

REPORT
on the Free Movement of Workers
in Denmark in 2009-2010

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Chapter I

The Worker: Entry, Residence, Departure and Remedies

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

Compared to last year's report, no amendments have been made pertaining to the transposition of the specific provisions of Directive 2004/38.

The Aliens Act¹ applies to EU/EEA citizens both regarding general and specific sections. However, the provisions of the Act apply to EU/EEA citizens only to the extent this is in accordance with EU law, cf. Section 2 (3) emphasizing and highlighting the prevalence of EU law in case of any conflict or divergence with the Act.

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

Art. 7 (1a): Right of residence for more than 3 months for workers and self-employed

Texts in force

Laws

Aliens Act Section 2 (1) lays down the basic rule on the right to enter and reside for up to 3 months or – if seeking work – up to 6 months, which applies to EU citizens as well as members of their families, cf. Section 2 (2). As for EU citizens, this rule is modified by the EU Residence Order Section 3, see below.

Administrative rules

EU Residence Order Section 3 (1) states that an EU citizen have a *right to reside* in Denmark for *more than the 3/6 months* mentioned in Aliens Act Section 2 (1) when the person has *taken up employment* in Denmark or is *self-employed*, including being a service provider, which appears to be in accordance with Art. 7 (1a).

1 Consolidation Act No. 785 of 10 August 2009 and amendment.

2 Executive Order No. 322 of 21 April 2009.

Art. 7 (3a-d): Retention of the status of the worker or self-employed

Texts in force

Administrative rules

EU Residence Order Section 3 (2) states that an EU citizen who has been encompassed by Section 3 (1), but is no longer active on the labour market, preserves his/her status as a worker or self employed person, provided that the EU citizen

- is temporarily disabled due to sickness or accident, cf. Section 3 (2) (i), which appears to be in accordance with Art. 7 (3a);
- is involuntarily unemployed upon paid occupation for more than 1 year, which is documented, and has entered an employment agency as seeking work, cf. Section 3 (2) (ii), which appears to be in accordance with Art. 7 (3b);
- has involuntarily lost his/her job within the first 12 months, which is documented, has entered an employment agency as seeking work or is involuntarily unemployed upon the expiration of a fixed-term employment contract of less than 1 year duration, cf. Section 3 (2) (iii). This group of EU citizens preserves the status as an employee or self employed person for 6 months, cf. Section 3 (3), which appears to be in accordance with Art. 7 (3c); or
- commences a business education related to the person's former occupation or is involuntarily unemployed and commences any form of business education, cf. Section 3 (2) (iv), which appears to be in accordance with Art. 7 (3d).

Art. 8 (3a): Administrative formalities for EU citizens

Texts in force

Administrative rules

EU Residence Order Section 22 states that the issuance of a *registration certificate* to an EU citizen encompassed by Section 3 (worker, self-employed or service provider) may be conditioned by *valid identity card* or *passport* and either *documentation of self-employment* in Denmark or a *declaration from his/her employer* that he/she has paid employment in Denmark, which appears to be in accordance with Art. 8 (3a).

Art. 14 (4a-b): Retention of the right to reside

Texts in force

Administrative rules

Apart from the expulsion provisions relating to criminal acts and public order (see Section 3 below), there is no legal basis for expulsion measures concerning EU citizens who are workers or self-employed persons. For jobseekers, the same is the case as long as they have actual chances to obtain employment (see Section 2 below). Thus, the Danish rules and practices on retention of residence right appear to be in accordance with Art. 14 (4).

Art. 17: Right of permanent residence for persons who are no longer working*Texts in force**Administrative rules*

EU Residence Order Section 20 states that persons with a right of residence in Denmark under Sections 7, 12 or 14 (3) have a *right to permanent residence without satisfying any further conditions*.³

EU Residence Order Section 7 concerns *retired persons, etc.* and corresponds Art. 17 (1) (a-c) and 17 (2):

- Section 7 (1) (i) concerns an EU citizen who *ceases paid employment or self-employment* after having reached the age of entitlement to *old-age pension* as fixed in the Old-Age Pension Act⁴ or who ceases paid employment and retires on *anticipatory pension*, provided that the EU citizen has had *business activity* in Denmark for at least the *previous 12 months* and has *resided* in Denmark continuously for at least the *previous 3 years*. Hence, Section 7 (1) (i), cf. Section 20, appears to be in accordance with Art. 17 (1) (a).
- Section 7 (1) (ii) concerns an EU citizen who *ceases paid employment or self-employment* as a result of *permanent incapacity* to work, provided that the EU citizen has *resided* in Denmark continuously for at least the *previous 2 years*. *No condition* is imposed as to the *residence period* if such incapacity to work is the result of an *accident at work* or an *occupational illness* entitling to *permanent benefits* payable in whole or in part by a Danish authority. Hence, Section 7 (1) (ii), cf. Section 20, appears to be in accordance with Art. 17 (1) (b).
- Section 7 (1) (iii) concerns an EU citizen who works as an *employee or self-employed* in *another Member State* while *retaining residence in Denmark* to which the *EU citizen return*, as a rule, at least *once a week*, provided the EU citizen has had *business activity* and has *resided* in Denmark continuously for at least the *previous 3 years*.

Section 7 (3) states that as for an EU citizen falling within Section 7 (1) (iii), *periods of paid employment or self-employment* completed in *another Member States* are considered as having been *completed in Denmark* for the purpose of acquisition of the rights mentioned in subsection (1) (i) and (ii). Hence, Section 7 (1) (iii), cf. Section 7 (3), cf. Section 20, appears to be in accordance with Art. 17 (1) (c) first and second part.

- Section 7 (2) concerns *periods of involuntary unemployment* duly recorded by the competent office of the Danish Employment Service and *periods without work* over which the EU citizen *has no control* as well as *absence from work* or *cessation of work* due to *illness or accident*. These periods are considered as *periods of employment*. Hence, Section 7 (2), cf. Section 20, appears to be in accordance with Art. 17 (1) (c) third part.
- Section 7 (4) concerns an EU citizen's *spouse*. The provision states that in the cases referred to in Section 7 (1) (i) and (ii), *no condition* is imposed as to the *residence period* or the *period of business activity* if the employee's or the self-employed person's *spouse* has *Danish na-*

3 Section 20 is a modification to Section 19 on right of permanent residence for EU citizens who have lawfully resided in Denmark for a continuous period of five years, cf. Directive 2004/38 Art. 16.

4 Consolidation Act No. 982 of 2 October 2009 and amendment.

tionality or has *lost it by marriage* to that person. The provision only refers to the EU citizen's *spouse* and does not refer to the person's *partner* as opposed to Art. 17 (2). However, Section 2 (2) states that a *registered partner* is treated as the *equivalent of a spouse*.⁵ Furthermore, Section 16 (1) states that the provisions on spouses apply correspondingly in cases where a person over 18 years of age cohabits at a shared residence in *regular cohabitation of prolonged duration* with a principal person over 18 years of age.⁶ Hence, Section 7 (4), cf. Section 20, cf. Section 2 (2), appears to be in accordance with Art. 17 (2), cf. Art. 3 (2) (b).

EU Residence Order Section 12 concerns *family members of retired persons, etc.* and corresponds to Art. 17 (3):

- Section 12 (1) concerns family members of an *EU citizen falling within Section 7* (i.e. has a right of permanent residence, cf. Section 20; see above) who *accompany or join* the EU citizen. As described in detail in the previous report, the requirement of previous lawful residence in an EU/EEA Member State imposed on the family member was abolished as a result of the ECJ judgment in *Metock*,⁷ see more below Chapter II.⁸
- Section 12 (2) makes it a condition for the right of residence under Section 12 (1) for family members falling within Section 2 (1) (iii-v), unless exceptional reasons make it inappropriate, that the EU citizen has *such income or means* at his/her disposal for the *support of him/herself and the family member* that the persons in question are presumed, upon specific assessment, *not to become a burden* on the public authorities.

Family members falling within Section 2 (iii) are the principal person's other dependent descendant and any other descendants of the principal person's spouse who are dependent on the principal person, cf. Section 2 (1) (iii) (cf. Art. 2 (2) (c) second part), relatives in the ascending line of either the principal person or the principal person's spouse if they are dependent on the principal person, cf. Section 2 (1) (iv) (cf. Art. 2 (2) (d)) and/or a principal person's other relatives if they are dependent on the principal person or are living under the roof of the principal person in the country from where they come, cf. Section 2 (1) (v) (cf. Art. 3 (2) (a) first part). Hence, Section 12 (2), cf. Section 20, appears to be in accordance with Art. 17 (3), cf. Art. 14 (2), Art. 7 (1) (b), cf. Art. 7 (2), cf. Art. 8 (4).

EU Residence Order Section 14 concerns *family members with a continued right of residence* after the principal person's *death or departure* and corresponds to Art. 17 (4).

