

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

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October 2009

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## Introduction

There have been some important changes of law as regards free movement of persons. As was clearly stated in 2007 Report (the same situation took place in 2008), there is still no massive influx of EU workers and other groups of EU citizens (and consequently members of their families) to Poland. Therefore, there is a very limited case law concerning status of this group of persons. However, it can be seen that there is a considerable amount of Polish citizens returning to Poland from other Member States. Therefore it is of vital importance to assure that they are not treated in a less favourable way than Polish citizens who have not made any use of free movement rights. Polish law requires from employers (irrelevant whether from public or private sector) to recognize previous periods of employment abroad in order to grant certain employees' privileges. In practice employers are sometimes reluctant to recognize such periods of employment. However, it must be emphasized, that such problems occur quite rarely..

Figures concerning amount of EU individuals applying for registration of stay, for documents certifying a right for permanent stay and members of their families applying for residence cards or permanent residence cards are listed in the last Chapter of the Report. They prove that the amount of individuals from other Member States and their family members coming into Poland is not indeed significant.

The following developments concerning free movement of workers that took place in 2008 need to be highlighted:

- 1) An important amendment to Ustawa o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin (Act of July, 14 2006 on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members, Journal of Laws No. 144, item 1043 with further amendments) has entered into force on January 1, 2009. New Article 11 a has been introduced. It states that decision on refusal of visa for a third country family member of EU citizen or a decision on refusal of entry for an EU citizen shall respect the proportionality rule and may be issued only if an individual behaviour represents genuine, present and sufficiently serious threat affecting interests of society. Previous criminal convictions shall not in themselves constitute grounds for taking such decisions. Moreover such decisions shall not be issued for economic reasons. Article 11 a leads to implementation of Directive 2004/38 provisions in a more comprehensive way.
- 2) The new Ustawa o służbie cywilnej (Act on civil servants of November 21, 2008) has entered into force on March 24, 2009 (Journal of Laws of 2008, No. 227, item 1505). The Act is of vital importance, since it opens the possibility for employment in a civil service (i.e. employment in the state administrative agencies, voivodships and other offices which are subordinated to ministers and other central administrative agencies) not only by Polish nationals, as has been a rule according to a previous Act of 2006. Surely, it is a real change and it solves the problem indicated in 2007 Report as regards the scope of nationality requirement and its possible inconsistency with EU law.
- 3) Moreover an important judgment in C-499/06 Nerkowska case has been delivered by the ECJ. The Court in Luxembourg stated that Article 18(1) of the EC Treaty shall be interpreted as precluding legislation of any Member State under which it refuses, generally

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and in all circumstances, to pay to its nationals a benefit granted to civilian victims of war or repression solely because they are not residents in the territory of that State throughout the period of payment of the benefit, but in the territory of another Member State. The Regional Court in Koszalin (Sąd Okręgowy w Koszalinie) issued on this basis the judgment on July 30, 2008. The Polish Court decided, on basis of the ECJ ruling, to change the decision of ZUS (Social Security Institution) and ordered to grant Mrs. Halina Nerkowska a non-contributory benefit connected with her right to a disability pension as a result of deportation.

- 4) Lastly, an important amendment to personal income tax rules has been introduced in 2008. Spouses, under certain circumstances, may be subjected to income tax together, even if they do not reside in Poland but in another Member State or EEA Member States or Switzerland.

## **Chapter I**

### **Entry, Residence, Departure**

#### *Texts in force*

- Ustawa z 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej (the Act of July 14, 2006 on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members, Journal of Laws 2006, item 144, 1043 with further amendments)
- Ustawa z 13 czerwca 2003 o cudzoziemcach (the Act of June 13, 2003 on Aliens; Journal of Laws 2003, number 234, item 694 with further amendments)

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

Article 16 of the Act on entry states a right to stay at the territory of Poland for workers and self-employed persons and members of their family without further requirements. Therefore it fully implements art. 7 para 1a of the Directive 2004/38.

As regards the registration of EU citizens engaged in an economic activity, according to Article 21 of the Act on entry, the request for registration shall be submitted in person, not later than on the following day after the expiry of 3 months from the date of entry to the territory of the Republic of Poland. The requirement to submit the request in person shall not refer to minors. The request shall be accompanied by relevant documents or written statements. A valid travel document shall be presented upon submission of the request to register the residence or to issue a residence card of a member of an EU citizen's family. An EU citizen may present different valid document which confirms his/her identity and citizenship. Therefore, Art. 21 of the Act on entry implements Art. 8 para 3a of the Directive 2004/38 correctly.

As regards an expulsion from the territory of Republic of Poland, the Act on entry concerns only cases where an expulsion decision is taken when an individual behaviour constitutes a threat for defence policy or national security, as well as for public safety, public order or public health (Part V of the Act on entry). The Act on entry does not contain provisions described in Art. 14 (4a-b) of the Directive 2004/38. However, the amendment to the Act on entry made in 2007 approximated the wording of the Act on entry with Art. 7 para 1 of the Directive 2004/38 by replacing words 'without the need of making use of social assistance benefits' by the words 'in a way to avoid becoming a burden on social assistance system' in cases of individuals who are not engaged in economic activity. This may lead to a conclusion that the mere fact of making use of social assistance benefits shall not be an enough reason for expulsion of EU citizen and members of their families. Moreover, it is important to mention Art. 70 of the Act on entry which lists circumstances that shall be taken into consideration when issuing decision on expulsion. These circumstances are as following: previous period of residence at the territory of the Republic of Poland, age and state of health, family

and economic situation, social and cultural integration with the country of stay and links with the country of origin.

As regards Art. 7.3 a-d of the Directive 2004/38 concerning the right to retain status of migrant worker by individuals not longer engaged in economic activity, Art. 17 of the Act on entry fully implements these 4 cases when an EU individual shall be still treated as a migrant worker with all consequences resulting from having such a status (since it covers situations of involuntary unemployment, taking vocational training and periodical incapacity to work).

As regards exemptions for EU individuals no longer working in the host Member State as well as their family members (as described in Art. 17 of the Directive 2004/38), these situations are covered by Art. 45 and 46 of the Act on entry. Therefore, the Act on entry implements provisions of Art. 17 of the Directive correctly.

As regards the issue of maintenance aid during studies for economically inactive EU citizens and members of their families, Article 43 para 5 of the Act on Higher Education states that EU citizens and members of their families (as well as citizens of Switzerland and European Economic Area Member states), that are not economically active, but possess sufficient resources for maintenance during studies, shall have a right to study at the territory of Poland on the same rules as are applicable to Polish citizens. However, they shall not have a right to social assistance – i.e. maintenance aid for students, special maintenance for disabled, maintenance for housing (accommodation), food allowance or other allowances. This provision implements the wording of Art. 24 para 2 of the Directive 2004/38.

## 2. SITUATION OF JOB-SEEKERS

According to Art. 2 para 1 point 2 of the Act of promotion of employment and labour institutions, the definition of unemployed (i.e. a person who is entitled to an unemployment benefit) comprises, inter alia, *EU citizens who are eager to take up employment at the territory of Poland*.

They shall not be employed or pursued gainful employment and shall fulfill other requirements as exhaustively listed in the abovementioned Act (especially they shall not have any maintenance aid, retirement or pension). They shall register in the regional employment office. It can be seen that the status of members of family of EU jobseekers does not qualify an individual to a right for unemployment benefit according to the Act. However, if a member of family of EU jobseeker possesses EU citizenship, then he/she may have an individual right to receive such a benefit, but independent from a status of family member.

However, according to the Act on promotion of employment, there is a difference between a jobseeker and unemployed. It is not possible to have a jobseeker allowance for both Polish and EU citizens (jobseekers) according to the Act. According to the Act, jobseekers (both Polish and from other Member State) shall have assistance of administrative institutions in order to find a job. However, this does not mean a financial assistance. According to the definition, a jobseeker is a person listed above as well as families of foreigners (other than EU citizens) that have a right for a stay for a definite period, foreigners and their spouses applying for a refugee status and members of families of EU, EEA Member States, nationals of Member States that entered into agreements on free movement of persons with European Community and Member States and foreigner – member of family of Polish citizens. In order to qualify as a jobseeker, they shall look for employment and be registered in a regional employment office. Jobseekers (similar as unemployed) are entitled to attend vari-

ous practical trainings aiming at finding a job, but as was emphasized above, they are not entitled to an unemployed benefit.

