

REPORT

on the Free Movement of Workers in The Netherlands in 2012-2013

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July 2013

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Introduction

GENERAL

On 29 October 2012 the conservative-liberal VVD and the social-democratic PvdA published the coalition agreement of the new Dutch government.¹ This agreement contains some proposals, restricting free movement and equal treatment of Union citizens.

- * EU nationals and knowledge migrants ‘remain welcome’ if they are able to provide for their own income by working, integrate quickly and help built the society. ‘For all migrants applies that knowledge of the Dutch language and society offers the best perspective for successful integration.’
- * The government’s aim is to have EU law amended so that nationals of other Member State will be entitled to social assistance only after seven years of residence in the Netherlands.
- * Anyone who does not master the Dutch language sufficiently will be excluded from social assistance. ‘This principle will be applied equally to third-country nationals, EU nationals and Dutch nationals.’
- * The policy of the former government concerning residence and return of EU labour migrants will be continued. This is not specified, but probably refers to the introduction of more strict rules on expulsion of nationals of other Member States in case of unemployment, a request for social assistance, use of facilities for homeless persons and in case of repeated convictions for minor crimes. It is not clear whether this also includes the reduction of the right to family reunification under Directive 2004/38 to the level of Directive 2003/86. This issue was mentioned in the March 2010 Dutch Position Paper, but is not mentioned in the agreement.
- * It is acknowledged that Bulgarian and Romanian workers will get free access to the labour market in January 2014. One of the two parties in its electoral programme hinted at a possible extension of the transitional measures for EU-2 workers after 2013. This is presented as an additional ground for full and strict enforcement of ‘the project EU labour migration’. This ‘project’ is not further specified, but probably refers to the measures of the previous government mentioned above.

Several policy documents about measures to regulate the labour migration from Central and Eastern Europe are published in 2012-2013. The ‘Integration Agenda’ of 17 February 2013 contains the integration policy and the integration measures of the new government in general, with specific attention for the promotion of Dutch language skills of EU and Turkish citizens. An approach will be developed based on participation, including entering into a participation contract with all newcomers, EU and Turkish citizens included. Concerning the proposed language requirement for social assistance, the limitation of the search period for EU citizens to three months and the ban on the export of social assistance benefits for frontier workers, consultations are still ongoing with the European Commission.

¹ For the full text in Dutch see parliamentary documents Tweede Kamer 33410, no. 15, p. 27-29.

IMPLEMENTATION OF DIRECTIVE 2004/38

While according to the Court of Justice (TA Luft, C-361/88 and C-59/89) circulars are not acceptable as instrument for the implementation of a directive, parts of the Aliens Circular 2000 are in the reporting year transposed to the Aliens Decree 2000 (Decision of 2 April 2012, *Staatsblad* 2012, no. 159). It regards the provisions concerning the facilitation of visa for third country family members of Article 5(2) Directive 2004/38, the continued residence of Article 11(2) Directive and the continued residence of Article 16 Directive. Finally, Article 8.22 of the Aliens Decree is amended to bring it fully in line with Article 28(1) of the Directive.

Again in 2012-2013 several decisions of the Council of State and of the district courts concerned the interpretation of ‘durable relationship, duly attested’ . The Judicial Division rejected the argument that the requirement of a common household for six months is discriminatory. A district court decided that also the cohabitation abroad should be taken into account.

In two more or less identical judgments of the Council of State dual nationality played a role. The Council of State rejected the argument of the State that a returning Dutch national cannot derive rights from her acquired Italian nationality because her right to stay in the Netherlands derives from her Dutch nationality. This argument assumes that owning Dutch nationality may affect the rights which the partner as citizen of another Member State derives from Union law. For this assumption exists no ground.

According to a district court Article 2, sub d Directive 2004/38 is insufficiently implemented in Article 8.7(2) Aliens Decree 2000. This Article of the Aliens Decree must be interpreted in conformity with the Directive that it also includes the direct relatives in the ascending line of the partner of the Union citizen.

In the reporting year an extensive body of case law concerned Detention and Departure. The case law indicates that administrative decisions still fall short concerning the requirement of a present, real and sufficient serious threat to a fundamental interest of the society. On the other hand, the existence of a genuine, present and sufficiently serious threat can be based on the nature and the frequency of the offenses, although each offense in itself does not constitute such a threat.

FAMILY MEMBERS

On a general note it can be held that the rewritten *Vreemdelingencirculaire* 2000, B10/2 is much shorter than its predecessor and, not surprisingly, leaves much unsaid. An express statement in the introduction to B10/2 that the policy rules in *Vreemdelingencirculaire* 2000, B10/2 supplement or elaborate the Dutch rules implementing Directive 2004/38/EC in Articles 8.7 – 8.25 *Vreemdelingenbesluit*, are designed to ensure full compliance with the European rules. Time, however, will show whether this is actually the case or whether family members will have to take their case to the courts to uphold their European rights.

An amendment to the ‘old’ policy rules, taking effect on 1 January 2013, was the inclusion of policy rules on the rights of caring parents of Dutch children, as developed by the Court of Justice in its *Ruiz Zambrano/Dereci* case law. Why these policy rules have found

their way into the section on family reunification in general² rather than the special section on EU-citizens, is a puzzle and can be labelled as ‘some what unfortunate’ as it not only detracts from the fact that Dutch nationals qualify as EU-citizens even if they are residents of the Netherlands, but does also not fit in the overall structure of the *Vreemdelingencirculaire* 2000 that addresses the entitlements of Dutch nationals by virtue of the Court of Justice’s rulings in the *Surinder Singh/Eind*, *McCarthy* and *Scholz* cases which are found in the special section on EU-citizens and their family members.³

The new policy rules that apply to Dutch nationals seeking entry/residence permission for their family members are located in different sections of *Vreemdelingencirculaire* 2000, namely: B10/2. and B7/2.9. These sections include policy rules on: return cases, dual nationals, naturalised Dutch nationals and ‘*Ruiz Zambrano*-cases’. Applications made claiming a right of residence as a cross-border service provider (*Carpenter*), are no longer subject of the policy rules.

LANGUAGE REQUIREMENTS

As of 1 July 2013 foreign employers who come to work in the Netherlands temporarily in certain risky occupations, such as remover of asbestos or crane driver, have to have sufficient command of the Dutch language in order to do their work safely and to prevent serious accidents.

The necessary level of command of the language depends on the work and responsibilities of the employee. Employees from abroad who are working here structurally in a certified occupation already have to meet the language requirement.

STUDY GRANTS

As a result of the decision of the CJEU,(case C-542/09, *Commission vs the Netherlands*) the Dutch government has recently withdrawn this ‘three out of six’ rule, but has opened the possibility to put a maximum to the amount of students who can ask for a study grant to take abroad.

The minimum threshold to be classified as a migrant worker will be adjusted on 1 January 2014 from 32 hours worked in a month to 56 hours worked in the month. If a student works 56 hours or more per month the Department of Education will assume that he is a migrant worker himself and entitled to full study grants in the Netherlands. It is doubtful whether this 56 hours requirement (as the corresponding 40% requirement in the Alien Circular 2000) is in conformity with the ‘genuine and effective’ jurisprudence of the CJEU.

2 *Vreemdelingencirculaire* 2000 (old) B2/10 (entry into force: 1 January 2013). See further, section 2 of this chapter.

3 The same holds true for *Vreemdelingencirculaire* 2000, B2/9.2.3.2 on the relevance of Article 3, Fourth Protocol to the ECHR for cases involving expulsion measures directed against parents of Dutch children.

Chapter I

The Worker: Entry, Residence, Departure and Remedies

A. ENTRY

Texts in force

In the Netherlands Directive 2004/38/EC is mainly transposed by provisions of the Aliens Decree 2000, but the Aliens Act 2000, the Work and Social Assistance Act and the study grant legislation were amended as well. Chapters A2 and B10 of the Aliens Circular 2000 contain the policy guidelines for the implementation of Directive 2004/38 as embedded in the amended Aliens Decree 2000. While according to the Court of Justice (TA Luft, C-361/88 and C-59/89) circulars are not acceptable as instrument for the implementation of a directive, parts of the Chapters A2 and B10 of the Aliens Circular 2000 are in the reporting year transposed to the Aliens Decree 2000 (Decision of 2 April 2012, *Staatsblad* 2012, no. 159). It regards A2/6.2.2.2 (facilitation of visa for third country family members of Article 5(2) Directive 2004/38), now Article 8.9(2) Aliens Decree; B10/5.2.2 (continued residence of Article 11(2) Directive), now amended Article 8.15 Aliens Decree and B10/2.5.3 (continued residence of Article 16 Directive), now Article 8.17(2) Aliens Decree. Finally, Article 8.22 of the Aliens Decree is amended to bring it fully in line with Article 28(1) of the Directive.

The chapters A2 and B10 of the Aliens Circular 2000 are still amended regularly. On 1 January 2012 important amendments came into force concerning the means of proof of a ‘durable relationship, duly attested’ with an EU/EEA citizen as mentioned in Article 8.7(4) Aliens Decree 2000 (new par. B10/1.7) and new rules concerning the termination of residence in case of social assistance or social care (new par. B10/4.3); see below under *Administrative practice*.

On 23 September 2009 a Draft Act Modern Migration Policy (MoMi Act) was presented to Parliament (*Tweede Kamer* 2008-2009, 32 052 nrs.1-3). This Bill concerns faster admission procedures for regular migrants in the Netherlands. It does not apply to asylum seekers neither to the free movement of Union citizens. On 16 July 2010 the Bill was published in the Official Journal (*Staatsblad* 2010, 290) with a proposed entry into force 1 January 2011, on 31 March 2011 postponed for an indefinite period due to ICT problems (*Tweede Kamer* 2010-2011, 30 573, nr. 66 and 2011-2012, 30 537, nr. 106). Finally, on 5 March 2013 the State Secretary of Security and Justice informed the Second Chamber of Parliament that the MoMi Act comes into force on 1 June 2013 (*Staatsblad* 2013, no. 165).

On 30 July 2010 a Modern Migration Policy Decree was published (*Staatsblad* 2010, no. 307), which amends the Aliens Decree 2000 in order to implement the Modern Migration Policy Act, to transpose the Knowledge Migrants Directive 2009/50 (implemented 19 June 2011) and to introduce the stricter criteria of the public order policies. The latter part of the decree came into force 31 July 2010. To implement the new public order policies the paragraphs A5, B1, C4 and C8 of the Aliens Circular were amended (WBV 201/11A, *Staatscourant* 30 July 2010, no. 11415). In 2012 even more stricter criteria were introduced by an amendment of Article 3.86 of the Aliens Decree 2000 (*Staatsblad* 2012, no.158 The amendment came into force 1 July 2012 (*Staatsblad* 2012, no. 286); see below under C. Departure and Detention, Administrative practice.

Judicial practice

Two judgements confirmed the (only) declaratory character of the residence documents provided according to the Residence Directive (see below no. 1) or according to Article 20 TFEU (no. 2).

Again in 2012-2013 several decisions of the Judicial Division of the Council of State and of the district courts concerned the interpretation of ‘durable relationship, duly attested’ (see no. 3-9). In no. 3 the Judicial Division rejected the argument that the requirement of a common household for six months is discriminatory. In no. 7 the district court decided that also the cohabitation abroad should be taken into account.

The denial of an entry visa as a minor child of a partner of an EU-citizen is the subject of no. 10.

Finally, dual nationality played a role in the judgments no. 11 and 12.

1. Judicial Division of the Council of State 18 January 2012, 201012417/1/V4 [LJN: BV1668], *Jurisprudentie Vreemdelingenrecht* 2012/119 confirmed that the document ‘permanent residence of citizens of the Union’ has only declaratory significance. The decision concerned an alien who travelled on September 16, 2009 from Schiphol to the UK. There he has been refused entry and his British passport and British citizenship were withdrawn due to the fact that he fraudulently had obtained British citizenship. He was then removed by plane to Schiphol airport, where he was refused entry because he was not in possession of a travel document. As previously considered (*JV* 2011/115, ve11000200), it follows from the *MRAX* decision (*JV* 2002/291, ve02000557) that an alien who claims rights from European Union law, in principle, can be required that he demonstrates his stated identity and nationality on the basis of a valid identity card or a valid passport. It is established that the alien does not have a valid passport in support of his appeal to Article 5 Directive 2004/38/EC. In view of this the Royal Military Police was not required to allow him immediately entry. The alien who cannot demonstrate his identity in the aforementioned manner has, in principle, no rights under European Union law, unless he still can demonstrate his identity otherwise. The copy of the document ‘permanent residence of citizens of the Union’ (granted to him by the State Secretary of Justice on August 27, 2008) and produced as evidence of his alleged residence (under Community law) may not serve as proof. It follows from Article 16 of Directive 2004/38/EC that such a document has only declaratory significance. Since the UK authorities have withdrawn his passport while he had obtained fraudulently British citizenship, the alien has never obtained residence rights under that Directive.

2. In District Court Amsterdam 26 November 2012, AWB 12/17134 the Court decided that the residence document after a successful appeal on the *Ruiz Zambrano* judgement is not constitutive but declaratory. According to the Minister the applicant is granted a residence permit ‘stay with daughter’, now she takes care of a Dutch child, through a successful appeal to the judgment in *Ruiz Zambrano* (*JV* 2011/146). The legal basis for this is Article 3.13, paragraph 2 Aliens Decree 2000. The Minister has the date set at July 27, 2010, since the applicant had paid her fees that day.

Now the right of residence has a direct basis in EU law, the residence permit is not constitutive but only declaratory, just as in the case of application of Directive 2004/38. Also the right of residence according to Article 20 TFEU arises from the facts and circumstances of the residence of Union citizens and their family. The Minister considered erroneously the payment of the fee as a condition for the start of that lawful residence.

According to Judicial Division February 21, 2011 (*JV* 2011/157) the Minister is not competent to determine from which date on the applicant had lawful residence in the Netherlands based on EU law, since a relevant national provision is missing (see also below under Residence, Judicial practice, Judicial Division 3 October 2012, *Jurisprudentie Vreemdelingenrecht* 2013/13).

Now the applicant derives her right of residence directly from EU law, the fee has to be applied as established in Art. 3.34h Aliens Regulation 2000, as they exist at the time of application, namely €30,-. The Minister, therefore, was wrong to require a fee of €830,-.

3. In Judicial Division of the Council of State 26 April 2012, 201008207/1/V4 [LJN: BW5635], *Jurisprudentie Vreemdelingenrecht* 2012-336, with annotation H. Oosterom-Staples, the applicant claimed that that the policy rule in B10/1.7 Aliens Circular 2000, alleging that the existence of a durable relationship between a Union citizen and his unmarried partner is only assumed, if, during a period of six months they have performed a common household, is discriminatory. According to the applicant in the regular Dutch migration law the existence of a durable relationship is accepted without ever being registered at one address and a common household of the partners, and he argues that the unmarried partners of Union citizens under applicable law should be treated more favorably instead of more strictly.

The Division considers that, as the Minister has explained at the hearing, the applicant if desired, given the appropriate framework for a regular application, may qualify for a regular residence permit. In addition, for her as an unmarried partner of an EU citizen there is an additional opportunity to stay in this country, namely when the existence of a durable relationship between her and the Union citizen is proven by evidence that they conducted or (recently) have conducted for six months a common household. Now for the applicant, the two aforementioned roads are open, which she has not contested, the policy laid down in B10/1.7 Aliens Circular 2000 in B10/1.7 has in this case no discriminatory effect.

4. Judicial Division of the Council of State 4 May 2012, 201012514/1/V4 [LJN: BW5644]: as previously considered (*JV* 2011/429) the Minister, by accepting only a GBA-registration or the birth of a child from the relationship, as evidence of a lasting relationship, has given the Directive, applied a too narrow interpretation of the term 'duly attested durable relationship'. In so far the appeal of the applicant is well founded, but, given the following, it cannot implicate the annulment of the judgment under appeal. The applicant had submitted a declaration about the relationship, as referred to in art. 8:13 paragraph 3 sub f Alien Decree 2000, but had not submitted a document attesting the civil registration, as required in Article 8:13(3)(c) Alien Decree 2000.

5. In Judicial Division of the Council of State 8 June 2012, 201105347/1/V4 [LJN: BW8594] the Judicial Division decided that based on the content of the official reports of house visits and the hearing of the *referent* by the police, the Minister could say that it is unlikely that the applicant and the *referent* are actually living together. Despite the registration in the civil registration (*GBA-Gemeentelijke Basisadministratie*, Municipal Population Administration) for a period of six months, the fact remains that under the applicable policy rules in B10/1.7 Aliens Circular 2000 'in all cases it should concern an existing relationship.' The Minister, now the actual situation does not correspond with the GBA registration, is, therefore, not incorrect in saying that there is no question of a duly attested durable relationship.

6. Furthermore, District Court Haarlem 12 March 2012, AWB 11/25917, 11/25920 [LJN: BW5749] concerned the proof of the unmarried status of the Polish *referent*. From the text on the Polish birth certificate - 'There is no reference to the conclusion of a marriage' - it is not clear whether the referent is married or not as there has not been an investigation into the civil status of the *referent*.

7. In District Court 's Hertogenbosch 30 March 2012, AWB 11/31299 [LJN: BW1988], the court finds that the Minister only took into consideration the formal registration of the applicant in the GBA and only on this basis concluded the absence of a durable relationship. Considering that the period of cohabitation abroad is important to assess whether applicant and the EU-*referent* have a durable relationship (i.e. at least six months), the Minister should have made visible in the decision-making process the importance of the alleged and with Spanish evidence substantiated cohabitation with the *referent* in Spain.

8. In District Court The Hague 15 August 2012, AWB 12/4972 [LJN: BX6831] a Nigerian applicant was detained on 10 February 2012 (and issued a re-entry ban). The applicant has insufficiently demonstrated the alleged durable relationship. There is no registration in the GBA (the civil registration), which shows that on February 10, 2012 the applicant has lived together for six months with his French girlfriend. Although the neighbours are witnesses of this occasion, this is found to be insufficiently objective. The declaration of their tax adviser is not concrete. It is not demonstrated by other objective evidence that there is a durable relationship.

9. Judicial Division Council of State 18 December 2012, 201111516/1/V4 [LJN: BY7389], *Jurisprudentie Vreemdelingenrecht* 2013/69. Rejection of the application for a residence document according to Article 9 Aliens Act 2000 for lack of an exclusive relationship considering the findings of a home visit. The State Secretary of Justice informed the applicant by letter before the home visit took place, that before the application of the applicant could be decided, further consideration was necessary into the actual cohabitation of the applicant with the *referent*. The letter stated that a home visit may be part of this investigation. Given the content of the letter it could reasonably be clear at the time of entry what the object of the house visit was. There are, therefore, no grounds to consider that the way the officers, in this case, entered was so contrary to what can be expected from a decently acting government, that the use of the evidence obtained during the home visit should be considered unacceptable.

10. District Court Arnhem 27 September 2012, AWB 12/13874 [LJN: BX9563] concerned the denial of an entry visa as a minor child of a partner of EU-citizen. The legislator intended to implement Directive 2004/38/EC with Article. 8.7(4) Aliens Decree 2000, by facilitating the entry of the persons mentioned therein. This facilitation is implemented in Dutch law by equating relatives in the descending line of a partner of a citizen of the Union for the purpose of the conditions of admission with such citizens. The argument that Directive 2004/38/EC, in this case, has no meaning, is thus not correct, because the applicable Dutch law is based on this Directive. That does not mean that the right to reside as such is based on this Directive. Nevertheless, the Minister could base his rejection of the applications on the fact that the applicants have not established that they are direct descendants of the *referent*.