- Section 14 (3) concerns *family members'* right to *permanents residence*, cf. Section 20, when the family member has a right of residence under Sections 8-11,⁹ when the principal fell within Section 3 (1)¹⁰ and when
 - o the principal person had resided in Denmark for a *continuous* period of at least *2 years* at his/her death;

5 This already follows to some extent from the Act on Registered Partnership, Consolidation Act No. 938 of 10 October 2005 Section 3.

6 Section 16 (2) makes it a condition that the principal person undertakes to support the cohabitant.

7 ECJ judgment of 25 July 2008 *Metock* (C-127/08).

8 Executive Order No. 984 of 2 October 2008 amending the former version of the EU Residence Order (No. 300 of 29 April 2008).

9 Family members of workers or self-employed persons, family members of seconded persons, family members of students and family members of persons with sufficient means, respectively.

10 An EU national who is a worker, self-employed person, including a service provider.

- the death was due to an *accident at work* or an *occupational illness*; or
- the family member was the principal person's *spouse* and *lost his/her Danish nationality* by *marriage* to the principal person

Hence, Section 14 (3), cf. Section 20, appears to be in accordance with Art. 17 (4).

Art. 24 (2): Equal treatment

Texts in force

Administrative rules

As described below in Chapter IV.2.2, first-time jobseeking EU citizens are not entitled to cash benefits under the *Act on Active Social Policy*¹¹, apart from costs related to return to their home country. EU citizens and their family members with residence right under EU law, on the other hand, are entitled to such benefits on equal terms with Danish citizens.¹²

Whereas these rules appear to be in accordance Arts. 14 and 27 of Directive 2004/38, the compatibility of the general exclusion from cash benefits under the Act on Active Social Policy with Art. 24 (2) may be questioned against the background of recent ECJ case law, cf. Chapter IV.2.2 and Chapter IX below.

2. SITUATION OF JOBSEEKERS

If seeking job, EU citizens have a right to residence in Denmark for up to 6 months without residence certificates/permits, cf. Aliens Act Section 2 (1) and EU Residence Order Section 3 (1). The EU citizen must be able to present ID or passport on the police's request.

Within this period the EU citizen has to supply for him-/herself and may only be afforded social assistance for the return journey. Hence, an EU citizen who is a first-time jobseeker does not have access to social assistance or starting assistance.¹³ The reasoning behind this is the view that social assistance and starting assistance are not support offered specifically for job seeking.¹⁴ However, the EU citizen may enter an unemployment fund.¹⁵

If the EU citizen can substantiate that he/she continues to seek job and has actual chances to obtain employment upon the expiration of the 6 months time limit, he/she may not be sent out of the country.¹⁶

11 Consolidation Act No. 946 of 1 October 2009, Section 12 a.

12 *Ibid.*, Section 3 (2).

13 See more below Chapter IV.2.2

14 Cf. Guidance No. 33 of 4 May 2004 to Section 12 a in the Act on Active Social Policy, para. 1.1, and Guidance No. 19 of 4 April 2008 on EU/EEA citizen's access to social security and starting assistance, paras. 2.2.3 and 3.2.2.B, issued by The National Directorate of Labour, 'Arbejdsdirektoratet', a body under The Ministry of Employment, official website: www.adir.dk.

15 Cf. Consolidation Act No. 975 of 26 September 2008 and amendments, and Executive Order No. 1399 of 13 December 2006 on unemployment insurance for workers within EEA and additional countries, cf. Guidance No. 116 of 13 December 2006.

16 Cf. Guidance No. 33 of 4 May 2004 to Section 12 a in the Act on Active Social Policy, para. 1.1. note 1.

According to the EU Residence Order Section 21 and the webpage of the Regional State Administration,¹⁷ EU citizens with a right of time-limited residence shall apply for a registration certificate within 3 months of entry if the residence is expected to last for longer than 3 months.¹⁸

3. OTHER ISSUES OF CONCERN: EXPULSION OF EU CITIZENS

As mentioned in the previous report, a number of judicial decisions have been passed on the criteria for expelling EU citizens. The general expulsion provisions in the Aliens Act apply to EU citizens, yet with the modification that they must give deference to EU rules in case of any incompatibility, cf. Aliens Act Section 2 (3). Due to possible inconsistencies in expulsion practices in cases with shorter sentences in particular (unsuspended imprisonment up to 6 months), as alleged by some defence lawyers, the higher courts have in 2008-2009 examined various cases with more principled issues as mentioned below.

In an article published in the Danish journal *Juristen* in 2009, a public prosecutor Hjortenbergt addresses the practice on expulsion of EU citizens by the Danish courts in cases with shorter sentences in particular.¹⁹ Hjortenbergt deals with especially 2 of the higher cases mentioned below (UfR 2009.808H and 2009.813H) in which the Supreme Court has made an assessment of the importance of Directive 2004/38 in cases where the sentences imposed are unsuspended imprisonment up to 6 months. Also for the future, Hjortenbergt argues in his article, a decision on expulsion will be based on a *concrete, individual assessment* of the circumstances of the case, such as the defendant's personal situation. From the judgments, he concludes that crime committed by EU citizens in a *professional manner*, like other *organized* or *systematic* crime, such as crime committed by people with *previous sentences* for similar crimes, must be assumed to lead to expulsion, when the person in question has *no real attachment to Denmark*. While referring to the increment of crimes of enrichment of a somewhat professional character committed by citizens of the Central and Eastern European countries in Denmark, Hjortenbergt considers this practice to be in accordance with the purpose of the provisions of Directive 2004/38 providing enhanced protection against expulsion for (EU) workers and others of honest intentions in staying in Denmark.

In 2009-2010 this practice was upheld by the courts as described below. In general, the Courts first examines whether the conditions in Aliens Act on expulsion are satisfied, and secondly examines the matter of the compatibility of the expulsion with Directive 2004/38 Art. 33, cf. Art. 27 and 28. Not all of the published summaries of the judgments contain clear references to the EU rules on expulsion, yet making it questionable whether the EU rules have been observed in the given case. In general, however, it seems as if the Courts conduct a concrete, individual assessment of the given case and the level of threat to society constituted by the defendant, as required by the EU legislation and case-law on expulsion of EU citizens. Regarding the level

17 <http://www.statsforvaltning.dk/site.aspx?p=6028>, accessed on 16 March 2010.

18 Thus, there seems to be an inconsistency with the webpage of the Ministry of Refugee, Immigration and Integration, stating that an EU/EEA citizen seeking job must apply for a registration certificate under the EU/EEA Residence Order with the Regional State Administration if the person in question wishes to stay in Denmark for more than 6 months. The application has to be handed in within 6 months from entry, see http://www.nyidanmark.dk/en-us/coming_to_dk/eu_and_nordic_citizens/eu-eea_citizens/residence_in_denmark_for_union_citizens_and_eea_nationals.htm, accessed on 16 March 2010.

19 Cf. 'Udvisning af EU-borgere i sager, hvor der idømmes korterevarende fængselsstraffe HD af 29.12.2008 (U 2009.808 H og U 2009. 813 H)' by Jesper Hjortenbergt in *Juristen* No. 3, 2009.

of threat to society constituted by the defendant, however, it might be argued that the Courts apply a low threshold.

It should be noted that in all cases on expulsion and revocation of a residence certificate or residence permit Aliens Act Section 26 applies. According to Section 26, an assessment of the alien's personal situation, including his/her attachment to the Danish society, family members here, the length of the stay etc., must be made in order to evaluate whether the expulsion or revocation may be considered to be excessively burdensome, cf. ECHR Art. 8 and the principle of proportionality. Moreover, Aliens Act Section 32 (7) states that an entry prohibition imposed on an EU/EEA citizen may be lifted at a later date where exceptional reasons make it appropriate. Section 50 b provides an automatically review of expulsion decisions concerning EU/EEA citizens when the expulsion has not been effected within 2 years, cf. Section 49.²⁰

UfR 2008.1148H:

A Polish citizen was sentenced to 6 years imprisonment for smuggling 13 ton of hash to Denmark and permanently expelled.

Regarding the length of the defendant's stay, he had resided in Denmark for 6 years, legally for 4 years - upon deduction of the period of *previous imprisonment*, cf. Aliens Act Section 27 (5).²¹

Upon assessment of the defendant's personal situation, cf. Aliens Act Section 26 (1), including the facts that he *entered Denmark at the age of 36, kept in contact with his family and friends in Poland, was married to a Polish woman, also residing in Denmark and 2 young children living in Denmark* all having residence rights independent of the defendant, the High Court briefly referred to the 'EU rules' and found the defendant to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and hence to be expelled and prohibited entry permanently. The Supreme Court upheld the verdict.

UfR 2008.2079Ø:

A Spanish citizen was sentenced to 4 months of imprisonment for fraud and false report, expelled and prohibited entry for a period of 5 years.

Regarding the length of the defendant's stay, he had resided in Denmark for a period of approximately 2 years.