The Act on entry does not give a special status for jobseekers. They may stay at the territory of Poland for a period for up to three months without any formalities (except for holding a valid travel document or document confirming his/her identity). The same rule applies to members of their families (as regards third country nationals – they must possess valid travel documents). EU citizens and members of their family shall have the right to reside for a period longer than 3 months if EU citizen meets one of conditions described in detail in 2007 Report (mainly as regards having sufficient resources not to become burden for social assistance).

However, it shall be added, that according to the Act on social assistance it is possible to receive social assistance in case of unemployment – irrespective whether short or long-term one. This provision creates a possibility to receive assistance for job-seekers. However, as will be further described in the Report below, in order to be eligible for such assistance, EU citizens shall have right for residence or right for permanent residence. As regards the detailed scope of individuals entitled to receive such benefits, see Chapter IV.

## **Chapter II**

### **Access to Employment**

#### *Texts in force*

- Ustawa z 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy (the Act of April 20, 2004 on promoting employment and institutions of the labour market, Journal of Laws 2008, number 69, item 415 with further amendments)
- Ustawa o języku polskim z 7 października 1999 (The Act on Polish Language of 7 October 1999, Journal of Laws of 1999, number 90, item 999 with further amendments)
- Ustawa Prawo Bankowe z dnia 29 sierpnia 1997 (the Banking Act of August 29, 1997, Journal of Laws of 1997, number 140, item 939 with further amendments)

#### **1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT**

In principle EU job seekers and members of their families are covered by the principle of equal treatment (e.g. as far as an assistance of employment agencies or recruitment procedure are concerned). There is no obligation to obtain work permit or fulfill other formalities. According to Art. 35 of the Act of promotion of employment and labour institutions, basic services of the employment market consist of: employment service, job counseling and job information, assistance in active job seeking, organization of training. The abovementioned services shall be conducted by local governments, non-governmental organizations, trade unions, employers' organizations, training institutions and employment agencies (therefore public and private institutions). The division between public and private institutions does not influence the obligation of equal treatment of job seekers from EU (and members of their family) and nationals.

Moreover, there is an obligation to equal treatment also as regards employment by agencies of temporary employment according to the Act on temporary employment agencies. The Act entitles agencies of temporary work to conclude employment agreement with an individual and delegate his/her to so called employer-user. These agencies shall not make any differences between Polish and EU nationals.

#### **2. LANGUAGE REQUIREMENT**

The Act on Polish Language has not change as to the merits in 2008 (there was only one very minor amendment). However, there is a draft of the amendment concerning Art. 7 and 8 which state that employment contract and any other document related to employment should be drafted in Polish language (irrespective whether it concerns private or public sector). Art. 8 para 2 and 3 has been claimed as infringing Polish Constitution by the Polish Constitutional Tribunal in 2005 (K 38/04), firstly because the rules concerning drafting employment contracts in language different than Polish could have infringed employees rights and secondly it made a difference employees and consumers who did not possess Polish nationality on nationals holding EU citizenship and third countries nationals. The draft of new Art. 8



para 2 and 3 provides that employment and consumer documents may be drafted simultaneously in language different than Polish. If a person is a Polish citizen, than the basis for interpretation shall be Polish version. Documents concerning employment and consumer matters may be drafted in a language different than Polish on a motion of an individual speaking in a relevant language, who is not a Polish citizen. However, it is claimed (in an expert opinion of Dr. Małgorzata Kożuch prepared on behalf of Polish Bar Council for Senat of February 16, 2009), that the provision stating the right to draft documents in language other than Polish shall be assessed as being a superfluum, since it is commonly agreed that parties shall have a right to draft documents in a language different than Polish.

As regards employment in private sector (as well as public) language requirement, according to Art. 30 para 1 point 2 of the Banking Act in order to establish a bank in Poland, at least two members of management board shall prove their knowledge of Polish language. However, it is possible that Komisja Nadzoru Finansowego (the Polish Financial Supervision Authority) in the form of decision issued at request of the founders, will depart from the requirement concerning proven knowledge of Polish language if it is not necessary for prudential supervision, taking into account in particular level of permissible risk or the scope of the activity of bank.

Language requirements apply also to some regulated professions (advocates, legal counselors, doctors, dentists, midwives, nurses, veterinary surgeons, medical assistants, and barber-surgeons). There are no distinctions between language requirements in private sector in comparison with public sector. Therefore, the same rules as those applicable to public sector apply to private sector, i.e. a candidate needs to prove the knowledge of Polish language.

## **Chapter III**

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

#### *Texts in force*

- Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 (Constitution of Republic of Poland of April 2, 1997, Journal of Laws of 1997, number 78, item 483)
- Kodeks Pracy z 24 czerwca 1974 (Labour Code of June 24, 1974, Journal of Laws of 1997, number 78, item 483 with further amendments)
- Ordynacja podatkowa (Act of August 26, 1997 on the tax law system, Journal of Laws of 2005, number 8, item 60 with further amendments)
- Ustawa o podatku dochodowym od osób fizycznych (Polish Act on personal income tax of July 26, 1991 (Journal of Laws of 2000, number 14, item 176 with further amendments)
- Ustawa o świadczeniach rodzinnych z 28 listopada 2003 (the Act of November 28, 2003 on family benefits, Journal of Laws of 2006, number 139, item 992 with further amendments)
- Prawo o szkolnictwie wyższym z 27 lipca 2005 (Act on Higher Education of July 27, 2005, Journal of Laws 2005, number 164, item 1365 with further amendments)
- Ustawa o systemie oświaty z 7 września 1991 (The Act of the September 7, 1991 on the system of education, Journal of Laws of 2004, number 256, item 2572 with further amendments)
- Rozporządzenie Ministra Pracy i Polityki Społecznej w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę z 30 sierpnia 2006 (Regulation of Minister of Labour and Social Politics of August 30, 2006 on performance of work by foreigners without necessity to obtain the work permits, Journal of Laws of 1006, number 156, item 1116 with further amendments)

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

As was clearly stated in 2007 Report, Article 11 para 2 of the Labour Code states that employees shall enjoy equal rights for performance of the same duties. This applies in particular to equal treatment of men and women in employment. However, as a general principle it applies to all employees working in all kinds of offices or undertakings (irrespective whether public or private). The obligation for equal treatment applies to all working conditions. And the rule equally applies to Polish and EU nationals employed in both Polish public and private sector.

There are no reported cases concerning inequality in working conditions depending on a citizenship of a worker. In this regard, Polish law fully implements non-discrimination EU rules.

## 2. SOCIAL AND TAX ADVANTAGES

The principle of equal treatment of workers, irrespective of their citizenship at the territory of Poland is enshrined mainly in the Constitution of Republic of Poland the Labour Code (see also previous reports). Moreover, it is important to mention the Act on promotion of employment (in particular as regards Art. 86 of the Act – see point 3 below). The rule is that both direct and indirect discrimination shall be forbidden under Polish legal order. Therefore according to the Polish Labour Law, if a Polish worker is entitled to any social or tax advantages, than such a benefit shall also, on equally basis, be granted to EU workers. According to Art. 18 para 3a of the Labour Code, employees shall be accorded equal treatment as far as entering into and terminating of an employment relation, terms of employment, promotion and access to training for the improvement of professional qualifications are concerned. Therefore the principle of discrimination as regards equal access to social and tax advantages shall be understood in a broad way.

As regards tax advantages (see also the Act on the tax law system according to the Act on personal income tax), there is a different position of individuals depending on a residence status. Citizenship is irrelevant. According to Article 3 of the Act, all individuals, whose place of residence is in Poland, are subject to unlimited tax liability in Poland, which means that they are liable to pay Polish taxes on the total of their income, irrespective of where it was generated. Individuals who do not have their place of residence in Poland are subjected to limited tax liability, which means that they are liable to pay taxes only on income gained at the territory of Poland. Other rules may be subjected of international agreements on elimination of double taxation. Therefore, according to Art. 3 para. 2a, there is no possibility to cover also income or losses generated outside territory of Poland in cases of individuals subjected to limited tax liability in Poland, i.e. individuals whose place of residence is not in Poland (irrespective of nationality).