11. Dual nationality (Italian/Dutch) played a role in Judicial Division 20 November 2012, 201105940/1/V4 [LJN: BY4031], *Jurisprudentie Vreemdelingenrecht* 2013/38. The application for issuance of a document referred to in Article 9(1) Aliens Act 2000 was rejected. The partner of the applicant is of Dutch and Italian nationality. She has acquired

Italian nationality by her marriage to an Italian man and lived from 1974 to 2006 in Italy. After her divorce in 2006 she returned to the Netherlands where the relationship with the applicant, an Egyptian national developed.

In the *McCarthy* judgment (JV 2011/243) the Court held that Art. 3 paragraph 1 Residence Directive must be interpreted that this Directive is not applicable to a Union citizen who has never exercised his right to free movement, who always resided in a Member State of which he is a national and who also has the nationality of a another Member State. Unlike the case to which this judgment refers, the partner of the applicant has exercised her right of to free movement. Given the Italian nationality of the partner she is, therefore, to be considered as beneficiary within the meaning of Article 3(1) of the Directive in this country. The argument of the State that the partner as a returning Dutch national cannot derive rights can from her Italian nationality because her right to stay here derives from her Dutch nationality, while at the same time third country family members with accrued rights are not involved. This argument assumes that owning Dutch nationality may affect the rights which the partner as citizen of another Member State derives from Union law. There is no ground for this assumption given the case law of the Court of Justice (see the judgment to *Micheletti* (RV 1992, 93), *Garcia Avello* (RV 2003, 94) and in the framework of Decision 1/80, the judgment *Kahveci and Inan* (JV 2012/234)).

12. Along the same line with regard to a Portuguese/Dutch dual national: Judicial Division 3 December 2012, 201108991/1/V1 [LJN: BY5575], *Jurisprudentie Vreemdelingenrecht* 2013/48.

Administrative practice

Several policy documents about measures to regulate the labour migration from Central and Eastern Europe are published in 2012-2013 (see below under a, b and d). The document under d contains the integration policy and the integration agenda of the new government in general, with specific attention for Dutch language skills of EU and Turkish citizens.

The document under c contains the new policy guidelines concerning the means of proof of 'a durable relationship, duly attested'.

Finally, the document under e introduces the requirement of working 56 hours or more per month to be considered as a migrant worker and to be entitled for full study grants in the Netherlands. It is doubtful whether this 56 hours requirement (as the corresponding 40% requirement in the Alien Circular 2000) is in conformity with the „genuine and effective’ jurisprudence of the ECJ.

a. On 14 April 2011 (*Tweede Kamer vergaderjaar* 2010-2011, 29 407, no. 118) and 18 November 2011 (*Tweede Kamer vergaderjaar* 2010-2011, 29 407, no. 132) the Minister of Social Affairs and Employment informed Parliament about measures to regulate the labour migration from Central and Eastern Europe. The actual number of labour migrants from these countries amounts 300.000 and will increase when on 1 January 2014 the work permit obligation for Bulgarian and Romanian workers will be abolished. Measures are announced concerning registration, information exchange, combating fraud, social security and social care, housing, integration and expulsion. To execute the measure concerning social security and social care Chapter B10 of the Alien Circular 2000 is amended on 23 December 2011 (*Staatscourant*, no. 23324) which amendment came into force on 1 January 2012. In paragraph B10/4.3 new rules concerning the termination of residence in case of social assistance or social care are introduced. During the first two years of residence an appeal on social as-

sistance or on social care in a hostel for more than 8 nights will cause an expulsion order. In year three the criteria for an expulsion decision are: social assistance for more than 2 months or complementary social assistance for more than three month or social care for 16 nights or more. In year four: 4 or 6 months social assistance or social care for more than 32 nights and in year five: 6 or 9 months social assistance or social care for more than 64 nights.

b. On 28 August 2012 the Minister presented a follow-up report (Tweede Kamer vergaderjaar 2011-2012, 29 407, no. 149). It is expected that the number of EU migrants in the Netherlands will increase further given the poor economic situation in some countries in Southern Europe. Continuation and, where necessary, extension of the approach is therefore necessary. The Second Chamber recognizes the problems associated with EU labor migration. In the debate following the report „Lessons from recent labor migration’ (*Tweede Kamer vergaderjaar* 2011-2012, 32 680, no. 3-4) the Chamber expressed its support for the policy to combat exploitation and fraud. A number of measures has already been implemented. EU Commissioners Reding (Justice) and Andor (Employment) have expressed concerns on three measures: the proposed language requirement for social assistance, the limitation of the search period for EU citizens to three months and the ban on the export of benefits for frontier workers. On these measures consultations are still ongoing with the European Commission.

c. In the same amendment of the Aliens Circular 2000 as mentioned above (which came into force 1 January 2012) the decision of the Judicial Division of the Council of State 6 September 2011, 201009139/1/V1 [LJN: BS1678], *Jurisprudentie Vreemdelingenrecht* 2011/429 is implemented (see last year’s report). According to paragraph B10/1.7 the common household of six month with an EU/EEA citizen can be proven not only by the civil registration (GBA), but also by inter alia rental contracts, mortgages or copies of bills in both names during that period of six months.

d. On 19 February 2013 the Minister of Social Affairs and Employment presented the vision of the cabinet on integration and the ‘Integration Agenda’ (*Tweede Kamer, vergaderjaar* 2012-2013, 32 824, 7). According to the cabinet successful integration requires that we can build on a foundation of shared values. Therefore, migrants should not only take note of the values of Dutch society, but also internalize these values. Concerning EU citizens the government expects an influx of CEE countries and from 2014 an influx of Romanians and Bulgarians. The government policy is to promote the positive development and combating the negative developments. The following measures have been taken:

- The integration requirements are further strengthened by the inclusion of a component for promoting labor market participation, which will be elaborated in the course of 2013.
- Migrants from the EU and Turkey will be promoted in different ways to learn Dutch.
- In cooperation with the municipalities the Minister of Social Affairs and Employment will develop an approach based on participation, including entering into a participation contract with all newcomers. This approach focuses on citizens of the Union, Turkey and the former West Indies and will be available in the autumn of 2013.
- The project on labor migration from Central and Eastern Europe, mentioned above (*Tweede Kamer* 29 407, 118 and *Tweede Kamer* 29 407, 132) will be continued with the fight against exploitation as focus point.
- At European level the attention will be drawn to the unintended consequences of EU labour migration. A restrictive migration policy concerning new accessions is necessary.

e. On March 12, 2013 (*Staatscourant* No. 6218) the Ministry of Education, Culture and Science published a new policy concerning migrant workers. Students with a nationality of one of the Member States of the European Union are just as Dutch students eligible for full study grants if they or their parents are regarded as 'migrant worker'. From 1 January 2014 the minimum threshold to be classified as a migrant worker will be adjusted from 32 hours worked in a month to 56 hours worked in the month. If a student works 56 hours or more per month the Department of Education (DUO) will assume that he is a migrant worker himself. The current 32-hours norm is relatively low chosen. This has led to an increasing number of migrant workers with financial assistance. Starting from the premise contained in the Aliens Circular (40% of the normal full working) there is room to increment the standard to a minimum of 56 hours worked per month. This standard is thus in line with the Aliens Circular. The new standard is effective for everyone, even for students who received a full study grant based on the 'old' standard. Entry into force of the new policy: 1 January 2014.

Literature

- M.C. Graaff, Interview (with Jorrit Rijpma, Tineke Strik and Ashley Terlouw): Wat bracht twee jaar 'Leers'?, *Asiel&Migrantenrecht* 2012, nr. 8.
- T. de Lange, Kroniek arbeidsmigratie, *Asiel&Migrantenrecht* 2012, nr. 9.
- B. de Hart, P. Minderhoud, T. Strik, A.B. Terlouw, De immigratievoorstellen van Rutte II ontrafeld, *Asiel&Migrantenrecht* 2012, nr. 10.
- C.A. Groenendijk & C.A.F.M. Grutters, Arresten en aanhangige zaken HvJEU op het terrein van migratie, asiel en derdelanders, *Asiel&Migrantenrecht* 2012, nr. 7 en 2013, nr. 1.

B. RESIDENCE

Texts in force

Union citizens and their family members who hold a valid identity card or passport have the right of residence for a period of up to three months in another Member State without any formalities (Article 6 of the Directive). This rights is contained in Articles 8.7 and 8.8(1) of the Aliens Decree 2000 for (a) holders of a valid identity card or valid passport or for (b) a person who can prove his identity and nationally unequivocally with other means (see also the Aliens Circular 2000, B10/2.4). The optional clause of Article 5(5) concerning the obligation to report to the authorities within a reasonable time is not materialized in the Aliens Decree 2000 for residence for a period for up to three months. According to B10/2.3 of the Aliens Circular 2000 Union citizens are exempted from the obligation to report. Only in cases of residence for more than three months they are obliged to report to the authorities. The obligation is sanctioned in Article 108(5) Aliens Act 2000 with detention for one month or a fine of the second category. In conformity with, i.a., EU Court of Justice 16 March 2000, C-329/97 (*Ergat*), *Jurisprudentie Vreemdelingenrecht* 2000/139 a Bill is presented to Parliament on 4 July 2012, to delete the detention, but to maintain the possibility of a fine (*Tweede Kamer, vergaderjaar 2011-2012, 33 296, nrs. 1-3*).

Article 7 of the Directive concerns the right of residence for more than three months. Article 7(1) distinguishes workers and self-employed, non-actives, students and the family members of these groups. The right of residence for more than three months is transposed by Article 8.12 of the Aliens Decree 2000 in a rather complicated way due to the much differen-

tiated categorization of family members. Article 8.13 concerns the right of residence for more than three months of third-country family members. In the Aliens circular 2000 the right of residence for more than three months is elaborated in B10/2.5.2 and 5. The obligation to report is embedded in Article 8.12(4) of the Aliens Decree 2000. After the period of residence for up to three months of Article 8.11 the migrant has to register himself with the alien's administration (the Immigration and Naturalization Service). The obligation is sanctioned in Article 108(5) of the Aliens Act 2000, with a maximum of imprisonment for a period of one month or a fine of the second category. The documents which should be provided (Article 8.12(5) Aliens Decree 2000) are since 1 July 2011 enumerated in Article 7.2a of the Aliens Regulation 2000 (see *Staatscourant* 30 June 2011, no. 11720). After registration the Immigration and Naturalization Service issues a registration certificate (Article 8.12 (6) of the Aliens Decree). This is a sticker that is placed in passports or attached to other identity papers and costs since 1 February 2013 €42 (*Staatscourant* 31 January 2013, no. 2529). The fee is related to the fee for a national identity card (*Staatsblad* 2012, 592). EU citizens are exempted from the recently introduced finger print obligation (see IND-News 21 January 2013). Once registered, an EU citizen is in principle entitled to stay in the Netherlands for as long as (s)he wishes.

Job seekers are treated in Article 8.12(1) of the Aliens Decree 2000 on the same footing as workers and self-employed. According to Article 8.12(1) a job seeker is entitled to a right of residence for more than three months when he is able to prove that he is still looking for a job and has a real opportunity to get a job (see also Aliens Circular 2000 B10/3.1). As other EU citizens a job seeker has to register himself with the Immigration and Naturalization service after the period of residence for up to three month. The same restrictions on grounds of public policy, public security or public health apply.

Union citizens who have resided legally for a continuous periods of five years in the host Member State shall have unconditionally the right of permanent residence there (Article 16 Directive). Situations which do not affect the continuity of residence are enumerated in Article 16(3). Article 8.17(2) of the Aliens Decree contains the same enumeration.

When certain conditions as to the length of residence and employment are fulfilled Article 17 of the Directive grants by way of derogation from Article 16 before completion of a continuous period of five years the right of permanent residence to workers or self-employed persons who are entitled to an old age pension (including early retirement), who stop working as a result of permanent incapacity, or who are cross-border workers. The provisions of Article 17 are more or less literally transposed by Article 8.17(3)-(5) of the Aliens Decree. The specific rules for family members of Article 17(3) and (4) of the Directive are included in Article 8.17(6) and (7) of the Aliens Decree.

Upon application Member States shall issue Union citizens entitled to permanent residence after having verified the duration of residence as soon as possible with a document certifying permanent residence (Article 19 Directive). A new document 'permanent residence for EU citizens' was introduced from 1 May 2006 on (Article 8.19 Aliens Decree). It will be issued automatically to Union citizen who have already resided for more than five years in the Netherlands when the validity of the old document expires and costs since 1 February 2013 €42 (*Staatscourant* 31 January 2013, no. 2529). Member States shall issue to third country family members entitled to permanent residence a permanent residence card, automatically renewable every 10 years (Article 20 Directive), which is implemented in Article 8.20 Aliens Decree. Permanent residence is elaborated in B10/2.5.3 of the Aliens Circular.

In July 2009 the Commission published Guidelines for the application of the free movement Directive 2004/38/EC (COM(2009) 313 final). Based on the Guidelines the wording of paragraph B/10 of the Aliens Circular 2000 is slightly amended and clarified, see WBV 2010/20, *Staatscourant* 2010, no. 20701 (22 December 2010), which came into force 1 January 2011.

Judicial practice

Case law on residence based on Articles 20 and 21 TFEU or on the ‘Belgium route’ is included in Chapter II of this national report.

The case law mentioned below concerns firstly the insufficient implementation of Article 2, sub d Directive 2004/38 /EC in Article 8.7(2) Aliens Decree 2000 (see no. 13). In no. 14 the Judicial Division of the Council of State repeated its ruling that the date on which the document of lawful residence is issued, does not equate to the date from which the EU-citizen enjoys lawful residence in the Netherlands (see also no. 2). In no. 15 a reference to the Carpenter judgment of the ECJ is rejected.

13. According to District Court Amsterdam 8 March 2012, AWB 11/28120 [LJN: BW1166], *Jurisprudentie Vreemdelingenrecht* 2012/264 Article 2, sub d Directive 2004/38 is insufficiently implemented in Article 8.7(2) Aliens Decree 2000.

The application of a Moroccan national for a document according to Article 9 Aliens Act 2000 evidencing the lawful residence as a Community national was rejected because one of the requirements of Article 8.7(3) Aliens Decree 2000 was not met. The son of the applicant has the Dutch nationality. Her daughter, a French citizen, has been living for some time in the Netherlands and since March 10, 2011 registered as a Union citizen. The application of the applicant sees to reside with her daughter. The applicant contends that it is not an ‘other’ family member within the meaning of Article 8.7(3) Aliens Decree 2000, but a direct blood relative referred to in the second paragraph, sub d of the above article. She is indeed the direct relative in the ascending line of the spouse (her son) of a Union citizen (her daughter). This means that the applicant is a Community national and is entitled to legal residence. The Court notes that in the Directive also direct relatives in the ascending or descending line of the spouse are considered family within the meaning of the Directive. Where in Article 8.7(2)(c) Aliens Decree 2000 also explicitly relatives in the descending line of the spouse are listed, it is in paragraph 2 sub d unclear whose direct relatives in the ascending line are involved. The court notes that accordingly the Directive is insufficiently implemented in art. 8.7(2) Aliens Decree 2000. Article 8.7(2)(d) Aliens Decree 2000 must be interpreted in conformity with the Directive that it also includes the direct relatives in the ascending line of the partner of the Union citizen.

14. In Judicial Division of the Council of State 3 October 2012, 201200896/1/V4 [LJN: BX9295], *Jurisprudentie Vreemdelingenrecht* 2013/13, the Judicial Division repeated its decision of 21 February 2011, 201003057/1/V2 [LJN: BP5947], *Jurisprudentie Vreemdelingenrecht* 2011/157, with annotation B.K. Olivier the Council of State. In this decision the Division decided that the date on which the document of lawful residence is issued, not proves the date since the EU citizen required lawful residence in the Netherlands. It only indicates that the document is valid for five years from that date on. In the decision of 3 October 2012 the Division added that for this reason the District Court erred when it considered substantively the claim of the applicant that the Minister should have provided the requested document earlier.

15. In Judicial Division 17 December 2012, 201204895/1/V4 [LJN: BY7393], *Jurisprudentie Vreemdelingenrecht* 2013/66, the application of a Tunisian national for a document according to Article 9 Aliens Act 2000 evidencing the lawful residence as a Community national has been rejected. Unlike in *Carpenter* (JV 2002/290), in which the wife of Carpenter by taking care for the children from a previous marriage of Carpenter, helped him to proceed with the provision of services in other Member States, the applicant had not put forward particular facts or circumstances which shows that her presence in this country has contributed to the fact that her partner could proceed with the provision of services in other Member States. In view of this, there is no reason to believe that the refusal to issue the requested document is an obstacle to the partner to make use of his right of freedom to provide services.

The argument of the applicant that her partner because of that refusal is forced to leave the Union, does not lead to a different conclusion.

Literature

Gerd Westendorp, Vraag & antwoord: Kan een EU-burger met een verblijfsvergunning bepaalde tijd regulier 'B9' en een bijstandsuitkering haar in 2011 geboren kind laten inschrijven als burger van de EU?, *Asiel&Migrantenrecht* 2012, nr. 2.

P. Boeles, Let op de Dereci-scheiding!, *Asiel&Migrantenrecht* 2012, nr. 5/6.

D. Schaap, Leges: een nieuwe tussenstand, *Asiel&Migrantenrecht* 2012, nr. 5/6.

G.G. Lodder, Het Zambrano-criterium in Nederland: een tussenstand, *Asiel&Migrantenrecht* 2013, nr. 1.

T.P.A. Weterings, Uitspraak van de maand: HvJEU van 6 december 2012, C-356/11 en C-357/11 (O. en S. en L.), *Asiel&Migrantenrecht* 2013, nr. 1.

C. DEPARTURE AND DETENTION

Texts in force

The right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years (Article 16(4) of the Directive). This provision is transposed in Article 8.18 of the Aliens Decree 2000 which adds serious reasons of public order and public security as another ground for withdrawal (see Article 28(2) of the Directive).

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in case of abuse or fraud such as marriages of convenience (Article 35). Article 8.25 Aliens Decree 2000 uses a more general wording: 'the Minister may withdraw the right of residence if the alien has submitted wrongful information or has withheld information which should have had as a consequence the refusal of entry or residence'. This provision suggests that grounds for withdrawal of the residence right may be used in cases that actually are not covered by Article 35 of the Directive.

Chapter VI of the Directive contains the restrictions on the right of entry and residence on grounds of public policy, public security or public health. In the Aliens Decree 2000 public health is mentioned in Articles 8.8(1), sub b (entry) and 8.23. For public policy and public security the relevant Articles are: 8.8 (1), sub a and b (entry), 8.22 and 8.24. Public health may only be applied as a restriction on the right of entry during a three-month period from the date of arrival. This is also the case in the Aliens Decree 2000. The relevant diseases are

diseases defined by relevant instruments of the World Health Organization (WHO) and other diseases if they are the subject of protection provisions applying to nationals of the host Member State. Article 8.23 of the Aliens Decree refers to the lists of the WHO and other infectious diseases or contagious parasitic diseases which are subject of protection provisions applying to Dutch citizens. The Explanatory Memorandum mentions in this respect plague, cholera and yellow fever and recent diseases as SARS (*Staatsblad* 2006, no. 215, p. 32, 33 and 46).