Upon assessment of the defendant's personal situation, cf. Aliens Act Section 26 (1), including *the amount and systematic character* of the crimes committed and the fact that he had *no attachment to Denmark*, the District Court expelled the defendant and prohibited him entry for a period of 5 years. The High Court upheld the verdict, referred to Directive 2004/38 Art. 27 (2), the preamble and practice from ECJ, cf. Aliens Act Section 2 (3), and added that *the professional behaviour* was found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

20 As described in previous reports, these provisions were introduced by Act No. 301 of 19 April 2006 and considered necessary in implementing Directive 2004/38 Art. 32 and 33, cf. See explanatory memorandum to Bill No. L 94/2005-2006, pp. 26, 31-32 and 38-39.

21 Contrary to the judgment in UfR 2009.581V mentioned below, the Court does not seem to consider whether deduction of previous imprisonment in the length of the defendant's stay pursuant to Aliens Act Section 27 (5) is in accordance with Directive 2004/38.

UfR 2009.581V:

A Slovakian citizen was sentenced to 4½ years imprisonment on the grounds of robbery and permanently expelled.

The defendant entered Denmark in 1996 and hence prior to Slovakia entering EU. However, the prosecutor declared that the defendant's situation should be evaluated as had Slovakia been a member of EU for his entire stay in Denmark. Regarding the length of the defendant's stay, he had resided in Denmark for more than 10 years. However, when deducting periods of previous imprisonment pursuant to Aliens Act Section 27 (5), he had resided in Denmark for less than 10 years. While referring to Directive 2004/38 Art. 28 (3) lit. a and Aliens Act Section 2 (3), the High Court stated that upon calculation of the period of residence under Art. 28 (3) lit. a, previous imprisonment was not to be deducted from the length of the stay. Furthermore, the Court stated that given the defendant had *resided in Denmark for more than 10 years*, an expulsion decision might be made only when based on imperative grounds of public security.

Upon assessment of the defendant's personal situation, cf. Aliens Act Section 26 (1), including the facts that the defendant *on more than one occasion had committed serious crime*, had *no attachment to or contact with his family in Slovakia*, *spoke very little Slovak* and *had 3 siblings residing in Denmark*, the High Court referred to Directive 2004/38 Art. 28 (3) lit. a, cf. Aliens Act Section 2 (3), and found the defendant to represent a present and sufficiently serious threat to the Danish public security to an extent requiring expulsion due to *imperative grounds of public security*. He was expelled and prohibited entry permanently.

UfR 2009.808H:

A British citizen was sentenced to 60 days imprisonment for violence or threat on violence by assaulting a bus driver. The defendant was not expelled.

Regarding the length of the defendant's stay, he had resided in Denmark for 3 years. Upon assessment of the defendant's personal situation, cf. Aliens Act Section 26 (1), including the facts that he was issued with an EU residence permit²² valid until 2010, was *seeking job*, was to *commence Danish course* and had *his parents and older brother residing in Denmark*, the High Court referred to Directive 2004/38 Art. 27, 28 and 33, cf. Aliens Act Section 2 (3), and found the defendant to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (i.e. public transportation) and hence to be expelled and prohibited entry for a period of 5 years. However, the Supreme Court reversed the decision of the High Court as the Court found the balancing pursuant to Section 26 (1) of the defendant's *attachment to Denmark* on the one hand and the character of the *spontaneous and isolated* crime on the other hand to lead the Court to establish the existence of considerations decisively against expulsion. In addition, the Supreme Court noted that expulsion would have been *against the principle of proportionality* in Art. 27 (2) in conjunction with Art. 28 (1), also.

UfR 2009.813H:

A Lithuanian citizen was sentenced to 30 days imprisonment for shoplifting and expelled from Denmark prohibited entry for 5 years.

Upon assessment of the defendant's personal situation, cf. Aliens Act Section 26 (1), including the facts that the crime was committed the same day the defendant entered Denmark and the *professional character* of the theft, the District Court found the defendant to represent a genuine,

22 Judgment's wording.

present and sufficiently serious threat affecting one of the fundamental interests of society and hence to be expelled and prohibited to enter Denmark for 5 years. The High Court and Supreme Court upheld the verdict, the Supreme Court referring to Directive 2004/38 Art. 27, 28 and 33, cf. Aliens Act Section 2 (3), adding the fact that the defendant had *previous convictions* in Lithuania and had *no attachment to Denmark*.

UfR2009.1137Ø:

A Lithuanian citizen was sentenced twice to 3 months imprisonment for violence and expelled with entry prohibition for 3 years.

Regarding the defendant's personal situation, he entered Denmark in 2008 with the purpose of education. Due to the fact that the defendant had hit the injured party in connection with a discussion and only once, the District Court did not find the presence of the defendant to represent a genuine, present and sufficiently serious threat to public order, despite of the fact that the defendant had a previous conviction for violence. The High Court reversed the verdict. On the compatibility of the expulsion with Art. 33, cf. Art. 27 and 28, the High Court found that the fact that the defendant during his *brief stay in Denmark twice committed violence* caused his behaviour to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Court further noted that the defendant had *no real attachment to Denmark* and thus, that the expulsion and entry prohibition for 3 years was not incompatible with the principle of proportionality.

UfR2009.2603Ø:

Two Slovakian citizens were sentenced to 2 years imprisonment for robbery, leaving a person helpless (resulting in his death) and attempt to theft and fraud. The defendants were expelled and prohibited entry permanently.

Regarding the defendants' personal situation, these resided in Slovakia and one of the defendants had friends in Denmark. Upon assessment of the defendants' personal situation, cf. Aliens Act Section 26 (1), the District Court briefly stated that Section 26 did not hinder expulsion. The District Court furthermore stated that the crime committed was of such *professional and systematic character* representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

The High Court upheld the verdict, adding the fact that the defendants had *no attachment to Denmark* and thus that expulsion with permanent entry prohibition was not incompatible with the principle of proportionality.

UfR2009.2834Ø:

A Lithuanian citizen was sentenced to 30 days imprisonment for violence committed against an airport policeman. The defendant was not expelled.

Regarding the defendant's personal situation, he lived in Estonia and worked on a Danish ship. The District Court did not find sufficient basis for expulsion as this would be *particularly burdensome* to the defendant's work, and as the defendant's behaviour *could not be characterized* as representing a genuine, present and sufficiently serious threat to public order and security.

On the matter of expulsion, the High Court upheld the verdict, noting that the defendant was a sailor and in transit in Denmark due to discharge of the Danish ship. The crime was committed as a *spontaneous reaction* and the exercise of violence was of *limited extent*. On this background and referring to the *inconvenience to his work* if expelled, the High Court found expulsion to be

incompatible with Directive 2004/38 Art. 33, cf. Art. 27 (2) and (28 (1), cf. Aliens Act Section 2 (3).

UfR 2010.250H:

Two Polish citizens were sentenced to 60 days imprisonment for theft of a lady's handbag at a supermarket and two attempts to similar thefts and were expelled from Denmark prohibited entry for 5 years.

Upon the matter of expulsion, the District Court found expulsion to be justified, despite of the defendants being EU citizens. The reasoning behind this view was the fact that the defendants *jointly* and by *prior agreement* committed the crimes *immediately upon arrival to Denmark*. The Court thus found the defendants to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

The High Court upheld the verdict, with one dissenting opinion, however, finding expulsion to be incompatible with the narrow interpretation of the criteria of expulsion as formulated by the ECJ.

The Supreme Court upheld the verdict, adding the fact that the defendants were sentenced to unsuspended imprisonment for committing the crimes *jointly* and by *prior agreement*. Thus, the Supreme Court concurred in such crime representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, cf. Art. 27 (2). The Court furthermore noted that since the defendants had *no attachment* to Denmark, expulsion was not incompatible with the principle of proportionality in Art. 27 (2) in conjunction with Art. 28 (1).

UfR 2010.1268Ø:

A Romanian citizen was sentenced to 30 days of imprisonment for fraud and attempt of fraud and expelled from Denmark prohibited entry for 6 years. The loss caused by the fraud amounted to 1,245 DKK (app. 165 Euro) and the possible loss of the attempted fraud amounted to 623 DKK (app. 83 Euro). The defendant was previously convicted in Denmark for document forgery in 2009 and sentenced to 40 days of imprisonment.

Regarding the defendant's personal situation, cf. Aliens Act Section 26 (1), he had resided in Denmark since March 2009. In April 2009 he met his partner with whom he had resided ever since. Regarding his job-situation, he stated that he was seeking job on a weekly basis through the Danish jobcentre.