An individual shall be treated as having place of residence at the territory of Poland provided that:

- he/she has established at the territory of Poland centre of personal or economic interests ('centre of live interests') or
- he/she stays at the territory of Poland longer than 183 days during a fiscal year

As regards tax advantages, according to Art. 6 para 3a of the Act on personal income tax, spouses may be subjected to income tax together, provided that they have stayed in a marital relationship and community of property for an entire fiscal year. Such a possibility applies also to cases where spouses:

- who have place of residence for tax purposes not in Republic of Poland but in another Member State of European Union or EEA or Swiss Confederation;
- if one of spouse is subjected to unlimited income tax at the territory of Republic of Poland and the other has a place of residence for tax purposes not in Republic of Poland but in another Member State of European Union or EEA or Swiss Confederation

and provided in both circumstances (1 and 2) that they have earned income subjected to tax at the territory of Poland that constitutes at least 75% of the overall income of both spouses in the relevant fiscal year and they documented the place of residence for tax purposes by a certificate of residence.

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

As was reported last year the necessity to know Polish language in order to be able to communicate at work may be mentioned as an obstacle. As regards the issue of Polish language requirement – see Chapters II and V.

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

#### 4.1. *Frontier workers*

As was stated in 2007 Report, according to the Act on family benefits there is a possibility to receive such benefits as family benefits and attachments to family benefits, custody benefits; nursing benefits and nursing allowances; commune benefits and one-off benefits for a newly born child. Under Art. 1 of the Act such a possibility applies to Polish nationals and those foreigners who are covered by provisions on co-ordination of social security systems. Under Art. 1 para 3 of the Act the benefits in question are provided for those individuals (EU nationals included) who reside in Poland during the period of receiving benefit, unless provided otherwise by rules on co-ordination.

As regards the *Hartmann* case, that relates to issue of residence clauses in respect for a child-raising allowances, the Act on family benefits shall be mentioned. According to the Act a benefit such as a child-raising allowance shall be granted to Polish nationals and those foreigners who are covered by provisions on co-ordination of social security systems. Under Art. 1 point 3 of the Act the benefits are provided for those aliens (EU nationals included) who reside in Poland during the period of receiving benefit, unless provided otherwise by rules on co-ordination.

Thus, it can be stated that with regard to child raising benefits the Act requires the residence within the territory of Poland. The prerequisite of residence in Poland needs to be fulfilled. There are no other provisions concerning frontier workers and their families. It seems the requirement to have a residence in Poland in order to receive a child raising benefit may be assessed as being incompatible with Community rules, because there are no provisions on evaluating potential connection of a beneficiary with Polish society. Instead, residence in Poland is required.

#### 4.2. *Sportsmen/sportswomen*

As was stated in the 2007 Report, no ‘home grown players’ principle has been introduced. The rule is that regulations of international sports association fully apply in Poland.

According to para 63 of the Resolution of Polish *Football* Union Board number III/39 of July 14, 2006 amending its own Resolution on the status of the Polish football players and the change of the club membership, each team may have unrestricted number of foreigners players (both EU and non-EU). The same rule applies to cup and championship matches. However, as regards players from third countries, they shall comply with Polish mandatory law as regards their employment and legalization of stay in Poland. Therefore in such situa-

tions work permits are obligatory (see also the Regulation on performance of work below). Moreover, according to Para 63 point 8, in each team there must be at least 8 players holding Polish citizenship. These players shall be entitled to play. As can be noticed from abovementioned provisions, in the same paragraph there are mutually exclusive rules. It shall be therefore stated that as regards football, there are certain nationality restrictions.

According to Resolution of Polish *Ice Hokey* Association, there is a possibility for foreign players to be engaged for definite or indefinite period. However, in every match in one team of Polish Ice-Hokey League may play up to 5 foreign players, whereas in 1<sup>st</sup> League team – 3 foreign players. A goal keeper shall be counted as 2 foreigners.

According to Regulation of Polish Association of *Basketball*, the Association is entitled to establish limits concerning participation of foreign players in basketball games. According to rules of Polish League of Women's Basketball, at least in one game there must be 50% of Polish players. Moreover, during basketball play there must be at least 2 Polish players playing.

According to Regulations of Polish Association of *Handball*, foreign player may represent Polish club in the highest level of games only after signing a contract with a particular club.

Moreover, the Regulation on performance of work by foreigners without necessity to obtain the work permits, shall be mentioned. As a rule, EU citizens are not obliged to obtain permission to work. As regards individuals from third countries, according to Para 2 point 10 of the Regulation, performance of work at the territory of Poland without the need to obtain employment permit applies to sportsmen/sportswomen who work for an entity with its seat at the territory of Poland and the work shall be based on representing this entity during sport events, provided that a work has an occasional character.

It shall be stressed that the complex report on sport regulations will be provided in a separate report in June. Moreover, it is extremely difficult to obtain information from sport organizations on nationality requirement. Representatives of relevant organizations are very reluctant to provide such information. Unfortunately, there are insufficient data on official websites.

#### **4.3. The Maritime sector**

The situation in maritime sector has not changed since the 2007 Report i.e. the Act on maritime safety and the Act Maritime Code).

Moreover, the Act on employment on maritime commercial vessels shall be mentioned. The Act regulates employment relations at Polish commercial vessels. According to Art. 1 para 3 if an international agreement concerning employment relations at vessels contains more favourable treatment for employers than provided in the Act, than provisions of the agreement shall prevail. Employment relation is subject to the law of the flag of vessel, unless parties decide otherwise. According to the Act, a foreign employer is an employer whose permanently reside outside Poland. Such an employer may be employed if he/she possesses a document issued by other state document certifying its identity and hitherto experience on vessels.

#### 4.4. Researchers/artists

According to Art. 109 of the Act on Higher Education, an employment of a foreign academic lecturer does not require any permission or consent. The same rule applies as regards granting to a foreigner gainful activity on a different basis than employment agreement (provided that they perform academic duties). Such lecturers are obliged to be covered by social security system as well as health insurance system. A foreigner shall benefit from any rights provided in the Act on Higher Education as well as other rights to which Polish citizens are entitled as employees.

The Community rule of equal treatment applies also to artists.

#### 4.5. Access to study grants

According to the Act on Higher Education, some categories of EU citizens shall have an access to education on the same conditions as Polish citizens, i.e.: migrating workers and members of their family if they live at the territory of Poland and EU citizens and members of their family that have a right for permanent residence (Art. 43 para 2 of the Act on Higher Education). The same rule applies to workers and their family members of Switzerland or members of European Economic Area. Moreover the rule of equal treatment applies to other categories of individuals. Taking into account the provision of Art. 43 it shall be emphasized that right to study grants is depended on the place of residence. Therefore if a migrant worker and members of his family do not have a place of residence in Poland, they are not covered by the rule of equal treatment with Polish citizens that is established in Art. 43 para 2 of the Act on Higher Education.

Definition of family members to which the Act on Higher Education refers to is established in the Act on entry. If EU citizens or members of their family apply for studies that are conducted in Polish, then there is an obligation to prove their good command of Polish.

Foreigners holding EU citizenship (and members of their family, irrespective of nationality) shall be treated according to the Act on Higher Education as Polish citizens. Consequently, they are excluded from the obligation to pay an entrance fee on the basis of the Regulation of on access and conditions of studies and training, researches or other academic works by foreigners,. Paragraph 17 of the Regulation requires that foreigners shall pay not less than 2000 or 3000 euro (depending on the type of studies) per year. As regards individuals that are of Polish descent, that study on a remuneration basis (since there is a possibility to study without any entrance fees – at public higher schools on stationary MA studies) shall pay 30% less than other foreigners. This rule does not, however, apply to EU citizens, since they shall be treated, on basis of Art. 43 para 2 as Polish citizens.