Article 27 of the Directive codifies the case law of the Court of Justice concerning public policy and public security. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Article 8.22(1) of the Aliens Decree contains the same definition. Originally, the provision of Article 28(1) of the Directive according to which Member State shall take into account a number of personal considerations was – against the advice of the Council of State – not transposed in Article 8.22 of the Aliens Decree 2000 while the general (but less specified) clause concerning the weighing of interests of Article 3:4 of the General Administrative Law Act applied, but by the Decision of 2 April 2012 to amend the Aliens Decree (*Staatsblad* 2012, no. 159) Article 8.22(1) is brought fully in line with Article 28(1) of the Directive. According to Article 28(2) of the Directive as transposed by Article 8.18, sub b of the Aliens Decree 2000, the host Member State may not take an expulsion decision against Union citizens or their family members, who have the right of permanent residence, except on serious grounds of public policy or public security. After 10 years legal residence or in case of minority only imperative grounds of public security may justify an expulsion order, see Article 28(3) of the Directive as transposed by Article 8.22(3) of the Aliens Decree 2000.

The notification provision of Article 30 of the Directive is not transposed as such in the Aliens Decree 2000. More in general stipulates Article 8.8(2) of the Aliens Decree 2000 that a refusal of entry shall be notified in writing. The procedural safeguards of Article 31(2) and (4) of the Directive are embedded in Article 8.24(1) and (2) of the Aliens Decree 2000. The maximum period of three years for the submission of an application for lifting of the public policy or public security exclusion order of Article 32 of the Directive is transposed in the Aliens Decree 2000 in the possibility of automatic review of the expulsion after two years; see Article 8.22(6).

The departure of EU citizens is elaborated in A4/3 of the Aliens Circular 2000 and the restrictions on the right of entry and residence on grounds of public policy, public security or public health in B10/7.1.1.

Judicial practice

The case law on Detention and Departure is represented in chronological order. No genuine, present and sufficiently serious threat was accepted in no. 16, 23, 24. In no. 21 and 26 the courts concluded to the existence of such a threat, in no. 21 based on the nature and the frequency of the offenses, although each offense in itself does not constitute such a threat. A threat to national security did exist in no. 19. In no. 22 the applicant argued that his undesirability decision was incorrect considering the ECJ judgment of 7 June 2007 (C-50/06). The court did not agree.

Detention is the subject of no. 17, 18 and 20. In no. 17 the District Court concluded that the lawfulness of the detention and the entitlement to compensation cannot be included in proceedings against a return decision and re-entry ban. In no. 18 the Judicial Division of the Council of State took a far reaching decision. Not the undesirability decision itself but the

fact that the applicant has not subsequently made efforts to realize his departure can be taken into consideration in the decision concerning the lawfulness of the detention. In no. 20 the ECtHR held unanimously that Article 5(5) ECHR was violated in a case in which the detention was lifted, but the compensation was reduced to nil.

Finally, in no. 25 the President of the Judicial Division suspended the termination of residence during the appeal procedure against the undesirability decision, notwithstanding the Aliens Act excluded residence as long as the undesirability decision continues.

16. District Court Haarlem 26 January 2012, AWB 11/32743, 11/32742 [LN: BV3857] concerns the suspension of the declaration as undesirable alien of a Romanian national while the Minister has not duly substantiated that the applicant constitutes an actual threat to public order or security. While requiring that the applicant should prove that there is no present threat, the Minister reversed incorrectly the burden of proof. Furthermore the view that the offenses committed affect a fundamental interest of the Dutch state lacks a sufficiently sound reason. As reflected in the guidelines of the European Commission persistent petty criminality may under certain circumstances represent a threat to public order. The decision does not indicate that the Minister has taken into account the damage factor. Therefore, the fact that the applicant has frequently committed theft and vandalism is in itself not sufficient for the termination of residence.

17. In District Court Zutphen 14 March 2011, AWB 12/640 the applicant appealed a return decision and an re-entry ban of 5 January 2012. On 30 January 2012 both decisions were revoked. Has the applicant still locus standi? The applicant has argued in court that his legal interest therein lies that the detention took too long, because his right under Directive 2004/38 was wrongly not timely identified. According to the applicant his interest in a judgment lies in his action for the damages to be claimed in connection with his detention. The court considers that the lawfulness of the continued detention of the applicant and whether or not he is entitled to compensation due to any unlawful continuation is not the subject of the present proceedings. Given this, the applicant has no interest anymore. Inadmissible. See also below D. Remedies, Judicial practice.

18. Judicial Division of the Council of State 12 April 2012, 201200612/1/V3 [LJN: BW3351], *Jurisprudentie Vreemdelingenrecht* 2012/249 concerns the grounds for detention. The Minister states that although EU citizens according to Article 2 paragraph 1 Return Directive are excluded from the scope of the Return Directive, the legislator nevertheless has chosen to apply Art. 5.1a and 5.1b Aliens Decree 2000 (reasons for detention) also to them in order to prevent inequality. This choice implies that, except where there are more favorable provisions for an EU citizen are, the assessment of the lawfulness of the detention of an EU citizen must be based on the jurisprudence of the ECJ and the Judicial Division on the application of the Return Directive.

Given the definition of the term ‘risk of absconding’ in Article 3, sub 7, Return Directive the condition in Article 5.1a paragraph 1, sub a, Aliens Decree 2000 for detention has the same meaning as the condition in Article 15, paragraph 1, sub a, Return Directive. It is beyond doubt that the condition of Article 5.1a paragraph 1, sub a, Aliens Decree 2000 [risk evading supervision] requires that it is explained why it may be reasonably inferred from the grounds for the detention that it is plausible that such a risk occurs and that such explanations only can be omitted insofar from the nature of the detention grounds such a risk appears immediately.

The offenses of the applicant are not related to his return or expulsion and therefore give no reason to believe that there is a risk that the alien will evade supervision, or that he will avoid or impede the preparation of the return or the removal.

Nevertheless, the presentation by the minister suggests that rather than the undesirability itself the fact that the applicant has not subsequently made efforts to realize his departure is taken into consideration in the decision concerning the detention. Now this ground implies that an alien has not complied with his obligation to leave the country, which ground also is included – as part c – in Article 5.1b paragraph 1 Aliens Decree 2000, the Minister could base the detention of the applicant on the decision on undesirability.

The decision on undesirability, along with the facts that he has no permanent place of residence and does not have sufficient means of subsistence, in principle, are sufficient grounds to believe that the risk exists. Not having a permanent place of residence makes it easier to evade supervision and not having sufficient means of subsistence impedes the voluntary departure.

19. Judicial Division of the Council of State 19 April 2012, 201109067/1/V1 [LJN: BW4915], *Jurisprudentie Vreemdelingenrecht* 2012/282. Declaration as undesirable alien of a Bulgarian national according to Article 67 paragraph 1 sub c and Aliens Act 2000. The official notice according to which the applicant received commands from a higher placed officer of the DHKP/C (the Turkish Revolutionary People's Liberation Party–Front) via veiled language, is not explicitly found in the underlying documents. Nevertheless, from those documents it is sufficiently clear that the presence of the applicant in the Netherlands is completely dedicated to her work for the DHKP/C. It is considered that the underlying documents show that the applicant communicates through veiled language, that she receives commands and that she has contacts with an officer of the DHKP/C. The Minister did not have to doubt the correctness of the official report and rightly stated that it is sufficiently clear on which basis the AIVD (the Dutch Intelligence and Security Service) has concluded that the applicant constitutes a threat to national security.

20. European Court of Human Rights 29 May 2012, 28260/07 (Emin – Netherlands), *Jurisprudentie Vreemdelingenrecht* 2012/305 concerns a Bulgarian national who came to the Netherlands in November 2004. On 21 July 2006 he was declared undesirable because he was sentenced to three years in prison for a crime. After the criminal detention on 5 April 2007, he was subsequently held in aliens detention. This detention was lifted on 11 April 2007. On April 23, 2007, the District Court of 's-Hertogenbosch decided that the detention was unlawful from the outset for lack of diligence in the preparation of the eviction and that the decision had not been reviewed on the grounds of undesirability (actual threat to public order) since he had become an EU-citizen, as a result of accession of Bulgaria to the EU. The compensation, however, was reduced to nil for his failure to meet the obligation to report, his criminal conviction and the undesirability. The appeal was dismissed on 10 May 2007 as inadmissible because of the appeal ban.

- The Court considered the national remedies exhausted and is therefore not persuaded that the complainant would benefit from a tort action under art. 6:162 Civil Code on civil courts.
- Having regard to the judgment *Stanev Bulgaria*, 36760/06 ro 182, the right to compensation in Article 5(5) of the ECHR should be guaranteed. Art. 5(5) of the ECHR creates a right to compensation when the national court has ruled that the detention is contrary to Article 5(1)-(5) ECHR. The reduction to zero of the damages on grounds unrelated to the actual detention is contrary to Article 5(5) of the ECHR.

The Court held unanimously that Article 5(5) of the ECHR has been violated.

21. District Court 's Hertogenbosch 8 June 2012, AWB 12/16129 [LJN: BX1255]: the Minister has terminated the right of residence of the applicant and he has declared him undesirable. It is the applicant that the departure time is reduced to zero hour. According to the policy of A5/6 Alien Circular 2000 the Minister assesses the undesirability of a Union citizen on the same footing as for the termination of residence of a Union citizen. The Minister may argue that the personal conduct of the applicant constitutes a genuine, present and sufficiently serious threat to a fundamental interest of society. The Minister has rightly pointed out that the applicant in the relatively short time that he was staying in the Netherlands (since 2010) is frequently convicted of property offenses and that after committing such offenses the behavior of the applicant has not improved, occurred. The applicant has therefore a tendency to continue this behavior in the future. Although each offense in itself does not constitute a sufficiently serious threat to a fundamental interest of society, it must be held that the Minister could consider the conduct of the applicant, especially considering its nature (property crimes and violent crimes) and the frequency of these offenses as a sufficiently serious threat to a fundamental interest of Dutch society.

22. District Court Assen 17 July 2013 AWB 12/12487, 12/8886 [LJN: BX2779] concerns an applicant of Italian nationality who has requested a document certifying that he has permanent residence as an EU citizen. According to Article 8.17 Aliens Decree 2000 5 years of continuous lawful residence in the Netherlands provides for permanent residence in the Netherlands. The applicant believes that his residence outside the Netherlands cannot be enforced against him because he then was wrongly deported. From a judgment of the ECJ (C-50/06, *Commission v. Netherlands*) June 7, 2007 (*JV* 2007/369) follows according to the applicant that he was wrongly declared undesirable.

It is not disputed that the applicant had not had 5 years of continuous lawful residence in the Netherlands, nor that he has resided the last five years continuously in the Netherlands. It is alleged nor proven that the Minister has any discretion in this respect. It is therefore clear that the applicant does not meet the conditions for the issuance of the requested document. Needless to say, the Court notes that it does not follow from that ECJ judgment that the applicant's undesirability was unlawful. The mere fact that the national rules were in hindsight in conflict with EC law, does not mean that the applicant could not be personally declared undesirable Whether plaintiff then could be declared undesirable as his case was examined under the then applicable EU-law (Directive 64/221/EEC) can not arise in these proceeding.

23. District Court Almelo 27 July 2012, AWB 12/1395, 12/3546: according to Article 27(1) Citizens Directive, as implemented in Article 8.22(1) Aliens Decree 2000, the right of residence of a Union citizen can be terminated for reasons of public policy, where the personal conduct of the applicant constitutes a genuine, present and serious threat to a fundamental interest of the society. The Court is considering in accordance with the ECJ (*Ziebell*, *JV* 2012/76) that a criminal conviction does not automatically imply such a threat and that at the time of the decision and of judicial review there should be an actual threat. This is not the case, since during and after his release there was no evidence of behavior which has implicated a threat and since the risk of recidivism is only considered on a average low. The Minister has applied an incorrect assessment framework examining whether recidivism is excluded, while only the existence of a real threat is cause for termination of the right of residence is.

24. District Court Rotterdam 27 September 2012, AWB 12/12297. An applicant of Polish nationality was sentenced on 30 November 2010 to twenty months in prison, eight

months suspended, for drug trafficking. By decision of 13 May 2011, his right of residence under the Residence Directive was terminated and he was declared undesirable under Article 67 paragraph 1 b Aliens Act 2000.

Since the end of the detention on 8 July 2011 and the undesirability decision more than eight months have passed. Given this time laps, the Minister cannot simply assume that there was an actual threat. The Minister has assessed whether the current threat still persists. Given the background of the Communication of the European Commission (COM (2009) 213, it is important that the applicant has detoxed from drugs during his detention period. According to his probation report of 29 September 2010 the recidivism rate is estimated to be low on average. There is (only) one criminal conviction and the applicant has since revealed no drug-related problems and/or a relevant punishable act in this context. The Minister cannot followed in his position that there is no evidence of a positive behavior. The Minister has not substantiated that the applicant has again exposed to drugs after his detention. The decision was carelessly prepared and with respect to the lack of positive behavior unjustified. Therefore, it cannot be established that there is still an actual and sufficiently serious threat to a fundamental interest of society.

25. President Judicial Division 28 November 2012, 201208487/4/V1, *Jurisprudentie Vreemdelingenrecht* 1013/43. By decision of 17 December 2010, the residence of the applicant under Article 27 Residence Directive is terminated and he has also been declared undesirable. By decision of 26 October 2012, the administrative review against the decision of 17 December 2010 was rejected. The applicant requested to suspend the legal effect of this decision, as far as it the termination of the right of residence concerns, until the appeal is decided. There is an urgent interest and the argument of the applicant is under the circumstances not without reason. The President grants the application for suspension until the appeal against the decision of 26 October 2012 has been decided.

In President Judicial Division 20 November 2012, 201208487/4/V3 the President decided in the same case still to the contrary while the applicant as long as he is declared undesirable cannot according to Article 67(3) Aliens Act 2000 be entitled to legal residence. Request for suspensive effect is, therefore, not assignable.

26. District Court 's-Hertogenbosch 10 January 2013, AWB 12/21407 [LJN: BY8148]. The court is of the opinion that considering the nature and severity of the applicant's offenses (drug offenses, illegal possession of weapons and murder of a police officer) and his escape from prison in 1994, the Minister has been able to establish that the conduct of the applicant represents a serious and present threat to public order. The fact that the applicant behaved well during the detention has no decisive significance, already because of the nature and seriousness of the offenses. That the applicant has served already his sentence imposed in the Netherlands, and that he has extradited to the British authorities to further undergo in the UK imprisonment for life, does not mean that the applicant constitute no present threat to law and order.

Administrative practice

The document under f concerns the policy to declare more frequently Union citizens who are involved in criminal violence, as undesirable aliens and to expel them. The policy amendments concerning the 'gliding scale' are the subject of the documents mentioned under g. The follow up of the report on aliens detention is the subject of h and alternatives for aliens detention are discussed under i. Under j the report of the National ombudsman on aliens detention is mentioned and under k the report of the Committee for the prevention of torture.

f. In the previous national reports we concluded that in many instances the administrative decisions concerning undesirability are not in conformity with the case law of the EC Court of Justice, particularly not with the requirement that the personal conduct of the person concerned should be taken into account. The above mentioned case law (no. **16**, **23** and **24**) indicates that administrative decisions still fall short concerning the requirement of a present, real and sufficient serious threat to a fundamental interest of the society. In no. **16** the Minister reversed incorrectly the burden of proof. In no. **23** the Minister applied an incorrect criterion by examining whether recidivism is excluded and in no. **24** the Minister could due to the time lapse not assume that there was still an actual threat. In so far the case law corrects the policy aim to declare more frequently Union citizens who are involved in criminal violence, as undesirable aliens and to expel them (*Tweede Kamer* 2006-2007, 19 637, no. 1168).

g. Also the ‘gliding scale’ for the withdrawal of residence on public order grounds was a frequent and prominent subject in previous reports. The same is true for this reporting year. After the introduction of stricter criteria of the ‘gliding scale’ in 2005 even more stricter criteria were introduced in 2009 (*Tweede Kamer* 2009-2010, 19 637, no. 1306) and 2010 (amendments of Articles 3.86, 3.95(3) and 6.6 of the Aliens Decree 2000, *Staatsblad* 2010, 307). In June 2011 the new cabinet decided to strengthen the criteria again and requested an advisory opinion of the Advisory Committee on Migration Affairs (ACVZ), see below Literature. The ACVZ reacted very critically and expressed its doubt on the proportionality and legitimacy of the proposal. Instead of decreasing, the proposal increases the differences in treatment of third country nationals on the one hand and Dutch and EU citizens on the other hand. Furthermore, the ACVZ recommended excluding migrants on whom the Family Unification Directive or the Long-term Residents Directive applies from the applicability of the ‘sliding scale’. They should be treated according to the public order criteria for Community nationals as embedded in the Articles 8.8 and 8.18 of the Aliens Decree 2000.

The cabinet rejected the arguments of the ACVZ and presented on 6 February 2012 the following proposal to amend the provisions on the ‘gliding scale’ of Article 3.86 Aliens Decree 2000:

- ‘tit for tat’ policy during the first three years of residence: each crime with a legal threat of punishment of two years can implicate an expulsion order (even when the conviction is only one day imprisonment),
- each migrant who commits three crimes will be considered as a ‘habitual offender’ irrespective whether or not he has had legal residence for more than two years,
- stricter criteria for ‘habitual offender’, also for ordinary crimes,
- possibilities for withdrawal of residence after ten year residency are extended,
- no end term: even after twenty year residency the ‘sliding scale’ can still be applied for very serious crimes

Article 3.86 Aliens Decree 2000 is amended on 26 March 2012 (*Staatsblad* 2012, no. 158). The amendment came into force 1 July 2012 (*Staatsblad* 2012, no. 286).

h. On 31 May 2011 the State Secretary of Security and Justice informed Parliament on the follow up of the report on aliens detention of September 2010 (*Tweede Kamer* 2010-2011, 19 637, no. 1429): separation of men and women in principle, but a specific section for partners and family members, improved information, training of staff members concerning intercultural communication and conflict management etc. The State Secretary confirmed the policy to underline the administrative law character of the aliens detention. The Penitentiary

Inspection reported on 13 January 2012 that most of the recommendation were implemented, but for some improvements new detention facilities are necessary.

i. On 22 December 2012 (*Tweede Kamer* 2011-2012, 19 637, no. 1483) the Minister for Immigration and Asylum informed Parliament about alternatives for aliens detention with reference to the report of Amnesty International ‘*Vreemdelingenbewaring in Nederland: het moet en kan anders*’ (see below under Literature). He announced four pilots with alternatives such as a reporting requirement, freedom restricting measures, prepaid bail and return projects.

j. On 19 January 2012 The National ombudsman announced an investigation on his own initiative regarding aliens detention. In his report of 7 August 2012(2012/105) he stressed the ultimatum remedium character of aliens detention and recommended to elaborate alternatives. A special regime for aliens detention should be developed.

k. On 9 August 2012 the Committee for the prevention of torture (CPT) reported about its visit to the Netherlands and its investigation of some facilities for aliens detention (Rotterdam Airport and Schiphol). It was particularly concerned about the aliens detention of families with children. This should be avoided as far as possible and if necessary it should not exceed the legal time limits.

Literature

A. Reijersen van Buuren, *Visitatie in vreemdelingenbewaring, Asiel&Migrantenrecht* 2012, nr. 7

M.W. Wijngaarden, *Kroniek Openbare Orde, Asiel&Migrantenrecht* 2013, nr. 2

D. REMEDIES

Judicial practice

27. In District Court Zutphen 14 March 2011, AWB 12/640 the applicant appealed a return decision and an re-entry ban of 5 January 2012. On 30 January 2012 both decisions were revoked. Has the applicant still locus standi? The applicant has argued in court that his legal interest therein lies that the detention took too long, because his right under Directive 2004/38 was wrongly not timely identified. According to the applicant his interest in a judgment lies in his action for the damages to be claimed in connection with his detention.