Upon the matter of expulsion, the District Court stated that neither Aliens Act Section 26 nor the rules on EU citizens hindered expulsion. The District Court furthermore stated that the fraud was committed in a *professional manner* and concerned a *not insignificant amount*. Thus, the court concluded that the crime committed represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that expulsion was compatible with Directive 2004/38 Art. 33, cf. Art. 27 and 28, cf. Aliens Act Section 2 (3). The High Court upheld the verdict, adding that the conditions in Aliens Act for expulsion were satisfied, leaving the matter of the compatibility of the expulsion with Directive 2004/38 Art. 33, cf. Art. 27 and 28, relevant. The High Court further noted that the defendant was sentenced to unsuspended imprisonment for fraud. Thus, the Court concurred with the District Court in the crime committed representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, cf. Art. 27 (2), which – according to the Court - was supported by the fact that the defendant was *previously sentenced* to unsuspended imprisonment for document forgery. Upon the matter of proportionality, the High Court stated that the *defendant's stay in Denmark was*

brief and his attachment to Denmark limited, thus concluding that the expulsion was not incompatible with the principle of proportionality in Art. 27 (2) in conjunction with Art. 28 (1).

Recent legal literature

Henrik Thomassen and Pernille Breinholdt Mikkelsen, 'Indrejse og ophold for udlændinge omfattet af EU-reglerne,' in L.B. Christensen et al., *Udlændingeret*, 3. edition, Copenhagen 2006, pp. 239-285.

Jesper Hjortenberg, 'Udvisning af EU-borgere i sager, hvor der idømmes korterevarende fængselsstraffe HD af 29.12.2008 (U 2009.808 H og U 2009. 813 H)' in *Juristen* No. 3, 2009.

Karsten Engsig Sørensen and Poul Runge Nielsen, *EU-Retten*, 4. edition, Copenhagen 2008.

Chapter II

Members of the Worker's Family

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

Texts in force

According to Section 2 (1) of the EU Residence Order, family members encompass the following categories of persons:

- the principal person's²³ spouse
- the principal person's descendants under 21 years of age and the descendants under 21 years of age of the principal person's spouse;
- the principal person's other dependent descendants and any other descendants of the principal person's spouse who are dependent on the principal person;
- relatives in the ascending line of either the principal person or the principal person's spouse if they are dependent on the principal person;
- the principal person's other relatives if they are dependent on the principal person or are living under the roof of the principal person in the country from where they come; or
- the principal person's other family members where serious health grounds strictly require the personal care of the family members by the principal person.

A registered partner is treated as the equivalent of a spouse, cf. Section 2 (2). In addition, Section 16 (1) stipulates that the provisions of the EU Residence Order on spouses apply correspondingly in cases where a person above 18 years of age cohabits at a shared residence in regular cohabitation of prolonged duration with a principal person above 18 years of age. It is a precondition for the right of residence of a cohabitant that the principal person undertakes to support the applicant, cf. Section 16 (2). These rules concerning cohabiting partners are identical to those applying to the right of Danish citizens to family reunification.²⁴

As regards *reverse discrimination*, various issues have been persistently raised in recent years concerning the rules on residence right for third-country family members of Danish citizens, as well as their implementation in administrative practice. In particular, there have been contentious issues concerning the *personal scope* of application of the EU rules concerning third-country spouses of Danish citizens. The scope was previously limited to Danes who had been *economically active* in another Member State, i.e. having resided there as workers, service providers or self-employed persons, or as retired from such activity. On the contrary, students and persons with sufficient means were not entitled to bring their spouses with them back to Denmark upon stay in another EU Member State.

As part of the political agreement of 22 September 2008 on the implementation of the EU rules on free movement in light of the *Metock* judgment,²⁵ it was decided to widen the personal

23 A principal person is defined as an EU national who has an independent right of residence in Denmark under the EU rules, cf. Section 1 (1).

24 Cf. Section 9 (1) (i) and (3) of the Aliens Act.

25 ECJ judgment of 25 July 2008 *Metock* (C-127/08). The political agreement resulted in Executive Order No. 984 of 2 October 2008 amending the 2008 EU Residence Order (No. 300 of 29 April 2008). Detailed guidelines on the

scope of application of these rules concerning third-country spouses of Danish citizens. Accordingly, the EU rules can now be invoked by a Danish citizen who has resided in another Member State as either worker, self-employed person, service provider, as a retired worker or self-employed or service provider, or as a seconded person, student or person with sufficient means.²⁶ Thus, although this issue was not expressly dealt with in the *Metock* judgment, the adjustment of administrative practice in this regard was decided as an indirect consequence of the judgment, probably in order to prevent further political and legal controversy over the Danish implementation of the EU rules pertaining to the exercise of free movement rights by citizens upon return from another Member State.

Previous practice also included a requirement that the Danish citizen be *economically active upon return* to Denmark, or returning to Denmark for retirement upon such activity in the host Member State. As a result of the ECJ judgment in *Eind*²⁷ the Ministry of Refugee, Immigration and Integration Affairs adopted new guidelines according to which the returning Danish citizen will be entitled to bring his or her family back to Denmark even if he or she is not employed or carrying out other economic activity at the time of return from abroad.²⁸

2. ENTRY AND RESIDENCE RIGHTS

Texts in force

Sections 8-12 of the EU Residence Order lay down specific rules on residence rights for family members of workers, self-employed persons, seconded persons, students, persons with sufficient means, and retired persons, respectively. Sections 14 and 15 provide for the continued right of residence for family members after the principal person's death or departure, and upon dissolution of the marriage. In contrast to previous versions of the Order, since 2008 the EU Residence Order also includes a specific provision on residence right for family members of Danish citizens, cf. Section 13 stating that, to the extent to which it follows from EU law, family members of a Danish national have a right of residence in Denmark extending for longer than the three- or six-month periods following from section 2(1) and (2) of the Aliens Act.

right to family reunification under EU law, and on the control measures mentioned below in Section 2, were laid down in Information to the Immigration Service about amendments of the EU Residence Order and of practice as a consequence of the *Metock* judgment, Ministry of Refugee, Immigration and Integration Affairs, 2 October 2008.

26 Internal guidelines on the processing of applications for family reunification under the EU rules where the principal person is a Danish citizen, Danish Immigration Service, Family Reunification Information No. 4/10, 29 April 2010, para. 4.1.2. See also official information from the Ministry of Refugee, Immigration and Integration Affairs and the Danish Immigration Service, accessible at www.nyidanmark.dk/en-us/coming_to_dk/eu_and_nordic_citizens/eu-eea_citizens/family_reunification_in_denmark (family members of EU citizens generally) and www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/family_reunification_under_eu-law (family members of Danish citizens).

27 ECJ judgment of 11 December 2007 *Eind* (C-291/05).

28 Press release of 15 January 2008 from the Ministry of Refugee, Immigration and Integration Affairs. According to the Danish Ministry of Employment (letter of 27 February 2008 to the European Commission with remarks to the FMoW Report for 2006, p. 4), the change of administrative practice took place already on 11 December 2007. From the transcript of the hearing of the Minister of Refugee, Immigration and Integration Affairs by the Parliament Committee on Aliens and Integration (15 January 2008, question A) it may be assumed that the administrative practice would be changed as of that date, while no concrete cases raising this issue were known to be pending at the time. According to a memorandum of 10 April 2008 from the Ministry of Refugee, Immigration and Integration Affairs, the change of practice would have legal effect as of 11 December 2007, whereas decisions made before that date were not to be re-examined on the authorities' own motion.

Detailed rules on documentation and other requirements for the issuance of registration certificates and residence cards have been laid down in Sections 21-29 of the EU Residence Order.

As a result of the ECJ judgment in *Metock*,²⁹ the requirement of *previous lawful residence* in an EU/EEA Member State was abolished. Instead, various measures were taken in order to prevent abuse of the EU rules on residence rights, in particular those concerning family members. This decision was implemented by the amendment of the EU Residence Order, inserting provisions on the refusal of registration certificates and residence cards on grounds of public policy, public security or public health, or in case of abuse of rights or fraud (Section 22 (5), Section 23 (2), and Section 26 (1) *in fine*, and Section 26 (3), respectively).

Furthermore, it has become a precondition for the issuance of the family member's registration certificate or residence card that both spouses or partners declare that the purpose of contracting the marriage or the partnership or establishing cohabitation was not solely to obtain a separate basis of residence for the person applying for the residence document (Section 23 (1) and Section 26 (2), respectively).

A declaration is also required that the principal person has established genuine and effective residence in Denmark. If there are reasons to assume abuse of rights, evidence of genuine and effective residence must be submitted by the principal person (Section 23 (1) *in fine* and Section 26 (2) *in fine*).