As regards the right to education on a lower level, the right may be exercised in all kinds of public schools. Article 94a para 2 of the Act on the system of education entitles to attend to public schools following categories of individuals: migrant workers and self-employed persons who are EU nationals, EEA nationals and nationals of Switzerland and members of their families if they live at the territory of Poland. The same right applies according to Article 94a para 11 of the Act to all citizens of abovementioned countries (i.e. not only employees or self-employed persons) and their family members who have the right to permanent residence. According to Art. 94 a point 2a, the definition of ‘family member of an EU na-

**Opmerking:** I have decided to delete this section as according to the Commission comment, the focus should be exclusively on workers and their family members.

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tional' is the same as in the Act on entry. Other categories of EU citizens and members of their families as listed in the Act on entry are obliged to pay for attending to public schools.

## **Chapter IV**

### **Relationships between Regulation 1408/71 and Article 39 and Regulation 1612/68:**

#### *Texts in force*

- Ustawa o rencie socjalnej z 23 czerwca 2003 (Act on social pension June 23, 2003, Journal of Laws of 2003, number 135, item 1268 with further amendments)
- Ustawa o świadczeniach rodzinnych z 28 listopada 2003 (Act on family benefits of November 28, 2003, Journal of Laws 2006, number 139, item 992 with further amendments)
- Ustawa o pomocy społecznej z 12 marca 2004 (Act on social assistance of March 12, 2004, Journal of Laws of 2004, number 64, item 593 with further amendments)
- Ustawa z 20 grudnia 1990 o ubezpieczeniu społecznym rolników z dnia 20 grudnia 1990 (Act of December 20, 1990 on social security of farmers, Journal of Laws of 2008, number 50, item 291 with further amendments);
- Ustawa z 13 października 1998 r. o systemie ubezpieczeń społecznych z 13 października 1998 (Act of October 13, 1998 on social security system, Journal of Law of 2007, number 11, item 74 with further amendments)
- Ustawa z 17 grudnia 1998 o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych (Act of December 17 1998 on old-age pensions and pensions from the Social Security Fund; Journal of Laws of 2004, number 39, item 353 with further amendments)
- Ustawa z 27 sierpnia 1997 o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych (Act of August 27, 1997 on vocational and social rehabilitation and employment of disabled persons; Journal of Laws of 2008, number 14, item 92 with further amendments)
- Ustawa z 25 czerwca 1999 o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Act of June 25, 1999 on cash social security benefits in respect of sickness and maternity, Journal of Laws of 2005, number 31, item 267 with further amendments);
- Ustawa z 30 października 2002 o ubezpieczeniu społecznym z tytułu wypadków przy pracy i chorób zawodowych (Act of October 30, 2002 on social security in respect of accidents at work and occupational diseases; Journal of Laws of 2002, number 199, item 1673 with further amendments)

The relationship between Regulation 1408/71 and article 7 para 2 of the Regulation 1612/68 was thoroughly analysed in 2007Report. It shall be emphasized once more that the difference between application of abovementioned two groups of provisions is based on the character of a particular benefit. So called ‘contributory benefits’, which main feature is that they are financed by contributions of employers and employees, are covered by Regulation 1408/71 and its successor, Regulation 883/2004. Polish citizens and EU nationals engaged in economic activity at the territory of Poland shall be subjected to a Polish social security statute. The Act on social security system divides social security into following branches: retirement scheme, pension scheme, maternity and sickness scheme, accidents at work scheme. These branches are then divided into more detailed systems (see Report 2007).



As regards pecuniary benefits covered by art. 7 para 2 of the Regulation 1612/68, following acts are relevant in this respect: the Act on social pension, the Act on family benefits, the Act on social assistance. The Act on social pension that provides for financial assistance for individuals who have been completely unable to work before age of 18 or 25 (as regards students or PhD students) applies not only to Polish citizens that reside at the territory of Poland, but also to residing at the territory of Poland EU/EEA and Swiss citizens and members of their families and individuals with a right for stay (as well as for foreigners residing at the territory of Poland and holding right to settle or holding a refugee status). The Act provides also for funeral assistance in case of death of person entitled to social pension.

The Act on family benefits provides for family benefits and attachments to family benefits, custody benefits (i.e. nursing benefits and nursing allowances), commune benefits and one-off benefits for a newly born child. They can be granted to Polish citizens and those EU foreigners who are covered by social security coordination schemes provided that they reside at the territory of Poland, unless coordination system provides otherwise. It shall be added that the amendment to the Act of November 2008 clarified that the abovementioned family benefits shall not be granted if a family member is entitled to a similar benefit abroad unless coordination system provides otherwise.

The Act on social assistance provides benefits for persons who are in need (as consequence of poverty, homelessness, unemployment) and are unable to overcome the situation without external help. The right for such a help is granted inter alia to Polish citizens who reside at the territory of Poland and EU/EEA, citizens of Switzerland and their family members who reside at the territory of Poland and have a right for stay or permanent stay. Moreover, these benefits may be granted to foreigners residing and staying at the territory of Poland on basis of permit to settle or the long term's EC resident permit or for a fixed period, or for a tolerated stay or for an individual in relation with status of refugee.

As regards another benefit, i.e. pension benefit for incapacity to work as war consequences, see Chapter VII and Nerkowska ruling.

## Chapter V

### Employment in the Public Sector

#### *Texts in force*

- Ustawa z 21 listopada 2008 o służbie cywilnej (the Act of November 21, 2008 on civil service; Journal of Laws 2008, number 227, item 1505)
- Ustawa z 21 listopada 2008 o pracownikach samorządowych (the Act of November, 21 2008 on employees of self-government; Journal of Laws of 2008, number 223, item 1458)

#### 1. ACCESS TO THE PUBLIC SECTOR

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

The 2007 Report concerning nationality requirement remains current. However, there is a significant change in comparison with last year concerning access to civil service. Therefore in this point emphasis will be put on the most important issues. Polish law introduces citizenship requirement for military forces and law enforcement agencies, such as Army, the Police, Prison Guard, Border Guard, Customs Officers, as well as Internal Security Agency and Central Anti-Corruption Office and Commune Guards.

Moreover Polish nationality must hold judges, public prosecutors, court executive officers, court appointed curators, notaries, bailiffs, diplomatic and members of consular missions.

The most important change in 2008 that shall be emphasized is the new Act on civil servants that entered into force on March 24, 2009. The Act opens the possibility for employment in civil service (i.e. employees of the state administrative agencies, voivodships and other offices which are subordinated to ministers and other central administrative agencies) not only by Polish nationals, as has been a case in previous Act of 2006. However, the principle remains, that a civil servant shall be a Polish citizen, but a new wording of Article 5 has been introduced. According to this Article, General Director of the Office, while making the information on vacant posts public shall indicate (after a consent of the Chief of Civil Servant) posts that may be opened not only for Polish citizens, but also for EU citizens and citizens from other states, who have a right for employment at the territory of Poland on basis of international agreements or EC law. An individual not holding Polish citizenship may be employed if the post is not connected with direct or indirect exercise of public powers or protection of fundamental states interests. Such an individual is obliged to prove knowledge of Polish language. Such a wording of Art. 5 of the Act addresses concerns of Professor Leszek Mitrus in 2007 Report where he has well-founded concerns as regards the compatibility with EU law of nationality requirement as regards the Principal Inspectorate of Trade Inspection, the Office for Registration of Medical Products and Office for Forest Seed Production (Biuro Nasiennictwa Leśnego) as well as powiat and frontier veterinarians. As the Act is entirely new, the most important issue will be the administrative practice of Article 5. It must be emphasized, that the new Act does not exclude particular civil service posts from

a nationality requirement, but it simply gives the possibility to decide which post does not fulfil the Art. 39 para 4 of the EC Treaty criteria. Of course, it is possible, that incompatible with EU law, particular posts will be deemed to be direct or indirect connected with public authority and therefore covered by the nationality requirement. But in such a case, an individual may try to question such an assessment as not only incompatible with EU law but also with Art. 5 of the Act.

It shall be emphasized that still Article 39 of the Act on State Labour Inspection is still questionable in the light of EC Treaty. It is quite surprising that Art. 39 of this law requires possession of Polish citizenship to become a state labour inspector. Such posts are connected with supervising working conditions (health and safety regulations included), but not safeguarding general interests of state or public authorities. Therefore it should be confirmed once more that this law is in breach of Community free movement rules as discriminatory against nationals of other Member States.