The court considers that the lawfulness of the continued detention of the applicant and whether or not he is entitled to compensation due to any unlawful continuation is not the subject of the present proceedings. Given this, the applicant has no interest anymore. Inadmissible. See also above C. Departure and Detention, Judicial practice.

Administrative practice

I. The Minister for Immigration and Asylum decided on 3 February 2012 as follows concerning an applicant who requested residence with her two Dutch children based on Article 8.7(2)(b) Aliens Decree 2000. The applicant is not an EU-citizen but of Cape Verdean nationality. She may only successful appeal that Article, if it has been established that she has stayed with a Dutch national in another Member State under European law. This is not the case. She is therefore not regarded as a Community national. Therefore she cannot be considered as a family member of an EU citizen and the requested document cannot be issued.

The applicant appealed to the judgment in *Ruiz Zambrano* (JV 2011/146). She states that a successful appeal in this case should lead to the issuance of a document EU/EEA as referred to in Annex 7 Aliens Regulation 2000. This document shows the lawful residence as defined in art. 8, sub e Aliens Act 2000 This is lawful residence according to the Treaty establishing the EC or the Agreement on the EEA, in particular Directive 2004/38.

In its judgment in *Ruiz Zambrano*, the EU Court however held that Directive 2004/38/EC does not (by analogy) is applicable to a situation such as in the main proceedings. In view of this, a successful appeal to the judgment in *Ruiz Zambrano* cannot lead to residence according to Article 8, sub e, but only to an ordinary residence permit according to Article 8(a) Aliens Act 2000 – and, therefore, a residence permit as referred to in Article 14 of the Aliens Act 2000.

The applicant is free to submit a new application for a residence permit as referred to in Article 14 of the Aliens Act 2000.

E. SPECIFIC ISSUES OF CONCERN

Transposition of provisions specific for workers

Article 7(1a) of Directive 2004/38 which concerns the right of residence for more than three months of workers and self-employed persons is – more or less literally -transposed by Article 8.12(1a) of the Aliens Decree 2000 and elaborated in Aliens Circular 2000, B10/3.3.

Article 7(3) (a)-(d) of the Directive concerning circumstances under which a Union citizen who is no longer a worker or self-employed person shall retain his status is – again literally – transposed by Article 8.12(2) (a)-(d) of the Aliens Decree 2000 and elaborated in Aliens Circular 2000, B10/3.5.

Article 8(3a) of the Directive concerning the documents a worker or a self-employed has to present for the issuance of a registration certificate is transposed by Article 8.12(5) of the Aliens Decree 2000 which refers to Article 3.29 of the Aliens Regulation 2000 (and its Annex 13). See also Aliens Circular 2000, B10/3.3 which only contains a reference to the Aliens Regulation 2000.

Article 14(4 a-b) of the Directive concerning the retention of the right of residence of workers, self-employed and jobseekers is literally transposed by Article 8.16(2)(a)-(b) of the Aliens Decree 2000.

The provisions of Article 17 of the Directive with exemptions for persons no longer working in the host Member State and their family members are more or less literally transposed by Article 8.17(3)-(5) of the Aliens Decree 2000. The specific rules for family members of Article 17(3) and (4) of the Directive are included in Article 8.17(6) and (7) of the Aliens Decree.

Article 24(2) of the Directive (no social assistance during the first three month nor maintenance aid grants for study prior to acquisition of permanent residence) is not transposed in the alien's legislation.

Concerning social assistance Article 24(2) is transposed by an amendment of Article 11 of the Work and Social Assistance Act (*Wet werk and bijstand*). By this amendment the following sentence is added to paragraph 2 of Article 11: 'with exemption of the instances as enumerated in Article 24, second paragraph of Directive 2004/38/EC'. The Explanatory Memorandum distinguishes four circumstances:

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- a. no social assistance during the first three months of residence,
- b. no social assistance to job-seekers as long as they have not find employment, even not when they have resided in the Netherlands for more than three months,
- c. other Union citizens, who have resided for more than three months but less than five years in the Netherlands are entitled to social assistance on an equal footing as nationals. In such instances their right of residence may be terminated on policy grounds. Such a decision should be taken on a case by case basis and should be proportional,
- d. Union citizens who have resided in the Netherlands for more than five years are entitled to social assistance on an equal footing without any consequences for their right of residence.

According to the new Article 2.2 of the Study Grants Act 2000 students from EU, EEA Member States and Switzerland are in principle equally treated as Dutch citizens, irrespective whether they reside in the Netherlands or not, but by a Royal Decree, the Study Grants Decree 2000, groups of students may be designated who are only entitled to a reimbursement of the enrolment fees (the so-called Raulin-compensation). According to a new Articles 3a and 3b of the Study Grants Decree 2000 (*Staatsblad* 2006, 374) an EU/EEA/Swiss-students, who is not (a family member of) an (ex-)worker or (ex-)self-employed and who has not (yet) acquired permanent residence as mentioned in Article 16 of the Directive (legal residence for a continuous period of five years), is entitled to the reimbursement of the enrolment fees only.

Situation of job-seekers

Job seekers are treated in Article 8.12(1) of the Aliens Decree on the same footing as workers and self-employed. According to Article 8.12(1a) a job seeker is entitled to a right of residence for more than three months when he is able to prove that he is still looking for a job and has a real opportunity to get a job (see also Aliens Circular B10/3.1). As other EU citizens a job seeker has to register himself with the Immigration and Naturalization service after the period of residence for up to three months. The same restrictions on grounds of public policy, public security or public health apply.

According to Aliens Circular B10/3.1:

‘EU/EEA and Swiss nationals are entitled to look for employment in the Netherlands for up to three months. In principle a rights of residence for job-seekers continues as long as there are real opportunities to get employment (see also Article 8.16(2b) Aliens Decree).

The right of residence of an EU/EEA/Swiss job-seeker can be terminated when the job-seeker:

- constitutes an actual threat to public policy or public security;
- suffers infectious diseases as mentioned in Article 8.23 Aliens Decree.

From the moment on the EU/EEA/Swiss national is engaged in genuine and effective employment or is self-employed the provisions of a worker or a self-employed person apply. When the EU/EEA/Swiss job-seeker has sufficient resources – not from employment but from other sources – he may be entitled to a right of residence as a non-economically active person’.

Chapter II

Members of the Family

GENERAL COMMENTS

The rules implementing Directive 2004/38/EC that see to the position of family members of EU-citizens in the Dutch *Vreemdelingenwet* and *Vreemdelingenbesluit* were not amended during the reporting period (June 2012-May 2013). The amendments brought to Dutch migration legislation with the entry into force of the *Wet Modern Migratiebeleid (Wet Momi)*⁴ and the *Visumwet*⁵ have, however, brought major changes to the policy rules in the *Vreemdelingencirculaire 2000*.⁶

The policy rules addressing the position of family members of EU-citizens (formerly *Vreemdelingencirculaire 2000*, B10) are now set out in *Vreemdelingencirculaire 2000*, B10/2 that entered into force on 1 June 2013.⁷ Like the ‘old’ policy rules, short stay visa and entry bans are found in *Vreemdelingencirculaire 2000*, A1.4 (short stay visa) and A4.3.8 (entry bans). These policy rules took effect on 1 April 2013.⁸ An amendment to the ‘old’ policy rules, taking effect on 1 January 2013, was the inclusion of policy rules on the rights of caring parents of Dutch children, as developed by the Court of Justice in its *Ruiz Zambrano/Dereci*⁹ case law. Why these policy rules have found their way into the section on family reunification in general (*Vreemdelingencirculaire 2000*, B7/3.9)¹⁰ rather than the special section on EU-citizens, is a puzzle and can be labelled as ‘somewhat unfortunate’ as it not only detracts from the fact that Dutch nationals qualify as EU-citizens even if they are residents of the Netherlands, but does also not fit in the overall structure of the *Vreemdelingencirculaire 2000* that addresses the entitlements of Dutch nationals by virtue of the

4 *Wet van 7 juli 2010 tot wijziging van de Vreemdelingenwet 2000 en enkele andere wetten in verband met de versterking van de positie van de referent in het reguliere vreemdelingenrecht en versnelling van de vreemdelingenrechtelijke procedure (Wet modern migratiebeleid)* [Act of 7 July 2010 amending the Immigration Act 2000 and some other Acts with a View to Enhance the Position of the ‘Referent’ in Regular Immigration Law and to Speed up Immigration Procedures (Act Modern Migration Policy)], *Staatsblad* 2010, 290.

5 *Wet van 24 mei 2012 tot wijziging van de Vreemdelingenwet 2000 in verband met nationale visa en enkele andere onderwerpen* [Act of 24 May 2012 amending the Immigration Act 2000 regarding National Visa and some other Issues], *Staatsblad* 2012, 258.

6 *Besluit van de Staatssecretaris van Veiligheid en Justitie van 19 december 2012, nummer WBV 2012/25, houdende wijziging van de Vreemdelingencirculaire 2000* [Decision of the Secretary of State for Security and Justice of 19 December 2012, No. WBV 2012/25 amending the Immigration Circular 2000], *Staatscourant* 24 December 2012, No. 26099 and *Besluit van de Staatssecretaris van Veiligheid en Justitie van 28 mei 2013, nummer WBV 2013/10, houdende wijziging van de Vreemdelingencirculaire 2000*, *Staatscourant* 28 May 2013, No. 13952 (Parts A and C) and *Besluit van de Staatssecretaris van Veiligheid en Justitie van 28 maart 2013, nr. WBV 2013/5, houdende wijziging van de Vreemdelingencirculaire 2000* [Decision of the Secretary of State for Security and Justice of 28 May 2013, No. WBV 2013/10 amending the Immigration Circular 2000], *Staatscourant* 9 April 2013, No. 8389 (Part B).

7 TK 2012-2013, 30 573, No. 115, *Brief van de Staatssecretaris van Veiligheid en Justitie aan de Voorzitter van de Tweede Kamer der Staten-Generaal* [Letter from the Secretary of State for Security and Justice to the Chair of the Second Chamber of the *Staten-Generaal*], 5 March 2013.

8 Article II, WBV 2012/25.

9 CJ EU cases C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-1177, and C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres*, 15 November 2011, n.y.r.. Confirmed in: CJ EU joined cases C-356/11-C-357/11 *O. and S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L.*, 6 December 2012, n.y.r. and case C-87/12 *Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration*, 8 May 2013, n.y.r..

10 *Vreemdelingencirculaire 2000* (old) B2/10 (entry into force: 1 January 2013). See further, section 2 of this chapter.

Court of Justice's rulings in the *Surinder Singh/Eind*,¹¹ *McCarthy*¹² and *Scholz*¹³ cases which are found in the special section on EU-citizens and their family members.¹⁴ Where appropriate, the amendments to these policy rules will be discussed in this chapter.

The number of judgments handed down by the Judicial Division of the Council of State and the District courts in the reporting period is still increasing steadily; a trend already signalled in earlier reports. The predominant themes have not changed, with reverse discrimination (*Surinder Singh* and *McCarthy* case law) and the *Ruiz Zambrano/Dereci* cases taking the lead. The Court of Justice's 2002 decision in the *Carpenter* case, which also concerns the issue of reverse discrimination, found its way into the Dutch case law in 2012. Though the courts are still handing down return cases, their number appears to be decreasing. Two references were made by the Judicial Division of the Council of State on 5 October 2012 which might be the explanation for this development, but that is mere speculation. Other issues addressed by the Dutch courts relevant to the position of family members of EU-citizens include: the qualification as a family member within the meaning of Articles 2 and 3(2)(b) of the Citizens Directive; evidence to be submitted with an application for a short-stay visa; and relations of convenience.

On 4 July 2012, the then Minister for Immigration, Integration and Asylum, Leers, informed the Second Chamber, upon its request, on the nature of applications made for residence permits under the free movement rules in 2011.¹⁵ Most of the applications were made by EU-citizens who are Dutch nationals (return cases), followed by nationals from the United Kingdom, Poland, Germany and Spain. The five main nationalities of family members are: Turkish, Moroccan, Brazilian, Ghanaian and American (US). No information is provided on the Member State of prior residence, as this information is not stored in the Immigration and Nationality Department's data bases. The latter is also the case – i.e. no data stored – regarding the number of applications actually made.

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

1.1 *The definition of family members*

Texts in force

The amended policy rules in *Vreemdelingencirculaire* 2000, B10/2 no longer include an enumeration of family members who enjoy derived rights under the Citizens Directive, as its predecessor did, leaving Article 8.7(2) and (3) *Vreemdelingenbesluit* 2000 as the sole reference for qualifying family members. This has put an end to the discrepancy between the text in the *Vreemdelingenbesluit* 2000 and the *Vreemdelingencirculaire* 2000 concerning family

11 ECJ cases C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265 and C-291/05 *Minister voor Vreemdelingenzaken en Integratie v RNG Eind* [2007] ECR I-10719.

12 CJEU case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] I-3375.

13 ECJ case C-419/92 *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I-505.

14 The same holds true for *Vreemdelingencirculaire* 2000, B2/9.2.3.2 on the relevance of Article 3, Fourth Protocol to the ECHR for cases involving expulsion measures directed against parents of Dutch children.

15 Tweede Kamer 2011-2012, 32 175, No. 34, *Brief van de Minister voor Immigratie, Integratie en Asiel aan de Voorzitter van de Tweede Kamer der Staten-Generaal* [Letter sent by the Minister for Immigration, Integration and Asylum to the Chair of the Second Chamber of the Staten-Generaal] 4 July 2012.

members within the meaning of Article 3(2) Directive 2004/38/EC; the *Vreemdelingenbesluit* 2000 states that the rules in the section EG/EER ‘also’ and ‘likewise’ apply to Article 3(2) family members. Whether and if so which implications this will have for the position of Article 3(2) family members remains to be seen. Finally, The *Teixeira* and *Ibrahim* case law,¹⁶ on caring parents of minor, school attending EU-citizens, on benefits is included in *Vreemdelingen-circulaire* 2000, B10/2.3, entitled: *Ontzegging of beëindiging rechtmatig verblijf; Beroep op de algemene middelen* [Denial or termination lawful residence, Reliance on public funds] as an exception to the right to withdraw a right of residence in cases in which reliance on public funds qualifies as ‘more than supplementary’.

The new policy rules merely provide clarification of the notions: ‘direct descendants’; ‘dependent’; and ‘durable relation’. ‘Direct descendants’ (Article 2(2)(c) Directive 2004/38/EC is to be read as including adopted children. Though the *Jia* case is not mentioned ‘dependent’ is defined reflecting the Court of Justice’s ruling in that case.¹⁷ A family member qualifies as a dependent family member if s/he cannot provide in his/her financial and social means in the State of origin or the State whence s/he came from at the moment the application for family reunification is made (see: *Jia*, cons. 37). Though not explicitly stated, it is assumed that this policy rules applies both to ascending family members (Article 2(2)(d) Directive 2004/38/EC) and descending family members older than 21 years (Article 2(2)(c) Directive 2004/38/EC) of the EU-citizen and his/her spouse/registered partner.

The amended policy rules on durable relations, duly attested,¹⁸ which were reported in the Dutch 2011-2012 report, are now found in *Vreemdelingen-circulaire* 2000, B10/2.2. (Definition) and B10/2.4 (Evidence). A durable relation is assumed when the partners have shared a household and cohabited together for six months prior to the application or have a child. The relationship must still exist at the moment of application. Evidence of a shared household includes: registration in a population administration, a rental contract or bank statements in both names; registration in the Municipal Population Administration (*Gemeentelijke Basisadministratie*) if the partners cohabit or have recently cohabited in the Netherlands or a birth certificate of the child. Not included in the new policy rules are long term legal or financial obligations, such as a mortgage, which were included in the ‘old’ policy rules. As rule is that there are no restrictions as to the evidence that can be submitted (*Vreemdelingen-circulaire* 2000, B10/2.4, entitled *Bewijsmiddelen* [Evidence]), the assumption is justified that mortgage papers submitted as evidence of a durable relationship will be accepted as proof by the Immigration and Nationality Authorities. As will be seen in section 2 of this chapter there is a discrepancy between the policy rules on durable relations in *Vreemdelingen-circulaire* 2000, B10/2 and those in *Vreemdelingen-circulaire* 2000, A1/4.10, on short-stay visa.

16 ECJ cases C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107 and C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010] ECR I-1065.

17 ECJ case C-1/05 *Yunying Jia v Migrationsverket* [2007] ECR I-1.

18 Besluit van de Minister voor Immigratie en Asiel van 16 december 2011, nummer WBV 2011/17, houdende wijziging van de *Vreemdelingen-circulaire* 2000 [Decision of the Minister for Immigration and Asylum of 16 December 2011, No. WBV 2011/17, amending the Aliens Circular 2000], *Staatscourant* 23 December 2011, No. 23324, p. 2 & 15.

Case law

The amendment of the policy rules to reflect the Judicial Division of the Council of State's case law on durable relations, as discussed in last year's Dutch report,¹⁹ has put a halt to the steady flow of national case law on the issue of evidence and definition, but has not meant that there are no more cases on the position of family members in a durable relation duly attested. This case law is discussed in Chapter 1.

The question whether a third-country child qualifies as beneficiary of the Citizens Directive by virtue of the fact that his mother also has a child who is an EU-citizen was answered in the negative by the Haarlem court. The fact that the mother of the two children derives a residence right as the caring parent of an EU-minor citizen (Spanish national) does not extend the scope of European law to the third-country national half-sister of the EU-citizen. The court acknowledges that descending and ascending family members of third-country national spouses and registered partners are covered by virtue of Article 2(2)(c) and (d) of the Citizens Directive, but finds that there are no arguments to be found in the considerations to extend this principle to other family members.²⁰

1.2 Reverse Discrimination**Texts in force**

The general overhaul of the *Vreemdelingen-circulaire* 2000 has meant a rewriting of the policy rules on the position of (family members of) Dutch nationals. As said in the introduction to this chapter, the new policy rules that apply to Dutch nationals are located in different sections of *Vreemdelingen-circulaire* 2000, namely: B10/2. and B7/2.9. which include policy rules on: return cases, dual nationals, naturalised Dutch nationals and 'Ruiz Zambrano-cases'. Applications made claiming a right of residence as a cross-border service provider (*Carpenter*), are no longer subject of the policy rules. Formerly, '*Carpenter*' applications were covered in *Vreemdelingen-circulaire* 2000, B10/5.3.2.2.

Vreemdelingen-circulaire 2000, B10/2.2, entitled *Beleidsregels, Nederlanders en het EU-recht* [Policy rules, Dutch nationals and EU law] sets out by stating that further to what is determined in Article 8.7 *Vreemdelingenbesluit*, Directive 2004/38/EC does not apply to Dutch nationals who are also nationals of another Member State if they have *never* exercised free movement rights and have always resided in the Netherlands. Though not made explicit, this policy rules intends to reflect the Court of Justice's decision in the *McCarthy* case²¹ as interpreted by the Judicial Division of the Council of State in its ruling of 2 November 2011,²² which it has confirmed in 2012 that is discussed in Chapter 1.

The *Scholz* rule is captured in the second paragraph of *Vreemdelingen-circulaire* 2000, B10/2.2 (formerly: B10/5.3.2.3) that reads: a family member of an EU-citizen does not lose

19 Afdeling Bestuursrechtspraak Raad van State, 6 September 2011, No. 201009139/1/V4, LJN: BS1678, *JV* 2011/429. See: Afdeling Bestuursrechtspraak Raad van State, 8 June 2012, No. 201105347/1/V4, LJN: BW8594, where the Judicial Division of the Council of State ruled that where the partners are registered as living at the same address, but the de facto circumstances are at odds with the formal situation it can be assumed that there is no longer a durable relationship and *ibidem*, 3 April 2013, No. 201208308/1/V4, LJN: BZ8720, *JV* 2013/188, where the Judicial Division of the Council of State found that as no new facts or changed circumstances had been presented, the case could be closed.