As a particular measure to prevent abuse by Danish citizens upon return from another Member State, it is stipulated that the principal person applying for registration certificate or residence card for family members must solemnly declare to have established *genuine and effective residence* in the host country. If there are reasons to assume that this is or was not the case, the Danish citizen is required to submit evidence of the residence established in the other Member State. A non-exhaustive list of possible documentation has been laid down in administrative guidelines, according to which the evidence will have to be assessed on an individual basis, so that the requirement should not become unreasonable or insurmountable.³⁰ In practice, however, the Danish Immigration Service appears to sometimes request forms of documentation that it will hardly be realistic for the principal person to deliver retroactively, such as evidence of the purchase of daily necessities in the host country.³¹

Even while this may ultimately not be a strictly required means of evidence in order to have the registration certificate or residence card issued, it may nonetheless be able to bring applicants under the impression that such forms of documentation are necessary, so that they cannot meet the requirements. This may cause particular problems in cases where the period of residence in another Member State dates several years back, and the relevant documentation may therefore no longer be available.³² Such cases are pending due to the fact that the personal scope of application of the EU rules concerning third-country spouses was widened as part of the implementation of

29 ECJ judgment of 25 July 2008 *Metock* (C-127/08).

30 Internal guidelines on the processing of applications for family reunification under the EU rules where the principal person is a Danish citizen, Danish Immigration Service, Family Reunification Information No. 4/10, 29 April 2010, para. 4.1.4.

31 Letter of 21 April 2010 from the Danish Immigration Service to the third-country spouse of a Danish citizen, resident in Sweden. Such a requirement could arguably raise further issues concerning the free movement of goods between the host country and the Member State in which the citizen is working, as well as issues pertaining to the protection of privacy.

32 An example of this is a letter of 4 June 2010 from the Danish Immigration Service to the third-country spouse of a Danish citizen who claims residence in Sweden from 2002 to 2004 as a basis for residence right for his spouse.

the *Metock* judgment in 2008 (see above in Section 1). Danish citizens who were precluded from obtaining residence for their family members upon return from another Member State under previous administrative practice in possible violation of EU law, may now have difficulties in providing sufficient evidence if they manage to get their cases reopened in accordance with the adjusted practice. Thus, the administrative practice pertaining to the criteria for reconsidering such cases, as well as the requirements of evidence for past residence in other Member States, may raise issues to be dealt with in future FMoW Reports.

3. ACCESS TO WORK

Texts in force

According to Section 14 (1) (ii) of the Aliens Act, aliens who are encompassed by the EU free movement rules, as described in Sections 2 and 6 of the Act, are exempt from the requirement of a work permit. While this exemption did not apply to EU-10 workers falling under the transitional rules, it is applicable to all EU workers since the abolishment of these rules as of 1 May 2009. Similarly, Section 18 of the EU Residence Order exempts from the requirement to hold a work permit all persons who have the right of residence under the EU Residence Order.

4. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

Texts in force

The abovementioned rules on residence rights for family members of EU workers apply similarly to the family members of jobseekers. While the period of residence permitted for the purpose of seeking employment is normally limited to 6 months (see above Chapter I.2), the jobseeker will be permitted to bring family members to Denmark for the same duration of time. The personal scope of this residence right is limited to spouses, registered partners or regularly cohabiting partners, children below 21 years of age, and other dependent family members.

DENMARK

Chapter III

Access to Employment: a) Private sector and b) Public sector

Aliens Act Section 14 (1) (ii), cf. Section 13, and EU Residence Order Section 18, exempts EU citizens from the requirement to have a work permit in order to take up employment in Denmark, which is imposed on most other groups of foreigners.

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

Employment under a collective agreement or on individual contract (as opposed to employment as a civil servant, see below) is not conditional on the applicant being a Danish citizen. Foreign citizens are generally free to hold such posts.³³

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

Compared to last year's report, no major amendments have been made.

EU/EEA citizens may register with job centres, make use of the facilities and receive guidance.³⁴

The job centres must offer advice on:

- the actual job opportunities in their geographical area;
- the use of www.jobnet.dk;
- entering CV on www.jobnet.dk;
- the work out of job applications and/or CV;
- work and residence permit/registration certificate, Civil Registration System number (CPR), tax card, public health insurance, language school and contact with the authorities;
- local, regional and national education or continuing education opportunities; and
- the Danish job market.³⁵

The job centres have an international Section, *EURES*,³⁶ which is the co-operation between the European Commission and the Public Employment Services of the EEA countries and Switzerland and other partner organizations (such as unions, employers' associations and local/regional authorities) with the purpose of supporting the free movement of workers by facilitating information, advice and recruitment for citizens and companies.³⁷

33 For general information on the Danish labour market, see *Employment in the Danish State Sector*, a publication from the State Employers' Authority, available at www.perst.dk/Publications/2005/Employment%20in%20the%20Danish%20State%20Sector.aspx, accessed on 18 March 2010.

34 Consolidation Act No. 522 of 24 June 2005 on Responsibility for and Regulation of the Active Employment Initiative; cf. Consolidation Act No. 1428 of 14 December 2009 on Active Employment Initiative.

35 Cf. information obtained from an official within the Ministry of Employment by e-mail of 17 June 2008 and Consolidation Act No. 1428 of 14 December 2009 on Active Employment Initiative Part IV-IX. See also 'Welcome pack' on www.workindenmark.dk, available at <https://www.workindenmark.dk/Find%20information/Til%20arbejdstagere/~media/14774523E15743BA88DCC121F33972B0.ashx>, accessed on 22 March 2010.

36 Official website: www.eures.dk (referring to www.workindenmark.dk from 1 October 2008).

37 Cf. www.ec.europa.eu/eures/home.jsp.

In 2008, the EURES special function was closed down. However, the tasks are now handled in 3 international centres, established on 1 October 2008.³⁸ The 3 international centres have been established in the metropolitan area ('Høje Taastrup'), Aarhus and Odense, respectively.³⁹ The purpose of the establishment of the centres is to strengthen and professionalize the recruitment of foreign labour in Denmark. Hence, the centres' core area are focused directly on assisting companies in recruiting workers from abroad and on assisting alien workers in their job seeking in Denmark in general.

The job centres must continue to handle the tasks as described above. However, in situations where the job centres are not able to carry out a task, the task will be handled jointly with the new international centres, or the international centres will take over the handling of the task.

In connection with the establishment of the international centres, a special Polish hotline was established. The hotline provides guidance on job seeking and establishment in Denmark in Polish for Polish jobseekers only.⁴⁰

a.2. Language requirements

Texts in force

Laws

Compared to last year's report, amendments have been made with regard to the Act on *Danish Courses for Adult Aliens et al*; see below.

Concerning equal treatment in access to employment, the central piece of legislation is the Act on *Prohibition of Differential Treatment on the Labour Market*,⁴¹ which prohibits direct and indirect discrimination, harassment and instructions on differential treatment on grounds of race, colour, religion or belief, political opinion, sexual orientation, age or handicap or national, social or ethnic origin in the relationship between an employer and an employee, cf. Sections 2-5. The National Labour Market Authority ('Arbejdsmarkedsstyrelsen'⁴²), which is an authority under the Ministry of Employment,⁴³ has issued a circular to the Act on *Prohibition of Differential Treatment on the Labour Market*⁴⁴ dealing with language requirements; see more below draft legislation, circulars, etc.

According to the Act on *Danish Courses for Adult Aliens et al.*, every adult alien residing in Denmark can receive education by attending Danish courses etc. arranged by the municipality, cf. Section 2.⁴⁵ The Act also applies to EU citizens and their family members. This means that they have a right to receive an offer from the municipality to take part in Danish courses, but they have no obligation to do so. Whereas such courses are free of charge for foreigners encompassed by

38 See www.workindenmark.dk, accessed on 18 March 2010.

39 See www.workindenmark.dk/Contact.aspx, accessed on 18 March 2010.

40 Cf. information obtained from an official within the Ministry of Employment by e-mail of 17 June 2008 and www.workindenmark.dk/Contact.aspx, accessed on 18 March 2010.

41 Consolidation Act No. 1349 of 16 December 2008.

42 Official website: www.ams.dk.

43 Official website: www.bm.dk.

44 Consolidation Act No. 1349 of 16 December 2008, Circular No. 60339 of 29 October 1998.

45 Consolidation Act No. 259 of 16 March 2006 and amendments and Executive Orders No. 755 and 756 of 26 June 2007. Executive Orders No. 1159 of 1 December 2005, No. 1270 of 7 December 2006, No. 1305 of 15 December 2009 and No. 68 of 6 February 2008.

the Act on *Integration*,⁴⁶ the municipalities may require a fee from other categories of participants who are self-supporting, including EU citizens and their family members, according to guidelines from the Ministry of Refugee, Immigration and Integration, cf. Section 14.⁴⁷ The size of the fee is differentiated resulting in a higher fee for aliens residing in Denmark for a shorter period of time without an aim as regards to integration. Among other things, the adoption of the fee was considered to ensure a higher attendance at the courses. As a consequence of this differentiation, EU/EEA citizens are required to pay the lowest fee of a maximum of 500 DKK (app. 67 Euro) per module. The government seems to have considered whether the adoption of the fee will raise questions of discrimination, since it is emphasised in the explanatory memorandum to the Bill that the language courses will provide general qualifications and will not address the need for specific professional training. The Bill was therefore considered as having no EU law implications, even while it was clearly stated that EU citizens were to be among those participants required to pay for such courses under the Act.⁴⁸ On 26 March 2010 the Ministry of Refugee, Immigration and Integration introduced a bill to amend Section 14 of the Act on *Danish Courses for Adult Aliens et al.*, making Danish courses cost-free for all aliens encompassed by the Act; see below draft legislation, circulars, etc.⁴⁹