### ***1.2. Language requirement***

There are no special regulations concerning language requirements in public sector in comparison with private sector. Consequently, the same rules as those applicable to private sector are relevant, i.e. a candidate needs to prove the knowledge of Polish language. Analysis of relevant legal acts leads to a conclusion that in cases of so called regulated professions where there is no nationality requirement, there is a language requirement. It is understandable that both employers and clients of a particular employee not holding Polish citizenship shall communicate with him/her in a Polish language. Language requirements apply also to some regulated professions (advocates, legal counselors, doctors, dentists, midwives, nurses, veterinary surgeons, medical assistants, barber-surgeon, and pharmacists). The same rule applies also to foreign lawyers that plan to provide legal services at the territory of Poland. In the same way as advocates and legal counselors, they are obliged to prove their knowledge of Polish language.

Additionally, for example Ustawa the Act of patent counsels states the general principle that patent counsels shall have a Polish citizenship. However, this requirement does not apply in cases where an international agreement accepts the possibility to apply on a list of patent counsels for foreigners. First it shall be emphasized that on this basis EU nationals shall have a right to apply for patent counsels. Secondly, as regards foreign candidates, there is a requirement to know Polish language.

Moreover, certified auditors, do not have to be necessarily of Polish citizenship, but must prove their knowledge of Polish language (the Act on certified auditors and their government).

The new Act on civil servants also require as regards posts not restricted solely for Polish citizens to prove knowledge of language by other candidates.

Moreover, the Act on Polish language shall be mentioned. In Article 11a there is a possibility to certify the knowledge of Polish language before a state exam commission. Such a possibility is open to foreigners or Polish citizens permanently residing outside territory of Poland. On the basis of this provision, Minister of Education and Sport has issued the Regulation on exams on Polish language as a foreign language. According to the Regulation, the special commission shall be established in order to check and certify knowledge of Polish

language. However, it shall be stressed, that foreigners shall have a right to prove their Polish language in different way than before the state commission only.

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

When an EU citizen is eligible to access to a particular public post, he/she shall be treated in a same way as Polish citizens. Therefore if there is recognition of professional experience in order to apply for a post or to gain additional benefits, than EU citizens shall be treated in the same way as Polish citizens. This rule is based not only on EU law on prohibition of discrimination, but also on Polish law regarding equal treatment of workers (candidates). The Polish regulations do not make a differentiation between Polish and EU citizens in this aspect.

An important provision in this aspect is Art. 86 of the Act on promotion of employment and labour institutions. According to Art. 86 of the Act, it is possible to document previous employment by both Polish and foreign worker abroad in order to gain special employment rights (such as a full time leave, additional remuneration, etc...). The Act does not explain which documents shall be relevant to prove such an employment experience. However, it shall be emphasized, that in order to fully comply with EU free movement rules, it is important to accept any kind of documents proving previous employment. Moreover, it shall be added, that neither Polish nor EU regulations clearly indicates which documents shall be treated as sufficient to prove periods of employment abroad. Therefore it is purposeful to analyze the Regulation on the scope of documentation of employees' documents and personal acts by employers. What is interesting, the Regulation allows proving periods of employment with various documents, not only by employment certificate. Therefore any certificates issued by the former employer or any other documents proving periods of employment abroad shall be deemed acceptable.

According to Art. 38 para 5 of the Act on self-government employees states that in order to gain several employment benefits, such as remuneration for a long employment, jubilee awards, one-time severance pay as a result of retirement or pension, all hitherto periods of employment shall be taken into account. Moreover, other periods of employment shall be also eligible to be taken into account if on basis of other acts or regulations they shall be taken into account. Para 7 point 1 of the Regulation on remuneration of self-government employees employed in commune, poviast and voivodship offices also states that to periods of employment entitling to several benefits, all previous periods of employment shall be taken into account.

The abovementioned rules shall apply to both Polish and EU citizens.

## **Chapter VI**

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

#### *Texts in force*

- Act on entry (listed in the Report above)
- Act on Aliens (listed in the Report above)
- Ustawa o obywatelstwie polskim z 15 lutego 1962 (the Act on Polish citizenship of February 15, 1962, Journal of Laws of 2000, number 28, item 353)

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

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

There are no particular rules or practices concerning family members of job-seekers from EU Member States concerning entry to Poland or residence within the country. The rule according to Act on entry is to have sufficient funds to provide for himself/herself and his/her family members in the territory of the Republic of Poland without the need to make use of social insurance benefits in order to stay for a period exceeding 3 months. In cases of stay not exceeding period of 3 months, family members of job-seekers as well as a job-seeker itself are simply obliged to possess relevant travel document while crossing Polish border.

As, according to Polish Act on promotion of employment and labour institutions, the definition of person seeking job covers also their families. Such members of families have all rights that are granted in the Act on promotion for job-seekers (as right to help to find a job, right to attend in trainings, seminars that aim at facilitating to find a job). Moreover, as was stated in Chapter I and Chapter IV above, according to Act on social assistance, there is a possibility to be granted social assistance in case of unemployment for both EU citizens and members of their families that reside at the territory of Poland.

##### *1.2. Application of Metock judgment*

As regards family members of a Union citizen, no provision of the Act on entry makes the application of the Act conditional upon a requirement to previously and lawfully reside in Poland. Therefore, the Polish Act implements Art. 3 para 1 and Art. 2 point 2 of the Directive 2004/38 correctly. According to Art. 9 para 1 and 2 of the Act, Union citizen may enter the territory of the Republic of Poland on the grounds of a valid travel document or other valid documents confirming their identity and citizenship. Family member who is not a Union citizen may enter the territory of the Republic of Poland on the grounds of a valid travel document and visa. Art. 10 para 1 of the Act on entry states that a family member who is not a Union citizen shall be issued an entry visa for stay or join a national of the Member State. The Act on entry does not require that a family member shall previously lawfully reside in another Member State before entering Republic of Poland.

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

Under current binding regulations, the aim of entering into marriages and the nature of such marriages between aliens and Polish citizens are examined in the procedure of legalization of stay (i.e. residence permit for a fixed period and the permit to settle). According to Art. 55 par. 1 of the Act on Aliens, the authority conducting the proceedings on granting the residence permit for a fixed period to an alien being a spouse of Polish citizen or of an alien residing on the territory of the Republic of Poland, who files an application for a residence permit for a fixed period, checks whether the marriage has not been concluded for the purpose of abuse by an alien the provisions on granting a residence permit for a fixed period on the territory of the Republic of Poland, if the circumstances of the case demonstrate that:

- 1) one of the spouses has accepted material profit in return for expressing a consent to conclude the marriage unless it is an established custom in the state or social group concerned
- 2) there is the lack of an appropriate contribution to the responsibilities arising from the marriage
- 3) the spouses have never met before their marriage
- 4) the spouses do not speak a language understood by both
- 5) the spouses are inconsistent about their respective personal data and other important information concerning them
- 6) the past history of one or both of the spouses contains evidence of previous marriage of convenience

The abovementioned circumstances shall be also examined in the case of granting a permit to settle and proceedings on expulsion.

It shall be emphasized, that if any of abovementioned conditions occur, there is only a justification to institute proceedings aiming at establishing whether the marriage has been entered for one of aims listed above. The result of the proceeding may justify decision on expulsion or refuse granting a residence permit for a fixed time.

Moreover, the issue of so called 'mixed marriages' (i.e. between Polish citizen and foreigner) is examined while rendering the decision of expulsion. According to Art. 89 of the Act of Aliens, the decision on expulsion of an alien shall not be rendered and the decision rendered shall not be executed if the alien is a spouse of the Polish citizen or of the alien possessing the permit to settle or the long-term resident's EC resident permit and he does not constitute a threat to state security and defence or public security and policy, unless the marriage has been concluded in order to avoid expulsion. The decision of expulsion is rendered by voivodes (acting in 1<sup>st</sup> instance) and the President of the Office for Aliens (acting in 2<sup>nd</sup> instance). According to the judgment of District Administrative Court (Wojewódzki Sąd Administracyjny) in Warsaw of May 25, 2006 (V SA/Wa 352/06), circumstances described in Article 55 of the Act on Aliens shall not automatically prove that there is a marriage of convenience. They shall only be a basis to institute administrative proceedings. According to the same court in Warsaw of September 26, 2006 (V SA/Wa 956/06) the fact that spouses are not familiar with general family situation of each other as well as their education, means of income and they do not live with each other entitle to claim that the marriage has been concluded in order to abuse or evade the Act on Aliens regarding granting a permit for stay.