20 Rechtbank 's-Gravenhag zp Haarlem, 1 November 2012, AWB 12/15475, LJN: BY3325.

21 CJ EU case C-434/09 [2011] I-3375.

22 Afdeling Bestuursrechtspraak Raad van State, 2 November No. 2011201011940/1/V1. LJN: BU3411, *JV* 2012.45, with commentary P Boeles.

existing rights when s/he acquires Dutch nationality (irrespective whether the former nationality is lost or not). This suggests that new rights cannot be derived from European law after Dutch nationality is acquired. This conclusion sits uneasily with the interpretation given to the *McCarthy* ruling both in the Council of State's case law and the policy rules, if the original nationality is not renounced, when Dutch citizenship is acquired. This conclusion is also hard to reconcile with the principle of non-discrimination that stands in the way of treating naturalised Dutch nationals who have had to renounce their original nationality by law or of their own choice differently from Dutch nationals with dual EU-nationality if both have exercised free movement rights in the past.

The entitlements of family members of a Dutch national returning to the Netherlands after having exercised free movement rights are subject of *Vreemdelingencirculaire* 2000, B10/2.3 (formerly: B10/5.3.2.1), with the heading: Abuse of rights and fraud [*Rechtsmisbruik en fraude*] and *Vreemdelingencirculaire* 2000, B10/2.4, entitled Documentary evidence [*Bewijsmiddelen*]. According to *Vreemdelingencirculaire* 2000, B10/2.3 residence permission is withheld or revoked if residence in the host-Member State, prior to the return to the Netherlands, does not qualify as 'genuine and effective'.²³ An EU-residence permit issued by a different Member State is - in principle - accepted as proof of residence in another Member State. The heading *Nederlanders en het EU recht* [Dutch nationals and EU law] suggests that this policy rule applies to the returning Dutch national rather than the third-country national family member. This questions the value of the policy rule, as EU-citizens are not issued with a residence permit, only third-country national family members are entitled to those documents (Article 10 Citizens Directive) and the issuing of a registration certificate (Article 9 Citizens Directive) is optional and, therefore, not always available as evidence.²⁴ It must, therefore, be assumed that the policy rule on residence permits is directed towards the third-country national family member. That the submission of a residence permit is not conclusive evidence, we will see when discussing the case law.

As stated in the general comments at the beginning of this Chapter, policy rules on the entitlements of parents of Dutch minor children are found in *Vreemdelingencirculaire* 2000, B7/2.9. This policy amendment took effect on 1 January 2013, when it was included in *Vreemdelingencirculaire* 2000, B2/10 entitled: *Gezinshereniging van verzorgende ouder met Nederlands minderjarig kind* [Family reunion Caring Parent of Dutch minor child].²⁵ From the explanatory memorandum that provides a brief summary of the case law it follows that this new section intends to reflect the Court of Justice's case law in the *Ruiz Zambrano* and *Dereci* cases. The residence permit issued to the caring parent of a Dutch minor child is a default (temporary) residence permit; it is issued if no residence permit can be issued under Article 3.3 or Chapter 8 of the *Vreemdelingenbesluit*. The residence permit is issued in accordance with Article 3.13(2) *Vreemdelingenbesluit* and qualifies as a residence permit within the meaning of Article 14 *Vreemdelingenwet*, rather than Article 9 *Vreemdelingenwet*, which is the normal legal basis for residence permission granted in accordance with Direc-

23 See: Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, 2 July 2009. COM(2009)313/4, p. 17.

24 Article 8(1) Directive 2004/38/EC.

25 *Besluit van de Staatssecretaris van Veiligheid en Justitie van 17 december 2012, nummer WBV 2012/26, houdende wijziging van de Vreemdelingencirculaire 2000* [Decision of the Secretary of State for Security and Justice of 17 December 2012, No. WBV 2012/26 amending the Immigration Circular 2000], *Staatscourant* 21 December 2012, No. 26248.

tive 2004/38/EC.²⁶ The residence permit is endorsed with the phrase ‘Residence with [name of the child]’. To qualify as a caring parent it needs to be established that

- a. the minor child is a Dutch national;
- b. dependent of the parent to whom the permit will be issued; and
- c. will have to leave the territory of the European Union if no residence permit is issued to the parent.

This enumeration is followed by a clarification of the following concepts: ‘dependent’; ‘no obligation to leave the EU-territory’; ‘other parent’; and ‘de facto impossible’. Dependent is to be read as: ‘de facto caring for the child or will be caring for the child’. There is no obligation to leave EU-territory if the other parent has lawful residence in the Netherlands within the meaning of Article 8, opening and sections a-e or I *Vreemdelingenwet* or is a Dutch national, unless that parent cannot take on the de facto care for the child. The explanation of ‘other parent’ is designed to exclude any other family members or acquaintances who have cared for the child in the past as qualifying to take the de facto care of the child upon them so that the child does not have to leave the EU-territory. ‘De facto impossible to care for the child’ does **not** mean that a residence permit is issued to the third-country national parent if the parent who enjoys lawful residence in the Netherlands or is a Dutch national cannot cope with the care and raising of a child. The latter parent is expected to seek assistance in the care and upbringing of a child that is offered by the State or social institutions and includes any financial assistance from public funding to which every Dutch national, habitually resident in the Netherlands, is, in principle, entitled. Applications made for a residence permit cannot be rejected for lack of a valid long stay visa (*machtiging tot voorlopig verblijf*). A residence permit is issued to the caring family member of a Dutch child subject to the obligation to take out adequate health insurance and allows the parent to take up employment, which is evidenced by the following statement on the residence permit: *Arbeid vrij toegestaan. TWV niet vereist* [Paid employment permitted. No work permit required].²⁷

Judicial Practice

Return Cases

Return cases are still being brought before the Dutch courts. On 5 October 2012 the Judicial Division of the Council of State stayed the proceedings in two cases to make a preliminary reference to the Court of Justice EU.²⁸ The Court of Justice has been asked whether recipients of services benefit from the *Surinder Singh/Eind*²⁹ case law and whether the right to rely on the Citizens Directive is forfeit if the EU-citizen and the family member’s return do not coincide. If the Court of Justice rules that recipients of services do benefit from the return case law, there are a further two questions regarding the duration of residence in the host-

26 See, however, Vz. Vreemdelingenkamer Rechtbank ’s-Gravenhage zp Amsterdam, 13 July 2012, AWB 12/8019, 12/20155, JV 2012/423 that does take Article 9 Vreemdelingenwet as legal basis.

27 *Vreemdelingen-circulaire 2000*, B2/10.2.

28 Afdeling Bestuursrechtspraak Raad van State, 5 October 2012, No. 201007849/1/T1/V2 & 201108230/1/T1/V4, LJN BX9530, JV 2012/468 and *idem*, No. 201011889/1/T1/V4 & 201108529/1/T1/V4, LJN: BX9567, JV 2012/469, CJ EU Case C-456/12, *Minister voor Immigratie, Integratie en Asiel en O, andere partij*: B, 10 October 2012.

29 ECJ cases C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265 and C-291/05, *Minister voor Vreemdelingenzaken en Integratie v RNG Eind* [2007] I-10719.

Member State and whether residence in the host-Member State has to be continuous or may also be of a certain frequency, for instance: weekly residence at weekends or regular visits.

On 17 December 2012 the Judicial Division of the Council of State found that it did not have to await the answers of the Court of Justice to the questions in the preliminary reference that it referred to that Court on October 5, 2012, because the facts of the case showed that residence in Belgium did not qualify as ‘genuine and effective’ and, therefore, could not trigger entitlements under Directive 2004/38/EC on return to the Netherlands.³⁰ Decisive was the fact that the claim, that by issuing a certificate of residence following an inspection of their living accommodation the Belgium authorities had provided evidence of their right of residence in that Member State, had not been appropriately substantiated; inadequate explanation why living accommodation had been rented in Tilburg (the Netherlands) for the entire duration of the residence in the host-Member State. Relying on its 29 February 2012 ruling,³¹ the Judicial Division of the Council of State argued that the *Eind* case required the Dutch authorities to make their own assessment of applicant’s free movement rights. The mere fact that the authorities of the alleged host-Member State, in this case Belgium, had issued a residence permit to the third-country national family member is not conclusive. Along the same lines the District Court ‘s-Gravenhage zp ‘s-Hertogenbosch found that residence in Germany in the period April-August 2010 did not qualify as ‘genuine and effective’ as the Dutch national had only resided in Germany during the weekends, had kept her living accommodation in the Netherlands, where she remained registered in the Municipal Population Administration [*Gemeentelijke Basisadministratie*], and her child attended school in the Netherlands. The fact that the German authorities had recognised their rights under EU-law was inconclusive, as the Dutch authorities have their own responsibility to assess whether the facts of the case merit application of EU-law upon return to the Netherlands.³²

Dual Nationality

In the 2011-2012 Dutch report, two decisions handed down by the Judicial Division of the Council of State were discussed with opposing outcomes, leaving the outsider in the dark as to the entitlements of Dutch nationals who are also nationals of another Member State under European law.³³ In the reporting period, the Judicial Division of the Council of State handed down two new rulings concerning the position of Dutch nationals who are also nationals of another Member State claiming family reunification rights under Directive 2004/38/EC,³⁴ confirming the reading given to consideration of the *McCarthy* case by the Judicial Division of the Council of State on 2 November 2011. These cases are discussed in Chapter 1.

Ruiz Zambrano and Dereci

As reported in the 2010-2011 and 2011-2012 Dutch reports the Minister for Immigration and Asylum made a public statement regarding the reading to be given to the effective enjoyment

30 Afdeling Bestuursrechtspraak Raad van State, 17 December 2012/201209994/1/V4, LJN: BY7401, JV 2013/67, cons. 2.5.

31 Afdeling Bestuursrechtspraak Raad van State, 29 February 2012, [201006036/1/V2](#), [JV 2012/159](#), [LJN: BV7838](#), JV 2012/159. See the 2011-2012 Dutch report.

32 Rechtbank ‘s-Gravenhage zp ‘s-Hertogenbosch (meervoudige kamer) 9 July 2012, AWB 11/31165, LJN: BX0739.

33 Afdeling Bestuursrechtspraak Raad van State, 28 October 2011, No. 2010012858/1/V2, LJN: BU3406, JV 2012/44, with commentary P Boeles & *idem*, 2 November No. 2011201011940/1/V1. LJN: BU3411, JV 2012.45, with commentary P Boeles.

34 Afdeling Bestuursrechtspraak Raad van State, 20 November 2012, No. 201105940/1V4, LJN: BY4031, JV 2013/38 and *idem*., 3 December 2012, No. 201108991/1/V1, LJN: BY5575, JV 2013/48.

test, set out by the Court of Justice in its *Ruiz Zambrano* ruling, on 31 March 2011.³⁵ The first cases were handed down by the Judicial Division of the Council of State on 7 March 2013.

In her analysis of the Dutch case law on the genuine enjoyment test as developed by the Judicial Division of the Council of State, Lodder³⁶ distinguishes the case law as follows:

1. Cases in which both parents are in the picture and live together as a family with their children. Reliance on *Ruiz Zambrano* and *Dereci* does not prevent the execution of an expulsion measure or invalidate the refusal to issue a residence permit to the third-country national parent, as there is no reason to assume that the children will be forced to leave the territory of the Union, though family life is affected.
2. Cases in which both parents are in the picture, but are divorced and no longer share a household. If there are no special circumstances justifying the conclusion that the Dutch parent cannot take care of the children, then an expulsion measure or a decision not to issue a residence permit is not considered to compel the children to leave the territory of the Union. It is immaterial which parent has parental authority, if it is not established that the Dutch parent cannot exercise parental authority. It is also immaterial whether the Dutch parent is resident in the Netherlands or another EU Member State, which parent actually cares for the children and on whom the child is dependent. Only if it is established that the Dutch parent can de facto not care for the child, will this act in favour of residence permission for the third-country national family member. Psychological or psychiatric illnesses will not, however, easily justify the conclusion that the Dutch parent cannot care for the child, if necessary with the assistance of social institutions.
3. Cases in which both parents are in the picture, but the Dutch parent is de facto not capable of caring for the children even if assisted by social institutions and with financial support. Prison detention and a admittance to a care institution for leper patients are the only two known examples in which permission was granted to the third-country national parent to continue residence in the Netherlands.
4. Cases in which only the third-country national parent is in the picture, because the Dutch parent has passed away or the place of habitual residence of the Dutch parent has been unknown for some time. In these cases, it is automatically assumed that a refusal to issue a residence permit to the third-country national parent will mean that the children will have to leave the Union territory. Neither the age of the children, nor the presence of other family members is a relevant factor.

Publications

- P. Boeles, *Let op de Dereci-scheiding*, 3 *Asiel & Migrantenrecht* (2012-5/6) p. 244-246
- G. Lodder, *Het Zambrano-criterium in Nederland; een tussenstand*, 4 *Asiel & Migrantenrecht* (2013-1) p. 4-10
- H. de Waele, *EU-burgerschap, gezinshereniging en de 'Europa-route': de onmogelijke kwadratuur van een cirkel?*, 11 *Journal Vreemdelingenrecht* (2011-2) (<<JNVR>> 2012/15) p. 160-171

35 Tweede Kamer 2010-2011, 19637, nr. 1408, *Brief van de Minister voor Immigratie en Asiel aan de voorzitter van de Tweede Kamer der Staten-Generaal* [Letter sent by the Minister of Immigration and Asylum to the Chair of the Second Chamber] 31 March 2011.

36 G. Lodder, *Het Zambrano-criterium in Nederland; een tussenstand*, 4 *Asiel & Migrantenrecht* (2013-1) p. 8.

T. Weterings, HvJ EU van 6 december 2012, C-356-11 en C-357/11 (O. en S. en L.): Volgende stap in de versterking van de positie van het kind?, 4 *Asiel & Migrantenrecht* (2013-1) p. 29-32

2. ENTRY AND RESIDENCE RIGHTS

Texts in force

The policy rules in force on short-stay visa are now found in *Vreemdelingscirculaire* 2000, A1/4.10, entitled *Onderdanen van de EU, de EER en Zwitserland* [EU-citizens, EER-citizens and Swiss nationals]. To qualify for facilitated issuing of a short-stay visa, as required by Article 5(2) second paragraph of the Citizens Directive, the new policy rules require the presentation of credible evidence of family ties with an EU-citizen within the meaning of Article 8.7(2) or (3) of the *Vreemdelingenbesluit* (Article 2(2) and 3(2) of the Citizens Directive) or an unmarried partner within the meaning of Article 8.7(4) *Vreemdelingenbesluit* (Article 3(2)(b) Citizens Directive). If the evidence submitted to the authorities is inconclusive, then the normal rules on the issuing of visa are applied. If, on the other hand, family ties are established a short-stay visa is issued free of charge by the border authorities.³⁷ Short-stay visa can only be refused if this is indicated by concerns relating to public policy, national health or public security or if fraud, e.g. a marriage of convenience, is established. If entry permission is not granted, a written decision in the format of a M18 form has to be issued, specifying in detail the reason justifying the refusal and a note is made in the travel document. The decision can be appealed during a period of four weeks, but there is no right to await the outcome of the appeal proceedings in the Netherlands.

The policy rules detail when there is a danger to public policy and public health that merits a refusal to issue a short-stay visa, but emphasises that in all cases consideration of the personal situation is key to any decision that has to respect the principle of proportionality, with the unfortunate reference to Article 3:4 *Algemene Wet Bestuursrecht*; (General Act on Administrative Law); unfortunate as proportionality in this provision is different to the European reading of proportionality. Public policy is endangered to the extent that it merits the refusal to issue a short-stay visa if the applicant is registered in the national database as unwanted non-national or has been issued an entry ban in accordance with Article 67 *Vreemdelingenwet*; is in the possession of fire arms or narcotics; or is suspected of human trafficking. The reading of public health reflects the European reading of this concept and includes a reference to www.Rijksoverheid.nl as the source to keep abreast of the latest developments regarding infectious diseases.

There is also attention for the evidence to be submitted as proof that there is a durable relation within the meaning of the Citizens Directive. Like the rules in *Vreemdelingscirculaire* 2000, B10/2.2 evidence that proves that the partners share or have shared a household, with a qualifying period of six months, or the birth of a child from the relationship has to be provided. The list of documentary evidence of a shared household outside the Netherlands includes: proof of registration in the *Gemeentelijke Basisadministratie* [Municipal Population Administration]; rental contracts; a mortgage for a house registered in both names, other considerable legal or financial commitments of a longer duration entered jointly; and bank statements made out in both names. This enumeration of evidence is more detailed than the

³⁷ See in general on the issuing of visa free of charge: *Vreemdelingscirculaire* 2000, A1/5.2.

one found in *Vreemdelingencirculaire* 2000, B10/2.4, that fails to mention a mortgage for a house registered in both names and other considerable legal or financial commitments of a longer duration entered jointly.

Case law

In a case concerning an application for reimbursement of procedure costs, the Almelo District Court considered the evidence that can be required when making an application under Article 6(2) Directive 2004/38/EC as a family member of an EU-citizen. Evidence substantiating the family relationship and the fact that the family member accompanies or joins an EU-citizen is admissible. Additional documents and an obligation to answer questions regarding the purpose of the intended journey and financial means are inadmissible. Likewise it cannot be expected that family members are in the possession of a return ticket. The case is reopened for an assessment of damages.³⁸

3. IMPLICATIONS OF THE *METOCK* JUDGMENT

Legislation

The entry into force of the *Visumwet* on 1 June 2013 has changed the rules on long-stay visa. Article 17(1)(b) of the *Vreemdelingenwet* 2000 now exempts beneficiaries of the Citizens Directive (*gemeenschapsonderdanen*) from the obligation to apply for a long-stay visa (*machtiging tot voorlopig verblijf*) in their country of origin, by establishing that an application for a residence permit cannot be turned down for failure to apply for a *machtiging tot voorlopig verblijf*. This provision has replaced the policy rule in *Vreemdelingencirculaire* 2000 (old) B10/2.2. No new rules are found in the *Vreemdelingencirculaire* regarding prior residence authorization, i.e. an obligation to obtain a *machtiging tot voorlopig verblijf*.

Literature

P. Boeles, In werking vanaf 1 juni 2013: De *Visumwet*, 4 *Asiel & Migrantenrecht* (2013-4) p. 200-206

4. ABUSE OF RIGHTS, I.E. MARRIAGES OF CONVENIENCE AND FRAUD

Texts in force

The policy rules on abuse of rights are now set out in *Vreemdelingencirculaire* 2000, B10/2.3 under the heading *Rechtsmisbruik en fraude* [Abuse of rights and fraud] which is part of the sub-section entitled *Ontzegging of beëindiging rechtmatig verblijf* [refusal or termination lawful residence]. Residence permission can be withheld or withdrawn according to this section if (i) the EU-citizen or his/her family member has provided incorrect information or withheld information that, if known, would have led to a refusal to grant entry or residence permission; or (ii) rights have been abused. Also listed in this enumeration is residence in another Member State as a family member of a Dutch citizen that does not qualify

³⁸ Rechtbank 's-Gravenhage zp Almelo, 28 December 2012, AWB 11/19588, retrieved from: www.Migratieweb.nl.

as genuine and effective, the so-called *Europe route* which was discussed in section 1.2 of this Chapter.