On 25 February 2009 the Ministry of Refugee, Immigration and Integration Affairs introduced a bill to amend the Act on *Danish Courses for Adult Aliens et al.* and the Act on Integration with the purpose of attracting highly qualified employees to Denmark.⁵⁰ The Bill establishes a free vocational offer on Danish courses on the internet ('Online Dansk'), cf. Section 16a.⁵¹ Furthermore, a specific provision on *EU/EEA frontier workers* was proposed adopted in the Act. The provision provides the legal basis for EU/EEA frontier workers to have a right to Danish courses on equal terms with aliens issued with a residence permit and residing in Denmark, cf. Section 2a. The explanatory memorandum to the Bill specifically refers to Regulation 1612/68 Art. 7 (2) on social (and tax) advantages and states that legitimate compensation claims from EU/EEA citizens who up to now themselves have defrayed the expenses for Danish courses will be covered.⁵² The Bill was adopted by the Parliament on 12 June 2009 entering into force on 1 July 2009.⁵³

On 11 November 2009, the Ministry of Refugee, Immigration and Integration Affairs introduced a bill to amend the Act on *Danish Courses for Adult Aliens et al.* The Bill was adopted by Act No. 1512 of 27 December 2009 and provides a supplement to the ordinary Danish courses by intruding cost-free 'intro-Danish', i.e. Danish courses aiming at the Danish labour market for aliens above 18 residing in Denmark on a more temporary basis with the purpose of employment or encompassed by Section 2 a (frontier workers), in particular by the adoption of Section 16b. The offer of Intro-Danish applies to all aliens having ordinary employment, continuous lawful residence and a right to take up employment in Denmark, and thus applies to EU citizens and third-country nationals alike. An alien who have followed intro-Danish will have the option of

46 Consolidation Act No. 1593 of 14 December 2007. Danish courses are mandatory for aliens encompassed by the Act on Integration, cf. Part IV of the Act.

47 Cf. Executive Order No. 68 of 6 February 2008 Section 16 (i) and (ii). EU/EEA citizens and members of their families are not encompassed by the Act on Integration, cf. Section 2 (3).

48 Explanatory memorandum to Bill No. L 158/2002-03.

49 Bill No. L 189/2009-10.

50 Bill No. L 140/2008-09.

51 See www.nyidanmark.dk/en-us/Integration/online_danish/ for a description, accessed on 20 March 2010.

52 Explanatory memorandum to Bill No. L 140/2008-09, general remarks 4.2 *in fine*.

53 Act No. 485 of 12 June 2009.

joining the ordinary Danish courses within a 3-year period, provided the alien continues to have lawful residence in Denmark. According to Section 16 (4), aliens receiving starting assistance ('starthjælp') or social assistance ('kontanthjælp') are not entitled to receive an offer of intro-Danish. This does not apply, however, to EU citizens residing in Denmark on the basis of the EU rules on free movement. Thus, EU citizens receiving starting assistance ('starthjælp') or social assistance ('kontanthjælp') are entitled to receive an offer of intro-Danish.⁵⁴

In addition, the Act introduced Section 2 a (5), providing the legal basis for the Minister of Refugees, Immigration and Integration Affairs to set out more detailed provisions on Danish courses for aliens encompassed by Section 2 a (1); EU/EEA frontier workers etc.

The Act entered into force on 1 January 2010, Section 16b, however, enters into force on 1 July 2010.

Draft legislation, circulars, etc.

The National Labour Market Authority ('Arbejdsmarkedsstyrelsen'⁵⁵), which is an authority under the Ministry of Employment,⁵⁶ has issued a circular to the Act on *Prohibition of Differential Treatment on the Labour Market*.⁵⁷

The Circular concerns employment agencies and their dealing with employers and ethnic minorities and constitutes general guidelines to the prohibition of different treatment on the labour market.

According to the Circular, a language requirement is formally a neutral requirement. However, in situations where an employer imposes a language requirement which is not reasoned/objectively justifiable, a language requirement may constitute indirect discrimination. This will be the case if the requirement to the person's ability to speak or write Danish is disproportionate and without relevance for the maintenance of the job in question.⁵⁸

In general, qualification requirements have to be justified by considerations of satisfactory maintenance of the job in question according to the Circular.

As mentioned above, the Ministry of Refugee, Immigration and Integration introduced a bill to amend Section 14 of the Act on *Danish Courses for Adult Aliens et al.* on 26 March 2010, making Danish courses cost-free for all aliens encompassed by the Act (as opposed to aliens encompassed by the Act on *Integration* which is the current wording of Section 14).⁵⁹ The proposed amendment is part of the government's debureaucratization plan having the purpose of reducing the administrative burden on businesses and simplifying and improving the processes.⁶⁰ The Bill was adopted on 25 May and enters into force on 1 July 2010.

Recent legal literature

Henrik Thomassen and Pernille Breinholdt Mikkelsen, 'Indrejse og ophold for udlændinge omfattet af EU-reglerne,' in L.B. Christensen et al., *Udlændingeret*, 3. edition, Copenhagen 2006, pp. 239-249.

54 Explanatory memorandum to Bill No L 64/2009-10, general remarks 3 and specific remarks Section 1, 10.

55 Official website: www.ams.dk.

56 Official website: www.bm.dk.

57 Consolidation Act No. 1349 of 16 December 2008, Circular No. 60339 of 29 October 1998.

58 Chapter III.B.

59 Explanatory memorandum to Bill No. L 189/2009-10 Section 2, 3.

60 'Mere tid til velfærd' (in English 'Better Regulation' (i.e. administration), available at <http://uk.fm.dk/Initiatives/Denmarks%20Better%20Regulation%20Programme.aspx>, accessed on 20 April 2010.

Karsten Engsig Sørensen and Poul Runge Nielsen, *EU-Retten*, 4. edition, Copenhagen 2008.

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

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

Compared to last year's report, no major amendments have been made.

A public employer has a special obligation to ensure equality for all employees regarding gender, ethnic origin, nationality etc.⁶¹ as stated in the Co-operative Agreement, Section 5 (3) ('Samarbejdsaftalen'), which is an agreement on co-operation and co-operation committees in the state's companies and institutions.⁶² Apart from the legislation on prohibition of differential treatment on specific grounds, a public employer is subject to the principle of equality ('lighedsprincipet'), the principle of legality ('legalitetsprincippet') and the rule on instruction ('instruktionsreglen').

Texts in force

Laws

According to the *Danish Constitutional Act* Section 27, Danish nationality is a prerequisite for employment as a *civil servant*.⁶³ This is modified, however, by the fact that foreign citizens can be employed on conditions similar to those of civil servants in positions where persons with Danish nationality are employed as civil servants. A rule on this is inserted in the *Act on Civil Servants*⁶⁴ and the *Act on Civil Servants' Pension*,⁶⁵ and reference is made to this rule and its connection with Art. 39 of the EC Treaty in the *Guidance on Personnel Administration*.⁶⁶

Draft legislation, circulars, etc.

Circular 210 of 11 December 2000 ('Ansættelsesformcirkulæret') specifies the special positions where appointments as *civil servants* ('tjenestemænd') are confined. If the position is not regulated by the Circular, the employment is not encompassed by the rules on civil servants, and aliens are free to hold such posts on the same circumstances as Danish citizens.

According to the *Guidance on Personnel Administration*, the right to be employed on the same circumstances as civil servants is limited by restrictions justified by regard for public order, public security and public health. Moreover, the job advertisement may not impose a requirement of Danish citizenship in a manner discouraging EEA citizens from applying for the position, un-

61 *Guidance on Personnel Administration* ('Personale-Administrativ Vejledning'), December 2009, issued by the State Employers' Authority ('Personalestyrelsen'), an agency within the Ministry of Finance, to public employers. The guidance is updated every year and is available at <http://pav.perst.dk/>. See Chapter 15.2.2.10.

62 Circular No. 9450 of 8 May 2008.

63 Constitutional Act No. 169 of 5 June 1953.

64 Consolidation Act No. 531 of 11 June 2004 and amendments, Section 58 c.

65 Consolidation Act No. 230 of 19 March 2004 and amendments, Section 19 (1).

66 Chapters 15.2.2.2 and 15.2.2.4.

less the position is encompassed by restrictions justified by regard for public order, public security and public health.⁶⁷

Miscellaneous (administrative practices, etc.)

In 2004 the State Employers' Authority ('Personalestyrelsen',⁶⁸ an agency within the Ministry of Finance⁶⁹) carried out a survey on the extent to which a requirement on Danish citizenship exists regarding positions in the public sector. The survey covers all Danish ministries but not the regional and municipal parts of the public sector.⁷⁰ The conclusion of the survey is that within the public sector there are in general not posts where a requirement on Danish citizenship is upheld. Exceptions to this are certain posts within the Ministry of Defence for which, however, a dispensation may be given, and certain posts within the Prison and Probation Service.⁷¹ A supplementary survey from 2006 has shown that in practice, for certain other posts, mainly within the police, the juridical system and the foreign services, Danish nationality is required.⁷²

b.2. Language requirements

Texts in force

Laws

Compared to last year's report, no major amendments have been made.