It shall be emphasized, that according to Art. 264a of the Polish Penal Code of June 6, 1997 a person who, in order to gain personal or property benefits, facilitates or enables third

person stay in Poland unlawfully, is liable to penalty of imprisonment between 3 months to 5 years. This provision may also contain cases of marriage of convenience.

As from January 1, 2009, new competences regarding control of marriages between aliens and Polish citizens have been granted for Border Guard divisions. They may inter alia examine a place of stay of a spouse or other member of family of an alien as well as other people with whom an alien has family ties. Granting new competences shall influence effectiveness of Border Guard divisions to control the scale of marriages of convenience and to prevent them.

Also the Act on entry, contains provisions that aim at combating marriages of convenience with EU citizens:

- a) Art. 25 states that if during the proceedings concerning the issue of a residence card of a member of a Union citizen's family, the circumstances point to the fact that:
  - 1. one of the spouses accepted a financial benefit in return for the consent for contracting a marriage, unless it results from a custom established in a given state or a social group
  - 2. the spouses do not fulfill the legal responsibilities arising from the marriage
  - 3. matrimonial cohabitation is not maintained
  - 4. the spouses have never met before their marriage
  - 5. the spouses do not speak a language understood by both
  - 6. the spouses are inconsistent about their respective personal details and about other important circumstances concerning them
  - 7. one or both of spouses had contracted a marriage of convenience in the past
 the authority which conducts the proceedings shall establish whether the marriage with the Union citizen is not a marriage of convenience.
- b) Art. 31 para 2 states that the family member who is not a Union citizen may also be refused residence card of the Union citizen family member in the case of marriage of convenience
- c) Art. 36 para 1 point 3 states that the residence card of the Union citizen family member is cancelled in following circumstances (...)
  - 3. the marriage of Union citizen family member who is not a Union citizen was of convenience
- d) Art. 56 para 1 point 2 states that the document certifying right for permanent residence or residence card of the Union citizen family member shall not be issued in following circumstances (...):
  - 2. The residence of Union citizen or Union citizen family member within the territory of Republic of Poland threatens the defence or public security of the State or protection of public security and public order

## 2. ACCESS TO WORK

According to Article 87 of the Act on promotion of employment and institutions of the labour market, there are group of individuals (aliens) that are entitled to take up employment in Poland without work permission. This covers the following individuals:

- a) nationals of EU Member States,
- b) nationals of those EEA states which do not belong to the European Union,

- c) nationals of those states which concluded the agreements of free movement of persons with European Communities and their Member States,
- d) family members of the abovementioned categories or is a descendant of a spouse of such an alien and who are under the age of 21 or are dependants of an alien or his spouse or is ascendant of an alien or his spouse that are dependant of one of them.

The abovementioned group as regards family members has been extended to individuals defined in Art. 19 para 2 and 3 of the Act on entry:

1. Family member, who is not a Union citizen shall retain the right of residence in following cases:
  - 1) death of the Union citizen who has a right for a stay exceeding 3 months if he/she accompanied the Union citizen in the territory of the Republic of Poland for a period longer than one year preceding the date of death of the Union citizen.
  - 2) divorce, annulment of marriage with the Union citizen who has a right for a stay exceeding 3 months if:
    - a) the marriage lasted for at least 3 years before prior to initiation of the divorce or annulment proceedings, including one year of residence of Union citizen in the territory of the Republic of Poland, or
    - b) by agreement between the spouses or by court order, as former spouse of the Union citizen he/she has custody of the Union citizen's children, or
    - c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting, or
    - d) by agreement between the spouses or by court order, the former spouse has the right of access to a minor child, provided that the court has ruled that such access must be in the Republic of Poland, and for as long as is required.
2. The Union citizen that has a right to stay for a period exceeding 3 months a departure from the Republic of Poland or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the Republic of Poland and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

In 2008 the abovementioned group of family members was not covered by the Article 87 listing the group of individuals that are not obliged to have a work permit in order to take up employment at the territory of Poland. The extension of abovementioned categories of family members of EU citizens is in line with the aim of Directive 2004/38.

Therefore it could be said that EU nationals enjoy the privileged status under regulations concerning access to Polish labour market. Currently there is an uniform group of aliens who are entitled to take up employment in Poland without restriction. This group contains EU nationals, EEA nationals (Norway, Iceland and Liechtenstein) and nationals of Suisse Confederation.

Moreover, The Act of December 19, 2008 amending Act on promotion of employment and labour institutions, changed Art. 86 of the Act concerning documented periods of employment abroad. The former wording of the Art. 86 entitled only Polish citizens and citizens of EU, EEA and citizens of member states that have a right to free movement on basis of an agreement concluded with European Community and Member States of European Union to



document its previous employment in order to gain special employment rights. Therefore it excluded such a right for refugees, long term residents and individuals that possess a right to settlement. Such a wording was discriminatory for individuals legally employed, irrespective of their citizenship. The Art. 86 covers such benefits as entitlement leaves, bonuses etc.

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

See point 1.1. above.

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

Family members of EU nationals are entitled to take up employment in Poland without any restrictions or additional formalities. They enjoy full access to national labour market in the same way that applies to EU nationals. As regards social and tax advantages, members of EU family (irrespective of their nationality) are covered by the principle of non-discrimination as regards access to social and tax advantages. However, the Polish legislator applied the rule concerning social assistance of non-economically active EU citizens and members of their family provided in Article 24 para 2 of the Directive 2004/38 as regards granting maintenance aid for students and members of their families. As has been described in Chapter III, the Act on higher education clearly states that social assistance – i.e. maintenance aid for students, special maintenance for disabled, maintenance for housing (accommodation), food allowance or other allowances shall not be granted to EU students and members of their family, unless they possess a status of economically active migrating citizens.

## **Chapter VII**

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

#### ***Important case law and its influence on a national level***

##### ***C-287/05 Hendrix***

The case was reported in 2008 by Professor Leszek Mitrus. Therefore below there is only a brief description of main issues concerning Polish law. In Poland benefit of this kind is provided by the Act on social pension. Social pension (*renta socjalna*) is a non – contributory benefit for persons who became incapable to work before reaching maturity or graduating studies. No prior employment is required. The characteristic of Polish ‘*renta socjalna*’ is in principle the same that ‘*Wajong benefit*’. For Polish and EU/EEA nationals there is a requirement to reside in Poland to be eligible for the benefit. According to the point 38 of the *Hendrix* judgment residence requirement to reside in Poland seems to be compatible with Community law.

Should the beneficiary carry out an economic activity, ‘*renta socjalna*’ can be suspended (art. 10 of the Act of 27 June 2003). This benefit should be regarded as social advantage within the meaning of art. 7(2) of the Regulation 1612/68. After moving to another country an employee who receives at the same time social pension should be regarded as a migrant worker within art. 39 EC Treaty. It seems that the reasoning of the ECJ is relevant to Polish law (especially points 57 and 58 of the judgment). Thus, when deciding on the entitlement to social pension in case of residence in another country the economic and social links of beneficiary should be analysed.

##### ***C-527/06 Renneberg***

According to the Act on personal income tax, there is a different position of individuals depending on a residence status. According to Article 3 of the Act, all individuals, whose place of residence is in Poland, are subject to unlimited tax liability in Poland, which means that they are liable to pay Polish taxes on the total of their income, irrespective of where it was generated. Individuals who do not have their place of residence in Poland are subject to limited tax liability, which means that they are liable to pay taxes only on income gained at the territory of Poland. Other rules may be subject of international agreements on elimination of double taxation. Therefore, according to Article 3 para. 2a of the Act, there is no possibility to cover also income or losses generated outside territory of Poland in cases of individuals subjected to limited tax liability in Poland.