Following this enumeration there is a description of ‘artificial behaviour’, i.e. behaviour the sole purpose of which it is to obtain a right of entry or residence under EU-law, but though that behaviour strictly speaking satisfies conditions set out in EU-law, violates the purpose of those rules. A violation of EU law is, in any case, assumed by the Immigration and Nationality authorities if the sole purpose of obtaining a right of residence under the Citizens Directive is to circumvent national laws and policy rules.

The discussions on the *Wet elektronische dienstverlening burgerlijke stand* [Act on online services for the Registrar Office, as discussed in the 2011-2012 Dutch report] are still ongoing. In October 2012 the Secretary of State for Security and Justice, Teeven, and the Home Minister, Spies, addressed the concerns regarding this Act voiced by members of the First Chamber. They argue that careful consideration whether an intended marriage should qualify as a marriage of convenience does not affect the free choice of partners – as the Greens had feared - as the Act will merely simplify, accelerate and tightened up procedures.³⁹ In response to the concerns expressed by the CDA, regarding fraud and marriages of convenience, they point out that a number of measures have been adopted to prevent fraud or abuse. To start, the authorities can request further information or invite future spouses for an interview if the information provided by them does not correspond with the information in the *Gemeentelijke Basisadministratie* [Municipal Population Registration] or other information that is made available by other governmental institutions. In all cases the residence status of non-Dutch nationals will be verified (Article 1:58(1) BW). In addition a statement has to be made by the future spouses/partners that the purpose of the marriage/partnership is not to acquire residence permission (Article 1:44(1)(j) BW). Each statement is verified by the authorities and making a false statement will amount to an offence. Rules are still to be adopted enabling the storing of these statements which can be used by the Immigration and Nationality authorities as a tool to prevent and combat marriages of convenience. Administrative fines can be imposed under the *Wet Modern Migratiebeleid*.⁴⁰ D’66 is not entirely convinced that the Act will provide sufficient guarantees to prevent marriages of convenience and has asked for further clarification.⁴¹ Concerns regarding forced marriages have been expressed by *Groen Links* (See Chapter 8, section 3.2).

Case law

Four cases were found on marriages of convenience which were handed down by the Council of State’s Judicial Division in the reporting period. In all four cases that court found in favour of the Secretary of State who had justly decided not to hear parties after having estab-

39 Eerste Kamer 2012-2013, 32 444, C, *Wijziging van Boek 1 van het Burgerlijk Wetboek en enige andere wetten in verband met de vereenvoudiging van en de invoering van een elektronische dienstverlening bij de burgerlijke stand (Wet elektronische dienstverlening burgerlijke stand)*, Amendment of Book 1 of the Civil Code and some other Acts as regards the Simplification of and the Introduction Electronic Services by the Registrar Office (Act on Electronic Services provided by the Registrar Office)] *Memorie van Antwoord*, p. 8.

40 *Ibidem*, p. 5.

41 Eerste Kamer 2012-2013, 32 444, D, *Wijziging van Boek 1 van het Burgerlijk Wetboek en enige andere wetten in verband met de vereenvoudiging van en de invoering van een elektronische dienstverlening bij de burgerlijke stand (Wet elektronische dienstverlening burgerlijke stand)* [Amendment of Book 1 of the Civil Code and some other Acts as regards the Simplification of and the Introduction Electronic Services by the Registrar Office (Act on Electronic Services provided by the Registrar Office)], *Nader Verslag*.

lished that the facts at hand justified the conclusion that it had been established beyond reasonable doubt that no different decision should have been adopted.⁴²

In all four cases there is a reference to the European Commission's guidelines on the application of Directive 2004/38/EC⁴³ and conflicting statements are established. Conflicting statements are made concerning: the facts that lead to the marriage; the marriage day and marital life had been established and no plausible rebuttal of these discrepancies had been provided upon request. In two cases the application had been preceded by irregular stay for a considerable period and in one case it was established that there was no shared household. In one case, information provided by the Minister of Foreign Affairs on the increasing number of consular marriages involving Egyptian nationals with nationals of CEE-Member States was found to justify the conclusion that there were serious doubts as to the nature of the marriage justifying further investigations even though, in the case at hand, the EU-citizen was a female, which did not correspond with the usual pattern.⁴⁴

5. ACCESS TO WORK

Texts in force

The amended policy rules now explicitly state that family members of cross border EU-workers resident in an adjacent Member State need prior authorisation (a *tewerkstellingsvergunning*) to pursue lawful employment in the Netherlands, unless the *Wet arbeid Vreemdelingen* provides otherwise.⁴⁵

Case law

The Dutch courts are mixed on the answer to the question whether pending an application for residence permission under Article 20 TFEU (*Ruiz Zambrano* case law), a third-country national parent enjoys a right to take up paid employment, evidenced by a stamp in the passport '*arbeid vrij toegestaan; tewerkstellingsvergunning niet vereist*' [free access to the labour market, no work permit required]. In November 2012 the Amsterdam District Court found that a refusal to issue a work permit pending proceedings regarding the right of residence could amount to the denial of the effective enjoyment of the right to move and reside in Article 20 TFEU⁴⁶, where it had found in July of the same year that the *Vreemdelingenwet* does not provide for a right of residence that is derived from the Treaty nor for a right to take up employment pending a decision on the application for residence permission, arguing that, by analogy with Article 10(1) and (2) of the Citizens Directive, the Dutch authorities have up to six months to establish whether the claim to a residence right under Article 20 TFEU is

42 *Afdeling Bestuursrechtspraak Raad van State* 6 June 2012, No. [201106910/1/V4](#), LJN BW7878, JV 2012/325; *ibidem.*, 29 June 2012, No. [201111222/1/V4](#), LJN BX0615, JV 2012/355; *ibidem.*, 3 April 2013, No. [201208308/1/V4](#), LJN BZ8720, JV 2013/188; and *ibidem.*, 31 May 2013, No. [201206477/1/V4](#), retrieved from: [www.MigratieWeb.nl](#).

43 Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, 2 July 2009. COM (2009)313/4, p. 15-17.

44 *Afdeling Bestuursrechtspraak Raad van State* 29 June 2012, No. [201111222/1/V4](#), LJN BX0615, JV 2012/355, [cons. 2.4.6](#).

45 *Vreemdelingencirculaire* 2000, B10/2.2.

46 Vzv Rechtbank 's-Gravenhage zp Amsterdam, 19 November 2012, AWB 12/28879, 12/30324, retrieved from [www.Migratieweb.nl](#).

justified. As Article 10(2) merely sets out that Member States may request evidence of the alleged family ties that it then may assess on its merits, but does not provide a right to take up employment pending this assessment. The fact that applicant has insufficient financial means is to be addressed in the regular procedure concerning the issuing of a residence permit.⁴⁷ The question is still pending before the Judicial Division of the Council of State.⁴⁸

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

Nothing to report.

47 Vz. Rechtbank 's-Gravenhage zp Amsterdam, 13 July 2012, No. AWB 12/8019, AWB 12/20155, JV 2012/423. See also: Rechtbank 's-Gravenhage zp Amsterdam, 14 May 2013, AWB 12/28874 and AWB 12/30322, cons. 4, retrieved from: www.Migratieweb.nl and *Afdeling Bestuursrechtspraak Raad van State*, 3 June 2013, 201304527/2/V4, cons. 2.

48 *Afdeling Bestuursrechtspraak Raad van State*, 201207385, oral proceedings: 29 January 2013, retrieved from: www.Migratieweb.nl.

Chapter III

Access to employment

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

a.1 Equal treatment in access to employment (e.g. assistance of employment agencies).

Article 1(1)(b) of the General Equal Treatment Act (*Algemene wet gelijke behandeling*) explicitly forbids discrimination on the basis of nationality. The prohibition applies to all employment relations outside the public sector. Article 5(1) explicitly provides that the prohibition applies to job offers, recruitment procedures, private employment agencies, concluding and ending an employment contract, employment conditions, access to vocational and other training during or before the job, promotion and workplace conditions. The Act explicitly allows for only two situations where distinctions on the ground of nationality (in the meaning of citizenship) are allowed: (1) where it is provided explicitly in a statutory provision or in a written or unwritten rule of international law, and (2) in cases where a distinction on the ground of nationality is required by the context, such as the composition of a national sports team (Articles 5(5) and (6) of the Act and Royal Decree of 21 June 1997, *Staatsblad* 1997, No. 317, *Besluit gelijke behandeling*, *Staatsblad* 1997, 317). The Act established the Equal Treatment Commission (*Commissie Gelijke Behandeling*). A worker or an applicant may file a complaint with this Commission, if (s)he deems that an employer has violated the provisions of this Act. In October 2012 this Commission became part of the Human Rights Board (*College voor de Mensenrechten*). There is equal access to assistance of employment agencies.

In The Netherlands the registration of job-seekers at the employment agency is regulated in Article 30b Act on structure implementation agency work and income (*Wet structuur uitvoeringsorganisatie werk en inkomen*, *Staatsblad* 2005, 573). This Article reads:

- (1) The implementation agency employee insurances (UWV) registers as jobseeker on his/her demand:
 - (a) Dutch citizens
 - (b) aliens on who Article 1 or Article 10 Regulation 1612/68 is applicable.

Although this Article has not been adapted to the fact that Article 10 Regulation (EEC) No. 1612/68 is repealed, when Directive 2004/38/EC came into force, the intention of this Article is clear. It applies equally both to nationals and EU citizens (and their family members).

a.2 Language requirements

As of 1 July 2013 foreign employers who come to work in the Netherlands temporarily in certain risky occupations, such as remover of asbestos or crane driver, have to have sufficient command of the Dutch language in order to do their work safely and to prevent serious accidents. (Art. 1.5ha Labour Conditions Decree, *Staatsblad* 2013, no. 213)

The necessary level of command of the language depends on the work and responsibilities of the employee.

The Inspection Social Affairs and Employment will check of the language requirement is met. If this is not the case, the foreign employee as well as the employer can be fined. It is important that in case of emergencies, employers can communicate well with each other and the emergency services. Employees from abroad who are working here structurally in a certified occupation already have to meet the language requirement.

According to the Dutch General Employers Association the question can be raised whether these measures are proportionate and in line with the case law of the CJEU in the recent *Las* case (C-202/11).

The language requirements for child care personnel will be sharpened. Since last year knowledge of the Dutch language has to be at 2F level and from 1 August 2013 in the city of Rotterdam this level has to become 3F.

Further there are not much explicit statutory requirements as to the knowledge of the Dutch language for private employment. In practice, for most white collar jobs applicants will be required to be proficient in the Dutch language.

Overview language requirements regulated professions in the Netherlands

General principle: article 31 Recognition of EC Vocational Qualifications Act (Algemene wet erkenning EG-beroepskwalificaties):

The migrant professional whose vocational qualifications are recognized on the basis of chapter 2 or who is admitted as a service provider as meant in chapter 3 must possess the language skills that are required to practise the concerned regulated profession in the Netherlands.

The enforcement of this article rests with the employer. Therefore there are no additional requirements for employees who work in education (Recognition of EC Vocational Qualifications Educational Personnel Regulation: Regeling erkenning EG-beroepskwalificaties Onderwijspersoneel), or health care (Healthcare Professionals Act: Wet op de beroepen in de individuele gezondheidszorg).

Hospitals for instance have a general knowledge and skills test (AKV: algemene kennis- en vaardighedentoets) for medical professions. This test centers around examining the Dutch communication skills. A doctor who passes this test is supposed to have level C1 language skills. The AKV test is a mandatory part of the registration procedure for medical personnel that is not automatically recognized, but many employers also expect the doctors who have been registered by the automatic recognition system to take this test.

THE NETHERLANDS

Professions that require knowledge of the Dutch language on the basis of Dutch law and regulation		
Profession	Required language skills	On the basis of
Working conditions expert	Dutch language at the level that is necessary for carrying out work activities in a responsible fashion in the specific conditions under which work takes place, or common foreign language	art. 1.5ha Working Conditions Decree (Arbeidsomstandighedenbesluit)
Asbestos removal expert	Idem	Idem
Asbestos removal supervisor	Idem	Idem
Diver	Idem	Idem
Diving supervisor	Idem	Idem
Diving medical assistant	Idem	Idem
Diver medic	Idem	Idem
Gas expert tank ships	Idem	Idem
Crane operator	Idem	Idem
Explosives engineer	Idem	Idem
Fireworks expert	Idem	Idem
Sworn interpreters	At least level C1 language skills in the source-target language	art. 3 (2) (c) Decree on Registration in the Register for Sworn Interpreters and Translators (Besluit inschrijving Rbtv)
Sworn translators	At least level C1 language skills in the source-target language	art. 4 (2) (c) Decree on Registration in the Register for Sworn Interpreters and Translators (Besluit inschrijving Rbtv)
Notary	Sufficient language skills for carrying out the notarial profession	art. 6, clause 2, (b) Notarial Profession Act (Wet op het notarisambt)
Crop protection professional	Sufficient language skills to understand and execute directions on labels on plant protection products and biocides and other laws and regulations on plant protection products and biocides.	art. 19 , clause 3, Plant Protection Products and Biocides Decree (Besluit gewasbeschermingsmiddelen en biociden)
Biocide professional	Idem	Idem
Judiciary	No language skills test, but the competence test (admittance of foreign professionals) is taken in Dutch.	Art. 3, clause 6, Recognition of EC Vocational Qualifications Judicial Professions Regulation (Regeling erkenning EG-beroepskwalificaties rechterlijke beroepen)

Judicial practice

The Board of Human Rights judged that the rejection of a Croatian woman by an intermediary agency for a possible job at a call center because she had an accent is discriminatory.

According to the Board the employer should be the one to decide whether her capability of the Dutch language is sufficient (Opinion no. 2013-66).

In another opinion the Board decided that the rejection of a Bulgarian woman for the job of dermatologist because she did not command the Dutch language sufficiently is justified. The hospital has a good reason for making this distinction. Good communication between doctor and patient and doctors among each other is essential for the function of a dermatologist (Opinion no. 2012-204) .

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

The posts reserved for nationals in the public sector are defined in Article 125e of the Dutch Civil Service Act. According to this article only Dutch citizens may be appointed in functions of confidence.

There has not been any development since the overview in the report *Free Movement of European Union Citizens and Employment in the Public Sector, Current Issues and State of Play* (Part II Country Files) by Jacques Ziller, 2010, p. 109-115. The observation made on p. 113 is still of particular interest:

Information available reveals two potential issues of compliance with EU law.

First, the criteria indicated by the *Civil Service Act* in order to reserve posts to nationals, i.e. *'functions of confidence'*, does not coincide with the criteria for the application of Article 45(4) TFEU. Vagueness of the criteria used in the legislation reserving posts to Dutch nationals does not facilitate analysis, especially as there is no official comprehensive list of the relevant positions involving the exercise of *'functions of confidence'*.

Second, the absence of legal provisions on the recognition of seniority acquired in other EU Member States may generate obstacles to the free movement of EU-citizens, including Dutch nationals, who make use of their right to free movement'.

See <http://ec.europa.eu/social/main.jsp?catId=465&langId=en>

There are no reforms pending or planned on the issue of posts reserved for nationals.

b.1 Nationality condition for access to positions in the public sector

A Bill abolishing the requirement of Dutch nationality for the appointment as a notary has been adopted in June 2012. (*Eerste Kamer* 31040, No. S; *Staatsblad* 2012, 272). A new Bill that will re-establish the nationality requirement for third-country nationals, effectively restricting the exemption to nationals of Member States has been adopted by the First Chamber in June 2013 (*Eerste Kamer* 33419). The new Dutch legislation includes a provision requiring knowledge of the Dutch language as an explicit condition for appointment as a notary.

b.2. Language requirements

Until recently, there were few, if any, explicit statutory requirements as to the knowledge of the Dutch language for appointment in posts in the public sector, although, in practice, proficiency in the Dutch language is required for most public service jobs. The legislation implementing Directive 2005/36/EC provides some examples of that practice. The explanatory memoranda on the ministerial regulations on the recognition of professional qualifications of police officers and fire-brigade officers, explicitly mentions that the officers concerned have to have obtained sufficient knowledge of the Dutch language to perform their job. Language knowledge is not to be tested during the procedure on the recognition of the qualifications acquired in another Member State, but afterwards in the appointment procedure. Moreover, the ministerial regulation on the recognition of professional qualifications of candidate notaries and candidate bailiffs stipulate that the aptitude test is to be conducted in Dutch.

The Bill mentioned above (sub-section b.1) includes a provision requiring knowledge of the Dutch language as an explicit condition for appointment as a notary. Apparently, this language condition has been applied implicitly, without statutory basis, until now. There was a presumption that the requirement of a Dutch law degree ensured that the job applicant had sufficient knowledge of the Dutch language to perform the job. The Bill has been approved of by the First Chamber in June 2013.

b.3. Recognition of professional experience for access to the public sector

There are no special statutory rules on this issue in the Netherlands.

b.4. Other aspects of access to employment

Nothing to report.

Chapter IV Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Working conditions in the public sector

There are no separate rules providing special working conditions for persons without Dutch nationality employed in the public sector.

As mentioned in earlier reports unequal pay, substandard working or housing conditions or downright exploitation of EU-8 and EU-2 workers are becoming a serious problem in the Netherlands.

In April 2013 the new Board of Human Rights published a report, entitled *Polish labour migrants in a human rights perspective*, based on a literature study and interviews with stakeholders and Polish labour migrants.

The Dutch government published also in April 2013 an action plan to combat so called fake constructions (*Tweede Kamer* 17050, nr. 428) The plan describes the specific problems and existing and proposed measures relating issues as:

Fake self-employment, evading minimum wages, abuse of payment of premium (including A1 form), evading of collective agreements, fake employment agreements and migration constructions.

Together with the municipalities, the government are taken measures regarding better registration, prevention of exploitation, better housing and return to the country of origin in case people are not working.

The main measures are:

- Foreigners who cannot support themselves, are not allowed to stay in the Netherlands. This will be controlled more strictly and the rules will be accentuated.
- The government takes measures to better observe the existing registration duty. For instance by calling employers to account for their responsibilities for the registration of foreign employees.
- The government will urge housing corporations and municipalities to make agreements about the housing market for foreign employees. For instance about building lodgings.
- The government will improve the information on the rights and duties of foreign employees. It will examine how existing information material can be used more effectively and will do this together with municipalities, employers' and employees' organisations, migrants' organisations and countries of origin.

The government also announced to take measures to deal more firmly with existing problems such as exploitation. The main measures are:

- Employers who retain too high a percentage of the wages for e.g. expenses for housing or transportation, will get a fine from the Inspection Social Affairs and Employment.
- Foreigners (including EU citizens) will only be eligible for social assistance benefits their residence permit has been established by the Immigration and Naturalisation Service.

- Anyone who does not speak Dutch and applies for social assistance must take a course in Dutch and finish it with success. If the applicant does not meet this requirement, the social benefit will be reduced or stopped.(see Chapter V)
- As of 1 July 2013 the language requirement will also apply to foreign employees who are temporarily working in risky occupations.(See Chapter III).

The government and the municipalities monitor if the measures will actually have the desired result, such as proper housing. They do so among other things in a biannual meeting.

The Board of Human Rights (former Equal Treatment Commission) issued an opinion regarding the application of the Equal Treatment Act to a Romanian national. It held that a building company had violated that law when it prohibited a Romanian national to enter a building site on the basis of his nationality, (Opinion no. 2013-37 of 21 March 2013). The Romanian was self-employed, which meant he did not need a labour permit. The policy of the building company was to prohibit all Romanian, Bulgarian and third country nationals from the building site when they did not possess a labour permit, in order to prevent financial risks in relation to irregular labour (see also chapter VII).