Concerning equal treatment in access to employment, the central piece of legislation is the Act on *Prohibition of Differential Treatment on the Labour Market*,⁷³ which prohibits direct and indirect discrimination, harassment and instructions on differential treatment on grounds of race, colour, religion or belief, political opinion, sexual orientation, age or handicap or national, social or ethnic origin in the relationship between an employer and an employee, cf. Sections 2-5.

Draft legislation, circulars, etc.

The National Labour Market Authority ('Arbejdsmarkedsstyrelsen',⁷⁴) which is an authority under the Ministry of Employment,⁷⁵ has issued a circular to the Act on *Prohibition of Differential Treatment on the Labour Market*. The Circular concerns employment agencies and their dealing with employers and ethnic minorities and constitutes general guidelines for the prohibition against differential treatment on the labour market.⁷⁶

67 Chapter 15.2.1.4, cf. 15.2.2.4. Cf. *Employment in the Danish State Sector*, publication from the State Employers' Authority, Chapters 1-3 available at www.perst.dk/~media/Publications/2005/Employment%20in%20the%20Danish%20State%20Sector/Employment%20in%20the%20Danish%20State%20Sector%202005-pdf.ashx, accessed on 20 March 2010.

68 Official website: www.perst.dk.

69 Official website: www.fm.dk.

70 Neither does the survey include information on positions for law graduates within the Danish courts.

71 See *Employment in the Danish State Sector*, Chapter 3.

72 Cf. information from the Ministry of Employment in *Danish remarks to the Danish Report 2006*, p. 4 ad p. 24 and information obtained by e-mail from an official within the Ministry of Employment of 17 June 2008.

73 Consolidation Act No. 1349 of 16 December 2008.

74 Official website: www.ams.dk.

75 Official website: www.bm.dk.

76 Circular No. 60339 of 29 October 1998.

According to the Circular, a language requirement is formally a neutral requirement. However, a language requirement may constitute indirect discrimination when an employer's language requirement is not reasoned/objectively justifiable. This will be the case if the requirement to the person's ability to speak or write Danish is disproportionate to and without relevance for the maintenance of the job in question.⁷⁷

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

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

Texts in force

Draft legislation, circulars, etc.

Compared to last year's report, no major amendments have been made.

In a paragraph in the *Guidance on Personnel Administration* it is expressly stated that previous employment in other Member States shall be taken into account to the same extent as had it been employment in Denmark.⁷⁸ This applies to Danish citizens and other EU/EEA citizens alike. In the guidelines reference is made to the jurisprudence of ECJ and the Communication from the Commission from December 2002.⁷⁹

b.4. Other aspects of access to employment

Nothing to report.

Recent legal literature

Karsten Engsig Sørensen and Poul Runge Nielsen, *EU-Retten*, 4. edition, Copenhagen 2008.

Ruth Nielsen, *Dansk Arbejdsret*, 1. edition, Copenhagen 2008.

Ruth Nielsen, *EU-arbejdsret*, 4. edition, Copenhagen 2006.

Jens Kristiansen, *Grundlæggende arbejdsret*, 2. edition, Copenhagen 2009.

Ole Hasselbalch, *Den danske arbejdsret*, Copenhagen 2009.

⁷⁷ Chapter III.B.

⁷⁸ Chapter 16.2.3.2.

⁷⁹ *Free movement of workers – achieving the full benefits and potential*, Communication from the Commission, 11 December 2002 (COM (2002) 694).

Chapter IV

Equality of Treatment on the Basis of Nationality

In Denmark, the labour market is characterised by a *collective bargaining model*. The key aspect of this model is the fact that the government will intervene as little as possible in the relationship between employers and employees as long as the labour market parties themselves are able to reach agreement.⁸⁰

However, labour market laws do exist, and concerning equal treatment, the central piece of legislation is the Act on *Prohibition of Differential Treatment on the Labour Market etc.*,⁸¹ which prohibits direct and indirect discrimination, harassment and instructions on differential treatment on grounds of race, colour, religion or belief, political opinion, sexual orientation, age or handicap or national, social or ethnic origin in the relationship between an employer and an employee, cf. Sections 2-5.⁸² The Act transposes parts of Directive 2000/43/EC on equal treatment of all regardless of race or ethnic origin into Danish law and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.⁸³

As regards discrimination on grounds of *nationality*, the Act does not encompass all kind of discrimination. Hence, differential treatment on the grounds of citizenship is not in itself encompassed by the Act. However, a requirement on citizenship may be categorized as indirect discrimination on the grounds of national or ethnic origin.⁸⁴

The Act on *Equal Treatment Irrespective of Ethnic Origin*⁸⁵ is partly an implementation of Directive 2000/43/EC on equal treatment of all regardless of race or ethnic origin, deals with conditions outside the labour market and lays down a prohibition against direct and indirect discrimination on the grounds of race or ethnic origin and a prohibition against harassment and instructions to discriminate, cf. Section 3 and a prohibition on reprisals, cf. Section 8.

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Specific issue: Working conditions in the public sector

- Recognition of professional experience for the purpose of determining the working conditions (e.g. salary; grade, career perspectives).
- Taking into account of diplomas for determining working conditions (salary, grade, career perspectives etc).
- Equal treatment in relation to issues like civil servant status, trade union rights etc.

80 Cf. *Employment in the Danish State Sector* pp. 8-9, a publication from the State Employers' Authority, available at www.perst.dk/Publications/2005/Employment%20in%20the%20Danish%20State%20Sector.aspx, accessed on 17 April 2009.

81 Consolidation Act No. 1349 of 16 December 2008.

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

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

84 Cf. Guidance on the Act on Prohibition of Differential Treatment on the Labour Market etc. No. 9237 of 6 January 2006 issued by the Ministry of Employment.

85 Act No. 374 of 28 May 2003 and amendment.

*Texts in force**Laws*

Compared to last year's report, no major amendments have been made.

Regarding Equal treatment in relation to issues like civil servant status, trade union rights etc., the *Danish Constitutional Act* Section 27 states that Danish nationality is a prerequisite for employment as a *civil servant*.⁸⁶ This is modified, however, by the fact that foreign citizens can be employed on conditions similar to those of civil servants in positions where persons with Danish nationality are employed as civil servants. A rule on this is inserted in the *Act on Civil Servants*⁸⁷ and the *Act on Civil Servants' Pension*,⁸⁸ and reference is made to this rule and its connection with Art. 39 of the EC Treaty in the *Guidance on Personnel Administration*.⁸⁹

Draft legislation, circulars, etc.

Circular 210 of 11 December 2000 ('Ansættelsesformcirkulæret') specifies the special positions where appointments as *civil servants* ('tjenestemænd') are confined. If the position is not regulated by the Circular, the employment is not encompassed by the rules on civil servants, and aliens are free to hold such posts on the same circumstances as Danish citizens.

According to the *Guidance on Personnel Administration*, the right to be employed on the same circumstances as civil servants is limited by restrictions justified by regard for public order, public security and public health. Moreover, the job advertisement may not impose a requirement of Danish citizenship in a manner discouraging EEA citizens from applying for the position, unless the position is encompassed by restrictions justified by regard for public order, public security and public health.⁹⁰

Regarding salary, grade, career perspectives etc., the *Guidance on Personnel Administration* states that *professional experience obtained in another EU/EEA country* has to be accounted for in the same manner as had the occupation been in Denmark.⁹¹ Hence, the comparison of previous occupation has to be performed on an objective and non-discriminatory basis, and without accounting for whether the previous employment was under the conditions for civil servants or collective agreements. These principles apply to both workers from other Member States and Danish citizens working in another Member State. In the guidelines reference is made to the jurisprudence of ECJ and the Communication from the Commission from December 2002. *Circular No. 6633 of 16 July 1987* on Salary Seniority lays down the detailed rules on determination of advantages.

Regarding grade, which per definition is a single reward granted for employment by the same employer for a certain period of time (i.e. loyalty), the most recent *Circular No. 9800 of 28 Octo-*

86 Constitutional Act No. 169 of 5 June 1953.

87 Consolidation Act No. 531 of 11 June 2004 and amendments, Section 58 c.

88 Consolidation Act No. 230 of 19 March 2004 and amendments, Section 19 (1).

89 *Guidance on Personnel Administration* ('Personale-Administrativ Vejledning'), December 2009, issued by the State Employers' Authority ('Personalestyrelsen'), an agency within the Ministry of Finance, to public employers. The guidance is updated every year and is available at <http://pav.perst.dk/>. See Chapters 15.2.2.2 and 15.2.2.4.