Moreover it shall be stressed that according to Article 9 of the Act if a taxpayer generates incomes from more than one source, than the overall sum is subjected to tax. When a taxpayer generates a loss from a particular source of income, than he is entitled to reduce an income generated from the same source in following five fiscal years (a reduction may not exceed 50% of the overall amount of loss). It is therefore not possible to reduce an income generated from a particular source by a loss generated from a different source. In abovementioned situations sources shall be the same.

***C-94/07 Raccanelli***

According to Regulation on concerning doctoral and post doctoral scholarships, there is a possibility to award an individual with doctoral scholarship that prepares doctoral dissertation if:

- a) doctoral dissertation procedure has been instituted,
- b) supervisor has issued a positive opinion or opinion about advance stage of the dissertation,
- c) an individual does not have any additional employment (except for individuals that work at hospital or veterinary clinic and they conduct activity in medical or veterinary sciences).

The abovementioned rules apply without distinction both to Polish and EU citizens. And they shall be understood in a different way than in the *Raccanelli* case. It cannot be excluded that an individual preparing a doctoral dissertation may be employed at the higher school where he is preparing this dissertation. But, as a general rule that applies to many Polish higher schools, only individuals holding PhD title are employed at universities. Therefore in general, the abovementioned rule (as regards point c) will apply to employment different than at higher schools.

Therefore, there is no possibility to be both employed and have a scholarship. However, an employment contract shall not be understood as only employment at a higher school – it concerns any employment taken by an individual. In the latter case, such a person, irrespective of the fact of preparing a doctoral dissertation, shall be treated as a worker, as opposed to not working doctoral student.

***C-1/05 Jia***

According to the ECJ, Community law does not require Member States to make the grant of a residence permit to nationals of a non-Member State, who are members of the family of a Community national who has exercised his or her right of free movement, subject to the condition that those family members have previously been residing lawfully in another Member State. The Act on entry that implements Directive 2004/38 fully complies with the ECJ ruling. Art. 11 para 1 of the Act on entry lists conditions when a third country national (member of family of EU citizen) may be refused entry. There is no provision that demands previous legal stay at the territory of another Member State. Moreover as regards definition of ‘dependency’, Art. 18 in connection with Art. 16 of the Act on entry states that an EU citizens shall be in possession of enough funds to provide for himself/herself and his/her family members in the territory of the Republic of Poland without the need to make use of social insurance benefits. This may be proved by various means and submitted at the time of application for a right to join EU citizen.

***C-158/07 Förster***

According to the ECJ, a student who is a national of a Member State and travels to another Member State to study there can rely on the first paragraph of Art. 12 EC Treaty in order to

obtain a maintenance grant where he or she has resided for certain duration in the host Member State. The first paragraph of Art. 12 EC Treaty does not preclude the application to nationals of other Member States of a requirement of five years' prior residence. Such a requirement, as was described in point 4.5 above, applies to EU/EEA and Switzerland citizens and members of their families. According to Art. 43 of the Act on Higher Education, the non-discrimination principle as regards maintenance grants does not apply to students and members of their families who come to study in Poland until they obtain a right for permanent residence (i.e. after five years of stay at the territory of Poland). Such a Polish regulation is in line with Art. 24 of the Directive 2004/38, that clearly states that economically inactive citizens and members of their family are not entitled to the same range of social rights as economically active individuals.

### ***C-33/07 Jipa***

Polish law does not contain provisions that would allow the right of a national of Poland to travel to another Member State to be restricted, in particular on the ground that he has previously been repatriated from the latter Member State on account of his 'illegal residence' there. The restriction to move abroad may be sentenced as a fine resulting from penal proceedings for a particular criminal case. Otherwise it is not possible in an administrative way to restrict the possibility to move abroad by a Polish citizen.

### ***Developments as regards implementation of cases discussed in the 2007 report***

#### ***Case C-499/06 Halina Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie (Social Security Institution)***

As was reported by Professor Leszek Mitrus, on November 13, 2006, the Regional Court in Koszalin in case *Halina Nerkowska v. ZUS* (Social Security Institution) made a decision to refer for a preliminary ruling concerning non-contributory benefit due to incapacity to work. The reference was made in the course of proceedings regarding the latter's refusal to pay Mrs. Nerkowska a disability pension for the damage to her health following the six years which she suffered as a deportee in the former Union of Soviet Socialist Republics (the former USSR). According to the Law on provision for war and military invalids and their families and the Law on combatants and certain persons who are the victims of wartime and post-war repression benefits that are financed by the Poland, are provided for by that Law are to be paid to the person entitled to them whilst he is resident in the territory of the Republic of Poland, unless the Law or an international agreement stipulates otherwise. Under Art. 12 para 2 of the Act of combatants, the cash benefits and other entitlements provided for by the Act on invalids are also to be received by persons who have been added to one of the groups of disabled persons on account of a disability connected, in particular, with a period spent in prison, in an internment camp, in a camp which was subject to the Main Administration for Affairs of Prisoners of War and Internees (GUPVI) of the People's Commissariat for Internal Affairs (NKVD) and, from March 1946, of the Ministry of Internal Affairs (MVD) of the former USSR, or in a camp subject to the Control and Filtration Camps Division of the NKVD and, from March 1946, of the MVD. Those benefits are also received by persons

who were the victims of wartime and post-war repression, that is to say by people who, on account of their political, religious and national convictions, were forcibly exiled or were deported to the former USSR. A disability resulting from wounds, contusions and other lesions or from an illness which arose because of a period of deportation is considered to be a disability connected with a period of deportation. Mrs. Halina Nerkowska was refused payment of a pension as a result of partial incapacity for work linked to her stay in places of isolation on the ground that she did not reside in Polish territory (Ms Nerkowska stayed in Germany at the time of make an application). Mrs. Nerkowska challenged that decision by lodging an appeal with the Sąd Okręgowy w Koszalinie (Regional Court, Koszalin), requesting that it hold her entitled to obtain payment of the disability pension sought. That court did not uphold her arguments and dismissed the appeal by judgment of 22 May 2003, which was delivered after the taking of evidence. Mrs. Nerkowska submitted a fresh application for payment of the abovementioned benefit in September 2006. In support of her application, she submitted that the Republic of Poland had acceded to the European Union on 1 May 2004 and had consequently incorporated Community law into the Polish legal order. The Regional Court in Koszalin (Sąd Okręgowy w Koszalinie) decided then to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Article 18 EC, which guarantees citizens of the European Union the right to move and reside freely within the territory of the Member States, preclude the binding force of the national rules laid down in Article 5 of the [1974 Law] in so far as they make payment of a pension benefit for incapacity for work that is linked to a stay in places of isolation subject to fulfillment of the condition that the person entitled be resident in the territory of the Polish State?’

The European Court of Justice delivered the judgment on May 22, 2008. The ECJ based its judgment on the fundamental role of the institution of European citizenship. The ECJ stated that Article 18(1) EC is to be interpreted as precluding legislation of a Member State under which it refuses, generally and in all circumstances, to pay to its nationals a benefit granted to civilian victims of war or repression solely because they are not resident in the territory of that State throughout the period of payment of the benefit, but in the territory of another Member State. Consequently, the ECJ followed the *Tas-Hagen* judgment.

The Regional Court in Koszalin issued the judgment on July 30, 2008. It decided to change the decision of ZUS (Social Security Institution) and ordered it to grant Mrs. Halina Nerkowska non-contributory benefit connected with her right to a disability pension as a result of deportation. The Court first explained that a disability pension for damaged caused by deportation of a citizen is not a social security benefit, as there is no equivalency, since an insured person has a right without parallel duties. A right to such a pension depends only on establishment that an individual has suffered damage to his health (and in consequence incapacity to work) as a result of deportation. In such a case it is irrelevant if an individual has paid any premiums. Therefore, the Court ruled that Article 5 the Law on provision for war and military invalids and their families, which states that the benefits provided for by that Law are to be paid to the person entitled to them whilst he is resident in the territory of the Republic of Poland, unless the Law or an international agreement stipulates otherwise, are not incompatible with Article 42 of EC Treaty. This conclusion, however, is not sufficient to claim that Article 5 is compatible with entire EU law. Mrs. Nerkowska claimed that the Law violates Art. 18 of EC Treaty. The Regional Court shared these hesitations. Therefore it decided to make a preliminary ruling. As a result of the ECJ judgment of May 22, 2008, the

Court claimed that Art 5 of the Polish law, as incompatible with Art 18 of the EC Treaty cannot form a basis for refusal to grant Mrs. Nerkowska certain benefits. Therefore it stated that Social Security Institution had a duty to grant to Ms Nerkowska a benefit in question as from August 1, 2006. According to Polish law, this benefit shall be paid as from the day of acquiring such a right, but not earlier from the month of submitting an application (Mrs. Nerkowska submitted an application on August 26, 2006).