2. SOCIAL AND TAX ADVANTAGES

Employers can get a discount for 1 to 3 years on the payment of the contributions for employees they hire, who enjoy a Dutch unemployment or disability benefit at that moment. It is questionable whether this is an obstacle to free movement of workers. The Dutch tax authority's reply was negative. The purpose of this discount is to reduce the burden on the Dutch social security system and, therefore, is justified in their eyes.

30% tax benefit

Foreign workers, can profit from tax benefits, the so-called '30% rule'. This rule entails that 30 per cent of the wage can be paid to the employee untaxed. The regulation was introduced to enable Dutch companies to compete with companies in countries such as the USA and the UK, which generally pay higher salaries. In 2009, 40,000 persons profited from the rule. As of 1 January 2012, restrictions to the 30% ruling took effect. A salary criterion was introduced, stating that only those employees who have a taxable income of at least €35.000 a year can profit from the ruling.

Furthermore, only those who lived more than 150 kilometres from the Dutch border prior to moving to the Netherlands in order to work there will be able to benefit from the rule.

In his opinion of 1 May 2013 the Advocate General of the Supreme Court has declared that this restriction is not an obstacle on free movement of workers, although it affects workers from Belgium, Luxembourg and parts of France and Germany (LJN CA0873).

2.1. General situation as laid down in Art. 7 (2) Regulation 492/2011

Nothing to report.

2.2. *Specific issues: the situation of jobseekers*

In the Netherlands, the *Vatsouras* decision led to questions in parliament (*Tweede Kamer* 2009-2010, *Aanhangsel van de Handelingen*, No. 684). The benefit enjoyed under the Dutch *Wet Werk en Bijstand* (*WWB*) is classified as a social assistance benefit and not as a benefit that facilitates access to employment, like the German benefit. The government confirmed that an economically active EU-citizen who has performed effective and genuine activities for less than a year and has become involuntary unemployed has a right to a *WWB* benefit during the six months period he retains his status as a worker (according to Article. 7(3)(c) Directive 2004/38/EC). After that period the Immigration and Naturalisation Service decides on an individual basis whether a *WWB* benefit justifies termination of the right of residence because the EU-citizen has become an unreasonable burden on the financial means of the host-Member State. In April 2011 there was an announcement that the rules on expulsion of EU nationals on the ground of reliance on social assistance (laid down in Aliens Circular B.10/4.3) will be made more restrictive (*Tweede Kamer* 29 407, No 118).

According to those new rules during the first two years of residence an appeal by an EU national on social assistance or on social care in a hostel for more than eight nights will cause an expulsion order. In the third year the criteria for an expulsion decision are: social assistance for more than two months or complementary social assistance for more than three month or social care for 16 nights or more. In the fourth year: four to six months social assistance or social care for more than 32 nights and in year five: 6 or 9 months social assistance or social care for more than 64 nights (new par. B10/4.3 of the Aliens Circular 2000).

Chapter V

Other Obstacles to Free Movement of Workers

KNOWLEDGE OF DUTCH LANGUAGE AS A REQUIREMENT FOR SOCIAL ASSISTANCE

The bill introducing language requirements for the reception of Social Assistance benefits is still pending in the Second Chamber since 2010. (TK 32328) According to the government this bill will only propose a requirement to prove sufficient knowledge of the Dutch language in cases where language knowledge will improve job opportunities of the applicant. This will apply to EU nationals as well. The government assured that the new requirement will be applied on a proportional and non-discriminatory basis.

The Board of Human Rights (former Equal Treaty Commission) decided that the refusal from a telecom provider of a subscription of a French citizen, because they did not accept a French identity card as sufficient identification is forbidden discrimination on nationality (Opinion 2013-24. Similar opinion: 2013-22 and 23).

The Board of Human Rights also decided that the policy of a housing company to ask foreigners (a Portuguese citizen in this case) a deposit of three months rent, where Dutch citizens do not have this obligation, is forbidden discrimination on nationality (Opinion 2012-203 and 204).

Chapter VI

Specific Issues

1. FRONTIER WORKERS

The Dutch Social Assistance system does not provide the possibility of additional social assistance benefits for frontier workers, who work in The Netherlands, but earn less than the social minimum. According to the Commission this is not in line with the equal treatment provision of article 7 Regulation 492/2011.

In 2010-2011 Eures Maas Rijn published six short information brochures on social security issues for frontier workers living and working in Belgium, Germany or the Netherlands. See: <http://www.eures-emr.org>

In 2012 the Social Insurance Bank published a *Vergelijkend Overzicht voor werknemers* (Comparative Overview for Workers) in which a comparison is made between the Dutch and Belgian social security rules. See: <http://www.svb.nl/Images/9070NO.pdf>

As mentioned in the 2011-2012 report, on 26 June 2009 the Supreme Court ruled in accordance with the decision of the CJEU in the *Renneberg* case (C-527/06) that Mr. Renneberg can deduct from his income generated in the Netherlands for the purpose of paying taxes the difference between the *huurwaardeforfait* (rateable value) for his house in Belgium, to be calculated as if the house was located in the Netherlands, and the mortgage he has paid for the years 1996 and 1997 (Supreme Court, 26 June 2009, No. 39258bis, VN 2009/33.14). The tax authorities, however, demanded under the Income Tax Act 2001, that frontier workers as Mr Renneberg choose to be registered for the Dutch system as internal taxpayer (*binnenlandse belastingplichtige*) and not as external taxpayer (*buitenlands belastingplichtige*). Internal taxpayers pay a higher tax rate than external taxpayers.

A judgment of the District Court Breda (18 April 2011, LJN: BQ 3849) established that frontier workers living in Belgium and working in Netherlands can also deduct their mortgage interest. It bases its decision on the CJEU judgment in the *Gielen* case (C-440/08), in which the CJEU found the possibility to choose between different tax regimes of a country in breach with the freedom of establishment (Article 49 TFEU). This decision was confirmed by the Appeal Court 's-Hertogenbosch 25 November 2011 (LJN BV 7552).

The State Secretary of Financial Affairs published a new decision in June 2012 that those EU citizens, who earn more than 90 % of their income in the Netherlands can deduct the mortgage interest they pay for the house they own in another Member State (*Staatscourant* 2012 nr. 11800, 14 June 2012). The above mentioned decision of the Appeal Court is challenged at the moment before the Supreme Court. The Advocate General holds the opinion that the right of choice for foreign taxpayers is acceptable (Opinion Advocate-General 6 March 2013, LJN: BZ5779, Hoge Raad , CPG 12/02201).

There is a special journal in the Netherlands dealing with the (mainly social security and tax) problems of frontier workers: *Over de grens, vakblad over grensoverschrijdend werken*. See www.futd.nl

A detailed overview of the on the social and tax problems experienced by frontier workers between Belgium and the Netherlands can be found in: H. Verschueren (ed.), *Werken over de grens België-Nederland; Sociaal-en fiscaalrechtelijke grensconflicten*, Antwerpen: Intersentia 2011, ISBN 978-94-000-0219-7 (xiv + 246 pp.)

2. SPORTSMEN/SPORTSWOMEN

Field Hockey: There are now over 44 men and 23 women with a foreign nationality playing in the highest hockey division (mostly from outside the EU). This development has been criticized by experts, as it is felt to affect the development possibilities of young Dutch players. There is no quota.

Basketball: According to the Dutch Basketball League for the 2012/2013 season only a maximum of 4 foreign players (including EU citizens) will be allowed. (<http://www.basketballleague.nl/nieuws/1255>).

Base-ball: For the 2012/2013 season base-ball teams in the highest league can consist of a maximum of 3 players without a Dutch passport. A foreign player who has played for five years in the Dutch league is counted as a Dutch player.

3. THE MARITIME SECTOR

Nothing to report. There are no new developments. See the 2012 report of Barnard on seafarers.

4. RESEARCHERS AND ARTISTS

The decisions of the Court of Justice in the *Gerritse* (2003), *Scoprio* (2006) and *Centro Equestre* (2007) cases and the amendment to the Commentary on Article 17 of the OECD Model Convention have brought major changes to the rules on taxation that apply to artists and sportsmen. Now, expenses are deductible at source and normal tax returns should be possible at the end of the year.

There is no withholding tax in the Netherlands on performance fees for artistes and sportsmen from countries with which the Netherlands have concluded a bilateral tax treaty. They have to pay taxes in their country of residence.

Most states in the world apply Article 17 (introduced in 1963) of the OECD Model Convention for the taxation of non-resident artistes and sportsmen granting the right to levy withholding tax on the performance fee to the state of performance. In 1977 the OECD introduced Article 17(2) ensuring also the taxation of payments to others than the artistes and sportsmen, for example, so-called 'artiste-companies' or any third party involved. To avoid double taxation states either apply the tax credit or the tax-exemption method. Inadequacies were discovered and, therefore, the Commentary on Article 17 advised in 1977 to exclude cultural exchanges and subsidized artistes and sportsmen from Article 17. The majority of all states soon started to use this exception as Article 17(3) in their bilateral tax treaties thereby granting the taxing right to the state of residence. The question of unequal treatment between a subsidized and a commercial theatre group arises. It might lead to the conclusion that an Article 17(3) clause in a bilateral tax treaty between EU Member States does not correspond with the freedom and non-discrimination principles of the EU. (See <http://www.allarts.nl/filelib/file/2106article173-intertax-april2012.pdf>)

For an overview of bilateral tax treaties articles applying to artists and sportspersons, see the most recent overview of April 2012. (<http://www.allarts.nl/filelib/file/overzichtnlart17-2012-04-14.pdf>)

5. ACCESS TO STUDY GRANTS

Since September 2007, the Dutch Study Finance Act (*Wet studiefinanciering, WSF*) allows students resident in the Netherlands to take their study grant with them when they study abroad. This is subject to the condition that the student must have resided legally in the Netherlands for at least three out of the six years preceding the beginning of the course abroad (Article 2.14 (2)(c) WSF). When applied to migrant workers, including frontier workers and their family members, this residence clause appears at odds with Article 7(2) Regulation (EEC) No. 1612/68. In particular, frontier workers who live in Belgium are affected by these rules. In December 2009, the European Commission started an infringement procedure against the Netherlands (case C-542/09). The CJEU decided on 14 June 2012: ‘Declares that, by requiring that migrant workers and dependent family members comply with a residence requirement – namely, the ‘three out of six years’ rule – in order to be eligible to receive funding for higher educational studies pursued outside the Netherlands, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation (EEC) No 1612/68.’

As a result of this decision of the CJEU, the Dutch government has recently withdrawn this ‘three out of six’ rule, but has opened the possibility to put a maximum to the amount of students who can ask for a study grant to take abroad (TK 33453, *Staatsblad* 2013, 180).

Migrant workers and their family members residing in the Netherlands have access to study grants under the same conditions as Dutch citizens. A student from another Member State, who works an average of 32 hours a month, is treated as a migrant worker (Policy rule Minister of Education, 17 December 2009, *Staatscourant* 2010, No.124). UPDATE

This amount of hours will be increased to 56 hours a month as of 1 January 2014. It is not sure whether this increase will stand firm in court. (Policy rule Minister of Education, 12 March 2013, *Staatscourant* 2013, No.6218)

Inactive EU citizens are subjected to a waiting period of five years that corresponds with Article 24(2) Directive 2004/38/EC and was acknowledged by the Court of Justice in the *Förster* (case C-158/07).

Judicial Practice

No entitlement to study financing abroad because the student does not fulfil the ‘3 out of 6’ condition and the parent cannot be qualified as a migrant worker (Central Appeals Tribunal 23 November 2012, LJN BY4515)

No entitlement to study financing abroad because the student does not fulfil the ‘3 out of 6’ condition and the parent cannot be qualified as a migrant worker (District Court The Hague LJN BZ1725)

Literature

Annette Schrauwen, De kosten van studentenmobiliteit, *Nederlands Tijdschrift voor Europees recht* 2012, p. 336 ff.

Alexander Hoogenboom, Mobility of our best and brightest from a free movement of workers perspective, in FMW-on-line *Journal on Free Movement of Workers*, Issue 4.

<http://ec.europa.eu/social/main.jsp?catId=475&langId=en&furtherPubs=yes>

THE NETHERLANDS

Floris de Witte, Who funds the mobile student? Shedding some light on the normative assumptions underlying EU free movement law: *Commission v. Netherlands*, *Common Market Law Review* 2013, p. 203-216.

6. YOUNG WORKERS

Nothing to report.

Chapter VII

Application of Transitional Measures

In 2012 and 2013 politicians of several political parties made pleas for an extension of the transitional regime for workers from Bulgaria and Rumania after 2013. This wish was also inserted in the electoral programme of the Social-Democratic Party (PvdA) for the parliamentary elections of 2102. However, this issue was not included in the coalition agreement of the current government formed after those elections by the PvdA and the liberal-conservative VVD in October 2012. In January 2013 MP's for the rights-wing Geert Wilders Party (PVV) and for the left-wing Socialist Party both introduced motions in the Second Chamber asking the government to do its best to amend the Treaties in order to extend the transitional regime (TK 29407, nos. 155 and 156). Both motions were rejected by a majority of the Second Chamber. However, a motion proposed by a MP for the Socialist Party, linking the debate on free movement of EU-2 workers after 2013 to the forthcoming accession of Croatia was adopted (TK 33183, no. 6). In a letter of 15 March 2013 the government, making explicit reference to that motion and to the free movement of EU-2 workers after 2013, announced that the Netherlands would apply the transitional measures for Croatian workers at least during the first three years after the accession of Croatia (TK 29407, no. 164). Consequently, employers will be required to have a work permit before they can legally employ a Croatian worker during the first years after accession. Answering parliamentary questions on the negative side-effects of the free movement of workers with Poland and the forthcoming full free movement of workers with Bulgaria and Romania, the government referred to the evaluation of Directive 2004/38 to be discussed in Brussels in 2013 (TK 13 December 2012, p. 35-12-124). The exploitation of workers from Bulgaria and Romania fraudulent employment agencies and illegal employers in the agricultural sector were discussed repeatedly both in Parliament and in the media.

7.1. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

7.1.1 *General information*

On 1 January 2012 more than 37.000 nationals of Bulgaria or Romania had a registered residence in the Netherlands, according to the population register. This was up from 25.000 in the previous year. They are relatively young: their average age is 30 years (CBS Jaarrapport Integratie 2012, p. 35). However most workers from the EU-2 do not register with the municipal population registry, because their stay is short and, thus, they are not obliged to register or they prefer not to register.

The total number of work permits issued for Bulgarian and Romanian workers in 2012 was 1061 (522 for Romanian and 539 for Bulgarian workers) down from 1,875 work permits in 2011 and 3,589 work permits in 2010. Here the effect of the introduction in 2011 of the restrictive policy with regard to the issue of work permit to EU-2, discussed in par. 7.1.3, is clearly visible. The total number of worker permits issued decreased slightly from 13,759 in

2010 to 10,592 in 2012 (a reduction of 23%), whilst the number of work permits for EU-2 workers from 2010 to 2012 decreased with 70%.

The number of notification of EU-2 workers employed by service providers established in Bulgaria or Romania decreased considerably IN 2012:

Notification of workers from	Bulgaria	Romania
2010	1,114	5,411
2011	1,695	7,114
2012	424	861

Source: Parliamentaty Questions TK 2012-2013, no. 1721

This sharp reduction may be partly explained by a different way of counting (in 2012 each worker was only counted once per year) or the changing economic situation, but is probably also due to a more strict application of the rules. The government announced that a Memorandum of Understanding has been signed with the authorities in Bulgaria and Romania on the exchange of information with the aim of monitoring the correct application of the Directive on posted workers in the Netherlands, (TK 29407, no. 161, p. 34.)

7.1.2 *Texts in force*

There was no amendment to the relevant legislation between January 2012 and May 2013. The Aliens Act 2000 (Article 17) and the Aliens Circular 2000, Chapter B10/1.2 both stipulate that EU-2 nationals are exempted from visa obligations. The Aliens Regulation provides that ‘reliance on public assistance could result in loss of the residence right’ should be included in the text on the residence permit issued to nationals from those two countries (Article 3.1(4) Aliens Regulation) and that employment is subject to a work permit (Article 3.2a Aliens Regulation). Article 8.26, under j, of Aliens Decree provides that the Minister of Justice adopt rules implementing the Association Agreements with Bulgaria and Romania. From the explanatory memorandum it appears that the amendment intends to indicate that the transitional measures are still in force for the EU-2. However, the reference is not correct. The clause in Article 8.26 of the Aliens Decree should refer to the Accession Treaties with the two Member States and not to the two now defunct Association Agreements. In October 2011 Article 3.2a Aliens Regulation was amended to make it more clear that employers are only allowed to employ an EU-2 worker without a work permit, if the worker has had uninterrupted access to the Dutch labour market for 12 months and that employers need a work permit to employ a self-employed EU-2 nationals who has not had access to the Dutch labour market for 12 months (Decision of the Minister for Immigration and Asylum of 28 September 2011, Staatscourant 2011, no. 17763)

The entry into force of a major change in the Dutch Aliens on 1 June 2013 (Wet Momi) did not change the statutory rules on nationals of Bulgaria and Romania. But the wording of the policy rules on workers from Bulgaria and Romania under the transitional rules in the Aliens Circular 2000, were amended. It is now explicitly stated that these workers are entitle to a residence document with met the mention ‘employment free; no work permit required’ after having worked for one employer for one year or for different employers for periods totalling one year in case there was no interruption of the employment. Moreover the immigration officers are instructed to issue to family members of Bulgarian and Romanian nationals lawfully resident in the Netherlands upon request immediately with a declaration on

their residence rights with the same mention on access to employment as their sponsor, Chapter B10/2.2.

Points 37 and 38 of the Annex to the Ministerial Decision Implementing the Aliens Employment Act (*Wet arbeid vreemdelingen*) stipulate that workers from Bulgaria and Romania are exempted from the work permit requirement after they have lawfully worked for 12 months in the Netherlands. For non-exempted EU-2 workers a work permit is required. Such permits are issued following a labour market test.

In November 2012 a government Bill proposing to introduce new restrictions in the Aliens Employment Act (*Wet arbeid vreemdelingen*) was sent to Parliament. In the Explanatory Memorandum it was explicitly recognized that the new restriction could not be applied to Bulgarian, Romanian and Turkish workers (TK 333475, no. 3, p. 9). However, the proposed Article 24 on the standstill clause in the bill only covers the consequences of the standstill clauses in the rules on the Association with Turkey. Later it was recognized that the standstill clause in the Accession Treaty with Croatia would prevent the application of the new restrictions with regard to Croatian workers after the entry into of that Treaty (TK 33475, no. 6, p. 9 and 13). Remarkably, the recognition of the effect of the standstill clause in the Accession Treaties of Bulgaria and Romania with respect of the new restrictions proposed in this Bill, did not alter the continued application of more strict rules and practices introduced in 2011 with regard to the employers of Bulgarian and Romanian workers

7.1.3 More restrictive application of work permit legislation and the standstill clauses

In the previous report it was mentioned that in April 2011 the Minister of Social Affairs announced his intention to restrict the granting of work permits for seasonal jobs after 1 July 2011 to the absolute minimum. The Minister in its letter did not mention the standstill clauses in the Accession Treaties with Bulgaria and Romania (TK 32144, no. 5). Several employers filed appeals against the refusal to issue work permits for Romanian or Bulgarian workers. In 2011 and 2012 the District Court of The Hague issued an interim injunction allowing the employer to employ the EU-2 workers pending the administrative review of the refusal. It was held that the more strict applications of the work permit legislation is in compatible with the standstill clause in Annex VI to the Accession Treaties. The agency entrusted with decision making in these cases (UWV) filed appeals against these judgments with the Council of State. In June 2013 the Judicial Division confirmed the judgments of the District Court that these new more restrictive practices were incompatible with the standstill clauses in the Accession Treaty with Romania. In 2012 the District Court had ruled that the more restrictive rules on the salary levels for the admission of high qualified workers also violated the standstill (see par. 7.1.5 below).

