgment C-161/07 (but it does not deal with transitional measures).

Chapter IX
Miscellaneous

The Federal Ministry for Interior Affairs is working on a 'national action plan for integration'. While the Commission is working on a 'Blue Card' for skilled workers, Austria is working on a 'Red-White-Red-Card' for immigrants. One of the topics is knowledge of the German language (certificate on A1-level before coming to Austria).

Eilmansberger/Herzig (eds), *Jahrbuch Europarecht 09* (2009) is the new edition of the annually new Austrian yearbook on European law. This yearbook analyses – in different thematic chapters – legislation on EC level as well as on national level, ECJ case law as well as domestic case law.