As regards ECJ judgment in the *Nerkowska* case, in which ECJ clearly stated that Article 18 of the EC Treaty is to be interpreted as precluding legislation of a Member State under which it refuses, generally and in all circumstances, to pay to its nationals a benefit granted to civilian victims of war or repression solely because they are not resident in the territory of that State throughout the period of payment of the benefit, but in the territory of another Member State, it shall be stated that another Polish Act on social aid for war victims may be assessed as incompatible with EU law. The Act on financial benefits and rights for civil, blind war victims states in Art. 1 para 2 that a person entitled to receive financial benefits are Polish citizens, that have a permanent residence at the territory of Republic of Poland. Similar provisions may be found in the Act on financial benefits for victims deported to forced labour and imprisoned in the Third Reich and Soviet labour camps.

Following the ECJ judgment in *Nerkowska* case, the government has prepared the draft amending both the Act on financial benefits for deported victims and the Law on provisions for war and military invalids in order to adjust to EU law. However, the draft has not been enacted so far.

## **Chapter VIII**

### **Application of transitional measures**

The Act on entry in Art. 16 para. 2 states that if the purpose of residence in the Republic of Poland is to undertake gainful employment, an Union citizen against whom the limitations in the access to labour market apply pursuant to international agreements shall be granted the right to reside for a period longer than three months after obtaining a promise of employment permit in that territory

However, in January 2007 Poland abolished all the restrictions on the access to employment of nationals of all 27 EU Member States. Consequently all EU workers are entitled to take up employment on the same terms as apply to Polish citizens. It was an unilateral decision taken by Polish authorities to abolish the restrictions also towards nationals of these countries who still maintain in force transitional measures which are allowed under Accession Treaty. Therefore, there is no legal obligation to grant preferential treatment to EU nationals in comparison to third – country workers.

However, it shall be also emphasized that EU nationals enjoy the privileged status under regulations concerning access to Polish labour market in comparison with third country nationals. They do not need to have a permission in order to take up an employment.

## Chapter IX

### Miscellaneous

#### *1. Short analysis of existing policies, legislations and/or practices of a general nature*

Rozporządzenie Ministra Pracy i Polityki Społecznej w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę (Regulation issued by the Minister of Labour and Social Policy on performance of work without a necessity to obtain work permit of August 30, 2006, Journal of Laws 2006, number 156, item 1116) concerns inter alia situation of workers from countries which are direct neighbours of Poland. The fact that EU citizens may take employment without any obstacles leads to a conclusion that these rules are relevant for these neighbouring countries that are not EU Member States, i.e. Byelorussia, Ukraine and Russia. The situation changed as regards this category of foreigners. It is possible to work not for period of 3 months within 6 months without permission, but of period of 6 months within 12 months. It shall be also emphasized that irrespective of above-mentioned rules, persons who fulfill relevant criteria can apply for a document 'Karta Polaka' (Charter of Polish National). Such a document can be issued by a consul to a person who declares affiliation to the Polish nation. Therefore it is possible for abovementioned group of foreigners to be fully exempted from the obligation to possess work permit, because foreigners holding the Charter shall have a right to take up employment, self-employment, studies, doctoral studies, etc. without additional permissions. As regards the obligation of preferential treatment, since all restrictions concerning employment of EU nationals in Poland were abolished in 2007 and consequently Poland does not apply any transitional measures, therefore there is no legal obligation to grant preferential treatment to EU nationals in comparison to third – country workers.

As was stated in 2007 Report, also Turkish citizens enjoy better status than other third country nationals; however, provisions concerning them have changed since 2007 Report. Under the previous wording of the Regulation, they could have taken up an employment without permission after certain a fourth-year period of legal employment at the territory of Poland and members of their family provided that they have lived at the territory of Poland with a Turkish worker for at least 5 years. Currently, Article 23a of the Regulation states that Turkish citizens may take up employment in Poland without work permits according to rules described by institutions established by Agreement establishing an association between the European Economic Community and Turkey of September 12, 1963.

Except for neighbouring countries and Turkey, other third country nationals – for example students, correspondents, researches may take up employment without necessity to obtain work permission (see 2007 Report).

Taking into account the current global economic situation and growing unemployment rate in Poland, some representatives of employees claim that it is necessary to take up initiative in order to restrict the number of workers from third countries in Poland, especially these not highly qualified. According to OPZZ (Polish Association of Trade Unions) the main problem covers building sector and agriculture. However, according to Polish Ministry of Labour and Social Policy, Polish law has not been opened so far to an excessive extent Polish labour market for employees outside EU. Therefore, no legislation initiative is planned in this case.



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

There are several organizations that help in instituting proceedings against violation of Community law. However, except for a state body – i.e. Rzecznik Praw Obywatelskich (Commissioner of Human Rights Protection, [www.rpo.gov.pl](http://www.rpo.gov.pl)), the following three are worth mentioning as the most active, important and well known as in this field:

- Fundacja Uniwersyteckich Poradni Prawnych (Legal Clinics Foundation) – [www.fupp.org.pl](http://www.fupp.org.pl)
- Fundacja Stefana Batorego (Stefan Batory Foundation) – [www.batory.org.pl](http://www.batory.org.pl)
- Helsińska Fundacja Praw Człowieka (Helsinki Foundation for Human Rights) – [www.hfhrpolwaw.pl](http://www.hfhrpolwaw.pl)

Additionally, there are also other national range organizations, but their influence is not very significant:

- Związek Biur Porad Obywatelskich (Union of Citizen's Advice Bureau) – [www.zbpo.org.pl](http://www.zbpo.org.pl)
- Poradnia Prawna dla Cudzoziemców (Legal Clinics for Foreigners) – [www.prawo.diplomacy.pl](http://www.prawo.diplomacy.pl)
- Polskie Stowarzyszenie Edukacji Prawnej (Polish Association of Legal Education) – [www.psep.pl](http://www.psep.pl)
- Centrum Pro Bono – [www.centrumprobono.pl](http://www.centrumprobono.pl)
- Centrum Pomocy Prawnej Haliny Nieć (The Halina Nieć Legal Aid Centre) – [www.pomocprawna.org](http://www.pomocprawna.org)

Moreover there are also regional organizations that help in launching complaints for violation of Community law that act in each voivodships.

## **3. Studies, seminars, conferences**

- Wspólnota Europejska po 50-ciu latach funkcjonowania – ocena i perspektywy (European Community after 50 years – assessment and perspectives), Gdańsk, October 2008;
- Bułgaria i Rumunia w Unii Europejskiej- Aspekty polityczne, prawne i ekonomiczne procesu akcesyjnego (Bulgaria and Romania in the European Union – political, legal and economic aspects of accession process) - March 2008, Warsaw;
- Konsekwencje przystąpienia UE do Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności dla umocnienia ochrony jednostki w UE i dla umocnienia europejskiego systemu ochrony praw człowieka (Consequences of EU accession to European Convention of Human Rights and Fundamental Freedoms), June 2008, Warsaw;
- Nadanie charakteru prawnego Karcie Praw Podstawowych na mocy Traktatu z Lizbony. Znaczenie dla umocnienia ochrony jednostki w UE (Binding character of the Charter of Fundamental Rights on basis of the Lisbon Treaty. Consequences for protection of individual in EU), March 2008, Warszawa;
- Polska w Schengen (Poland in Schengen), October 2008, Kętrzyn;
- Strengthening fundamental rights of individuals while reforming EU – December 2008, Warsaw.