7.1.4 Illegal employment and disputed self-employment

In 2012 the inspectorate detected 953 Bulgarian workers employed without the required work permit and 261 Romanian workers without a work permit, together they accounted for almost half of the total number of detected undocumented workers. This was a clear increase with regard to previous years. In 2010 workers from Bulgaria and Romania accounted for 30% and in 2011 for almost 40% of those working without the required work permit detected by the labour inspectorate (Annual Report of the Inspectorate SZW 2012, p. 34).

The Labour Inspectorate often deems that EU-2 nationals who are claiming to work as self-established or service providers are in fact workers. In 2010 and 2011 in around 250 cases the inspectorate held that the ‘pseudo-self-employment’ was a cover for employment. In 2012 the total number was almost twice as high: 481. As with the number of illegally employed EU-2 the sharp raise may reflect an increased demand for foreign workers and a politically inspired increased focus of the activities of the Labour Inspectorate on EU-2 workers. Almost 90% of the persons who said to be working as self-employed persons, but according to the inspectors were actually employees were Bulgarian or Romanian nationals (Annual Report 2012, p. 33). In those cases heavy administrative fines are imposed on the individuals or companies that are qualified as the employers of those workers. From January 2012 until June 2013 in a total of 25 cases concerning those fines imposed on employers of Bulgarian or Romanian workers without the required work permit a judgement of the State Council was published. The administrative fines imposed in those cases varied between €6,000 and €328,000. Four fifths of the cases concerned Bulgarian workers. Only in a few cases the court reduced the fines with 50%.

In June 2013 the Dutch Minister of Social Affairs announced that he had reached an agreement with his Bulgarian and Romanian colleagues to combat fake labour constructions more effectively.

7.1.5 Judicial practice

The Judicial Division of the State Council, making reference to the CJEU judgments in the case C-546/07 (*Commission/Germany*) and the case C-101/05 (*Skatteverket v. A*), held that the standstill clause prohibits the introduction of more restrictive legal rules and less favourable administrative practices. Applying the same criteria to a changed labour market situation is allowed, but the introduction of more restrictive practices is not compatible with the standstill clause. Taking into account the two letters of the Minister of Social Affairs to the Parliament of April and May 2011, stating his intention to reduce the number of residence permits to be issued to employers of Bulgarian and Rumanian worker, and the actual reduction of the number of those work permits after March 2011, it was held that agency issuing the worker permits (UWV) had not proven that the reduction was due only to changes in the labour market situation. Hence, the agency in its decisions had not properly motivated why its decisions were compatible with the standstill clause in the Accession Treaties, two judgments of the Judicial Division of the State Council of 12 June 2013, LJN: CA2855 and CA2856.

It was held that the introduction of more restrictive rules on the salary levels for the admission of high qualified workers could not be applied to workers from Bulgaria and Rumania; that application would be in violation of the standstill clauses in the Treaties on the accession of those two states to the EU, District Court The Hague (Aliens Chamber session in Haarlem) of 28 June 2012, LJN: BX7326.

The Equal Treatment Commission issued two opinions regarding the application of the Equal Treatment Act to Romanian nationals. In the first case it held that a building company had violated that law when it prohibited a Romanian national to enter a building site on the basis of his nationality, Opinion no. 2013-37 of 21 March 2013. The Romanian was self-employed, which meant he did not need a labour permit. The policy of the building company was to prohibit all Romanian, Bulgarian and third country nationals from the building site

when they did not possess a labour permit, in order to prevent financial risks in relation to irregular labour.

In the other case the Commission held that the Dutch government did not discriminate by reducing the statutory old age pension benefit of a Romanian man on the ground that he had lived for thirty years in Romania and not in the Netherlands (and therefore did not built up this pension during these years), Opinion no. 2013-52 of 25 April 2013.

7.1.6 Literature

Centraal Bureau voor de Statistiek, *Jaarrapport integratie 2012*, Heerlen 2012, annex to TK 32824, no. 7

Rooijen, J, van and E. Eenkhoorn, Meer werknemers uit Midden- en Oost-Europa, *CBS Webmagazine* 4 July 2012

Lange, T. de, Kroniek Arbeidsmigratie, *Asiel- en Migrantenrecht* 2012, p. 503-510.

Chapter VIII

Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION NO. 883/04, ON THE ONE HAND, AND ARTICLE 45 TFEU AND REGULATION NO. 492/2011 ON THE OTHER HAND

In the Netherlands the only problems concern the WAJONG-benefit which was subject of the Court of Justice's judgment in the *Hendrix* case. This is a benefit for young people with disabilities.

Judicial practice

On 9 April 2013 there was a request for a preliminary ruling from the *Centrale Raad van Beroep* on the interpretation of Articles 2, 3 and 16 of Council Regulation (EEC) No 1408/71 and Article 7(2) of Council Regulation (EEC) No 1612/68. It concerns the personal scope of the Old Age Pension Act and the insured position of someone with a privileged status:

1. Must Article 2 and/or Article 16 of Regulation 1408/71 be construed as meaning that a person like Evans, who is a national of a Member State, who exercised her right of freedom of movement for workers, to whom the social security legislation of the Netherlands was applicable and who then went to work as a member of the service staff of the Consulate General of the United States of America in the Netherlands, from the commencement of such work no longer falls under the personal scope of Regulation 1408/71?

If not: 2(a): Must Article 3 of Regulation (EEC) No. 1408/71 and/or Article 7(2) of Regulation (EEC) No 1612/68 be construed as meaning that the application of privileged status to *Evans*, which in this case consists inter alia of not being compulsorily insured for the purposes of social security and of not paying contributions in that regard, should be considered a sufficient justification for discriminating on grounds of nationality?

(b) What significance must be attached in that regard to the fact that in December 1999 *Evans*, when asked, opted for the continuation of the privileged status?

(Case C-179/13 *Evans*; LJN BZ6146)

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38/EC AND REGULATION NO. 492/2011 FOR FRONTIER WORKERS

There is no information on tension between Directive 2004/38/EC and Regulation No. (EU) 492/2011

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS

3.1. Integration measures

Since 1 January 2013 an amendment to the *Wet Inburgering* [Integration Act] has removed the concept *vrijwillige inburgeraar* [voluntary integrater] from that Act.⁴⁹ This means that EU-citizens no longer fall within the personal scope of the *Wet Inburgering* and cannot, therefore, be expected to follow integration courses or pass the integration exam. An amendment to the *Wet Educatie en Beroepsopleiding* [Education and Professional Training Act], however, now entitles those who formerly classed as *vrijwillige inburgeraar* to participate in Dutch as a second language course (Article 8.1.1.(6) *Wet Educatie en Beroepsopleiding*). The exclusion of EU-citizens from the Integration Act has not meant that concerns regarding Dutch language skills as a key to participate successfully in Dutch society have diminished, in particular EU-citizens who intend to stay for a longer period in the Netherlands.

Concerns regarding the integration of new arrivals from CEE-Member States, in particular Romania and Bulgaria, with low educational skills were expressed by the Minister of Social Affairs and Employment in February 2013.⁵⁰ Measures geared to improve their integration, in particular their Dutch language skills, are being developed. One measure is the introduction of Social Loans to pay for language and integration courses by EU-labour migrants who are registered in the *Gemeentelijke Basisadministratie* [Municipal Population Administration] after 1 January 2013. Other initiatives include the improvement of language skills on the work floor, emphasis on the employer's responsibility for their employees language skills and the materialisation of the plans in the Coalition Agreement that social benefits are not to be paid to those with insufficient Dutch language skills;⁵¹ an initiative discussed in the 2010-2011 and 2011-2012 Dutch reports that will entail an amendment of the *Wet werk en bijstand* [Law on Labour and Social Benefits].

Publications

R van Oers, *Derserving Citizenship; Citizenship Tests in Germany, the Netherlands and the United Kingdom*, Diss. Radboud University, 1 March 2013, (Nijmegen: Wolf Legal Publishers, 2013)

R van Oers, *De Wet Inburgering en het Europees recht*, 4 *Asiel en Migrantenrecht* (2012-3) p. 131-135

J van der Winden, *Wijziging Wet inburgering*, 4 *Asiel en Migrantenrecht* (2012-2) p. 82-90

49 *Wet van 13 september 2012, tot wijziging van de Wi en enkele andere wetten in verband met de versterking van de eigen verantwoordelijkheid van de inburgeringsplichtige* [Act of 13 September 2012 amending the Integration Act and some other Acts concerning the Strengthening of Own Responsibility of Compulsory Integrators], *Staatsblad* 2012, 430 and (entry into force) 519 and *Besluit van 25 september 2012 tot wijziging van het Besluit inburgering en enkele andere besluiten in verband met de versterking van de eigen verantwoordelijkheid van de inburgeringsplichtige* [Decision of 25 September 2012 to amend the Integration Decision and some other Decisions concerning the Strengthening of Own Responsibility of Compulsory Integrators], *Staatsblad* 2012, 432 and (entry into force), *Staatsblad* 2012, 519.

50 *Tweede Kamer* 2012-2013, 32 824, No. 7, *Brief van de Minister van Sociale Zaken en Werkgelegenheid aan de voorzitter van de Tweede Kamer der Staten-Generaal, Integratiebeleid* [Letter sent by the Minister of Social Affairs and Employment to the Chair of the Second Chamber, Integration Policy] p. 6.

51 *Ibidem*, p. 2 of the Annex 'Agenda Integration'.

3.2. *Immigration policies for third-country nationals and the Union preference principle*

In this sub-section there will be attention for the developments regarding forced and polygamous marriages and marriages in the third and fourth degree as well as the plans to amend the Dutch Nationality Code.

On 22 May 2012 the Legislative Division of the Council of State presented its opinion on the *Wet tegengaan huwelijksdwang* [Act Preventing Forced Marriages], which was put on a halt on 23 April 2012 following the resignation of the Rutte I government (see the 2009-2010; 2010-2011 and 2011-2012 Dutch reports).⁵² The Act aims at reducing forced marriages by prohibiting marriages between relations in the 3rd and 4th degree (so-called: Niece-nephew/cousin-marriages); will reduce the possibilities to recognise polygamous marriages and, more generally, will make it more complicated to have a marriage convened abroad recognised. Concerns were voiced by the Legislative Division of the Council of State regarding the justification to not recognise marriages in the 3rd/4th degree. The Legislative Division of the Council of State feels that the effects of these measures do not justify a legislative measure of general nature and it is concerned about the victims of forced marriages. The Secretary of State for Security and Justice, however, does not share these concerns, arguing that most people will not declare under oath that the marriage was convened of their own will if this was not the case. He assumes that if both the marriage and the statement under oath are a result of force originating from family members, then Article 40 *Wetboek van Strafrecht* [Criminal Code] allows the Public Prosecutor to abstain from prosecution for perjury. The suggestions to provide further clarification in the Explanatory Memorandum regarding habitual residence and polygamous marriages; the undesirability of the annulment of a forced marriage for spouses in terms of social, financial and migration rights; and the implications of the amendment for migration rules are endorsed by the Secretary of State.⁵³ The proposed Act is tabled for discussion in the fall of 2013.

New rules on criminal prosecution of forced marriages, polygamous marriages and female genital mutilation will apply from 1 July 2013.⁵⁴ Initiatives to tackle the problem of

52 Advies Raad van State betreffende voorstel van wet tot wijziging van Boek 1 en Boek 10 van het Burgerlijk Wetboek betreffende de huwelijksleeftijd, de huwelijksbeletselen, de nietigverklaring van een huwelijk en de erkenning van in het buitenland gesloten huwelijken (Wet tegengaan huwelijksdwang) [Advice Council of State on the proposed act to amend Book 1 and Book 10 of the Civil Code regarding marriage age, marriage impediments, annulment of marriage and recognition of marriages convened abroad], 22 May 2012, *Staatscourant* 7 December 2012, No. 25196.

53 Nader Rapport inzake Wijziging in Boek 1 en Boek 10 van het Burgerlijk Wetboek betreffende de huwelijksleeftijd, de huwelijksbeletselen, de nietigverklaring van een huwelijk en de erkenning van in het buitenland gesloten huwelijken (Wet tegengaan huwelijksdwang) [Supplementary report on the Amendment of Book 1 and Book 10 of the Civil Code regarding marriage age, marriage impediments, annulment of marriage and recognition of marriages convened abroad] 20 November 2012, *Staatscourant* 7 December 2012, No. 25196.

54 *Wet van 7 maart 2013 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en het Wetboek van Strafrecht BES met het oog op de verruiming van de mogelijkheden tot strafrechtelijke aanpak van huwelijksdwang, polygamie en vrouwelijke genitale verminking* [Act of 7 March 2013 amending the Criminal Code, the Procedural Criminal Code and the Criminal Code BES to extend the Possibilities to Penalise Forced Marriages, Polygamous Marriages and Female Mutilation] *Staatsblad* 2013, 95. Besluit van 14 mei 2013 tot vaststelling van het tijdstip van inwerkingtreding van de wet van 7 maart 2013 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en het Wetboek van Strafrecht BES met het oog op de verruiming van de mogelijkheden tot strafrechtelijke aanpak van huwelijksdwang, polygamie en vrouwelijke genitale verminking (Stb. 2013, 95) [Decision of 14 May 2013 establishing the moment of entry into force of the Act of 7 March 2013 amending the Criminal Code the Criminal Procedures Act and the Criminal Code BES to increase the criminal possibilities to combat situations of forced marriages, polygamy and female genital mutilation (Stb. 2013, 95), *Staatsblad* 2013, 187.

forced marriages, in particular a holistic approach, were communicated to the Chair of the Second Chamber by the Minister for Social Affairs and Employment on 6 June 2013.⁵⁵

A legislative proposal to amend the *Rijkswet op het Nederlandschap* [Statute on Dutch Nationality] was presented on 14 March 2012.⁵⁶ The proposal, that was withdrawn on 27 November 2012,⁵⁷ would have made it more difficult to obtain Dutch nationality. Amendments in the proposal included: a tightening of the obligation to denounce former nationality, the introduction of a language requirement for optants; a five year residence condition (currently three) for couples (both married and cohabiting); a public policy condition for 12-15 year olds; and a financial means condition. A new proposal to amend this act is forthcoming as the Rutte II Cabinet has plans to change the five year residence condition into a seven year residence condition.⁵⁸

Literature

G.-R. de Groot, *Wijzigingsvoorstel Rijkswet op het Nederlandschap, 3 Asiel&Migrantenrecht* (2012-4) pp. 180-188

3.3. Return of nationals to new EU Member States

The efforts to increase the number of EU-citizens who rely on benefits or are habitual offenders, reported in previous years are still ongoing. The data available do not always distinguish EU-10 nationals from other EU citizens. 2011 saw 60 cases in which residence permission was withdrawn following unreasonable reliance on social benefits. Though reliance on social facilities may also justify termination of residence permission from 1 January 2012, there are no cases reported where this has been a justification to terminate residence permission. Voluntary return of homeless EU-citizens to the CEE Member States has been realised with the assistance of the *Stichting Barka* by the Amsterdam, The Hague and Utrecht local authorities in over a hundred cases. Local authorities of other municipalities, institutions and police forces have shown interest in this cooperation and have contacted the *Stichting Barka*.⁵⁹

A letter sent to the Chair of the Second Chamber by the Minister for Social Affairs and Employment dated 28 August 2012 provides the following information on return measures conducted against EU-citizens.⁶⁰ Entry bans were issued in 230 cases in 2011 of which it is

55 Tweede Kamer 2012-2013, 32 175, No. 50, *Brief van de Minister van Sociale Zaken en Werkgelegenheid aan de voorzitter van de Tweede Kamer der Staten-Generaal* [Letter sent by the Minister for Social Affairs and Employment to the Chair of the Second Chamber] 6 June 2013.

56 Tweede Kamer 2011-2012, , 33 201 (R 1977) nr. 1, *Wijziging van de Rijkswet op het Nederlandschap ter aanscherping van de voorwaarden voor verkrijging en verlening van het Nederlandschap* [Amendment of the State Act on Dutch Nationality to tightening the conditions for acquisition and the Granting of Dutch Nationality].

57 Tweede Kamer 2012-2013, 33410, nr. 68, *Brief van de Minister President, Minister Van Algemene Zaken* [Letter sent by the Minister President. Minister of General Affairs].

58 Tweede Kamer 2012-2013, 33201 (R1977) nr. 11, *Brief aan de voorzitter van de Tweede Kamer houdende intrekking van het Wetsvoorstel Wijziging van de Rijkswet op het Nederlandschap ter aanscherping van de voorwaarden voor verkrijging en verlening van het Nederlandschap* [Letter to the Chair of the Second Chamber revoking the Proposal to amend the Statute on Dutch Nationality to tighten up the conditions to acquire and to grant Dutch Nationality].

59 Brief aan de Voorzitter van de Tweede Kamer der Staten-Generaal van 28 augustus 2012, betreffende Voortgang maatregelen EU-arbeidsmigratie [Letter to the Chair of the Second Chamber of 28 August 2012, concerning Progress measures EU-labour migration] Kenmerk: AV/SDA/2023/11488, p. 15-16.

60 *Ibidem*, p.16-17.

known that 140 people actually left the Netherlands. The first half of 2012 saw 190 return cases of which it is known that in a hundred cases the EU-citizen left the Netherlands. Nearly all known departures were forced departures and include expulsion measures directed against habitual re-offenders. Since February 2012 the municipalities of Amsterdam, The Hague and Rotterdam, in cooperation with the Home Ministry and the Immigration Police, have started to reduce nuisance caused by EU-citizens who are frequently in contact with the local police authorities for disrupting public order by committing criminal offences begging and public drunkenness. As the re-offenders do not have a known place of residence it is proving difficult to apply the rules in the Citizens Directive to them as they are proving hard to trace. In the period February 2012-July 2012 residence permission was withdrawn in 30 cases.

Two cases concerning expulsion measures against CEEC-8 nationals, who had committed multiple light criminal offences, in particular shop lifting, have been found. In both cases the courts referred to the Commission's 2009 guidelines and both found that the decision to expel a national from Poland respectively Letland was insufficiently justified, in particular the nature of the damage caused by the criminal offender.⁶¹

4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED

Equal Treatment Commission and National Ombudsman. Decisions of both organizations are not legally binding.

On 2 October 2012 the Equal Treatment Commission has become part of the Human Rights Board (*College voor de Rechten van de Mens*) See <http://www.mensenrechten.nl/>

5. SEMINARS, REPORTS AND ARTICLES

On 15-16 November 2012, the Centre for Migration Law of Radboud University Nijmegen organized the Network's annual conference in Valletta, Malta. The presentations have been published on the website of the CMR: <http://www.ru.nl/law/cmr/projects/fmow-2/annual-conference/>

All relevant reports and articles are mentioned in the other chapters of this report.

61 Rechtbank 's-Gravenhage zp Haarlem, 15 February 2013, AWB 12/19811, LJN: CA1559 and *ibidem* zp Amsterdam, 13 March 2013, AWB 12/28858, LJN: BZ6327.