90 Chapter 15.2.1.4, cf. 15.2.2.4. Cf. *Employment in the Danish State Sector*, publication from the State Employers' Authority, Chapters 1-3 available at www.perst.dk/~media/Publications/2005/Employment%20in%20the%20Danish%20State%20Sector/Employment%20in%20the%20Danish%20State%20Sector%202005-pdf.ashx, accessed on 20 March 2010.

91 Chapter 16.2.3.2.

ber2009 states that the seniority is estimated from the first employment within the Danish State only.

2. SOCIAL AND TAX ADVANTAGES

2.1. General situation as laid down in Art. 7 (2) Regulation 1612/68

Danish courses

As mentioned above Chapter III, a.2., the Ministry of Refugee, Immigration and Integration Affairs introduced a bill to amend the Act on *Danish Courses for Adult Aliens et al.* and the Act on Integration on 25 February 2009 with the purpose of attracting highly qualified employees to Denmark.⁹² The Bill establishes a free vocational offer on Danish courses on the internet ('Online Dansk'), cf. Section 16a.⁹³ Furthermore, a specific provision on *EU/EEA frontier workers* was proposed adopted in the Act. The provision provides the legal basis for EU/EEA frontier workers to have a right to Danish courses on equal terms with aliens issued with a residence permit and residing in Denmark, cf. Section 2 a. The explanatory memorandum to the Bill specifically refers to Regulation 1612/68 Art. 7 (2) on social (and tax) advantages and states that legitimate compensation claims from EU/EEA citizens who up to now themselves have defrayed the expenses for Danish courses will be covered.⁹⁴ The Bill was adopted by the Parliament on 12 June 2009 entering into force on 1 July 2009.⁹⁵

Moreover, the Ministry of Refugee, Immigration and Integration Affairs introduced a bill to amend the Act on *Danish Courses for Adult Aliens et al.* on 11 November 2009 providing a supplement to the ordinary Danish courses by intruding cost-free 'intro-Danish', i.e. Danish courses aiming at the Danish labour market for aliens above 18 residing in Denmark on a more temporary basis with the purpose of employment or encompassed by Section 2 a (frontier workers), in particular by the adoption of Section 16 b. The offer of Intro-Danish applies to all aliens having ordinary employment, continuous lawful residence and a right to take up employment in Denmark, and thus applies to EU citizens and third-country nationals alike. An alien who have followed intro-Danish will have the option of joining the ordinary Danish courses within a 3-year period, provided the alien continues to have lawful residence in Denmark. According to Section 16 (4), aliens receiving starting assistance ('starthjælp') or social assistance ('kontanthjælp') are not entitled to receive an offer of intro-Danish. This does not apply, however, to EU citizens residing in Denmark on the basis of the EU rules on free movement. Thus, EU citizens receiving starting assistance or social assistance are entitled to receive an offer of intro-Danish.⁹⁶ The Bill was adopted by Act No. 1512 of 27 December 2009 and entered into force on 1 January 2010; Section 16b, however, enters into force on 1 July 2010.

Furthermore, the Ministry of Refugee, Immigration and Integration introduced a bill to amend Section 14 of the Act on *Danish Courses for Adult Aliens et al.* on 26 March 2010, making Dan-

92 Bill No. L 140/2008-09.

93 See www.nyidanmark.dk/en-us/Integration/online_danish/ for a description, accessed on 20 March 2010.

94 Explanatory memorandum to Bill No. L 140/2008-09, general remarks 4.2 *in fine*.

95 Act No. 485 of 12 June 2009.

96 Explanatory memorandum to Bill No L 64/2009-10, general remarks 3 and specific remarks Section 1, 10.

ish courses cost-free for all aliens encompassed by the Act on *Danish Courses for Adult Aliens et al.* (as opposed to aliens encompassed by the Act on *Integration* which is the current wording of Section 14).⁹⁷ The proposed amendment is part of the government's debureaucratization plan having the purpose of reducing the administrative burden on businesses and simplifying and improving the procedures.⁹⁸ The Bill was adopted on 25 May and enters into force on 1 July 2010.

Social assistance to Danish citizens upon return from another Member State

Section 11 (3) of the *Act on Active Social Policy*⁹⁹ makes it a requirement for the payment of full social assistance ('kontanthjælp') that the recipient has resided in Denmark during a total period of 7 years within the past 8 years. If this requirement is not fulfilled, the significantly lower amount of the so-called *starting assistance* ('starthjælp') will be paid out instead. The provisions on starting assistance and the residence requirement for entitlement to full social assistance were adopted in 2002.¹⁰⁰ The purpose of the residence requirement and the reduced assistance that follows from non-compliance, as officially stated in the preparatory works of the legislation, was to create stronger incentives for refugees and immigrants to seek employment and become self-sufficient as an alternative to receiving social benefits.¹⁰¹ From the political background and the legislative context it could be assumed that an additional, yet only implicit, purpose was to make it less attractive for third-country citizens to come to Denmark and apply for asylum or other kinds of residence permit.¹⁰²

In any event, it was not intended to make the residence requirement an obstacle to the free movement of EU citizens. This is demonstrated by Section 11 (6) of the Act on Active Social Policy, stating that the requirement of 7 years of residence in Denmark does not apply to EU/EEA citizens insofar as they are entitled to cash benefits under EU law. The somewhat unclear scope of this exemption was clarified in the explanatory memorandum. Reference was here made to Regulation No. 1612/68 and the EEA Agreement, and the ECJ case law according similar rights to self-employed persons as to workers under these instruments. It was further explained that the requirement of 7 years of residence therefore does not apply to workers and self-employed persons, nor to Danish citizens comprised by Regulation No. 1612/68, such as Danish citizens having resided as workers in another EU/EEA country.¹⁰³ Against this background, Section 11 (6) would seem to imply that Danish and other EU/EEA citizens would only rarely, and mainly due to residence periods outside the EU/EEA Member States, be referred to the starting assistance as a result of non-compliance with the residence requirement.

Some decisions from the National Social Appeals Board have created doubts about the scope of this EU exemption, in particular regarding Danish citizens who have resided under the EU rules in another Member State, and then move back to Denmark. In the first case the applicant

97 Explanatory memorandum to Bill No. L 189/2009-10 Section 2, 3.

98 'Mere tid til velfærd' (in English 'Better Regulation'), available at <http://uk.fm.dk/Initiatives/Denmarks%20Better%20Regulation%20Programme.aspx>, accessed on 20 April 2010.

99 Consolidation Act No. 946 of 1 October 2009.

100 Act No. 361 of 6 June 2002 amending the Act on Active Social Policy and the Integration Act.

101 Cf. Ministry of Refugee, Immigration and Integration Affairs, *En ny udlændingepolitik* ('A new aliens policy'), government policy paper 17 January 2002, pp. 6-7, and the explanatory memorandum to Bill No. 126/2001-02 (2. Session), paras. 1 and 4.

102 Ibid., p. 1, and explanatory memorandum to Bill No. 126/2001-02 (2. Session), para. 1.

103 Explanatory memorandum to Bill No. L 126/2001-02 (2. Session), para. 5.4 and specific comments on Section 11 (4) (the EU exemption was moved to Section 11 (6) by amending Act No. 379 of 25 April 2007).

had returned to Denmark after a number of years of residence and work in another EU/EEA country. Upon return he applied for full social assistance, but was only granted the lower starting assistance. The reason given for this was that he did not fulfil the residence requirement in Section 11 (3) of the Act on Active Social Policy, and that his period of residence in the other Member State did not count towards the 7 years requirement because he had not acquired the *status of worker* in Denmark. This conclusion, as well as the line of reasoning, was upheld by the National Social Appeals Board. The Appeals Board referred to the caselaw of the ECJ, in particular the *Tsiotras* judgment,¹⁰⁴ invoking this as a basis of the assumption that the status of worker is lost in case of cessation of an employment contract unless it is documented that the EU citizen is genuinely jobseeking in the Member State in which he or she got unemployed.¹⁰⁵

The Appeals Board's decision seems to be based on misinterpretation of the EU rules, as the *Tsiotras* judgment dealt with a particular situation regarding the transitional arrangements upon the accession of Greece to the EC. Furthermore, the Appeals Board seems to have confused the requirement of previous employment and actual jobseeking in a host Member State with the issue of seeking employment in the Member State of origin upon return to that country. Only a month after the publication of this decision the Appeals Board admitted another case concerning starting assistance in order to carry out a new principled examination 'as a supplement' to the abovementioned decision.¹⁰⁶

In its decision on the latter case, the National Social Appeals Board maintained focus on the issue of having *acquired the status of worker* upon the Danish citizen's return to Denmark from another Member State.¹⁰⁷ While that criterion was rather obviously met, the decision seems at the same time to detract attention from the more pertinent question of whether the person actually had such status while staying in another EU Member State. In this case the Danish citizen who applied for cash benefits had been living in Germany as a housewife for 21 years, when returning to Denmark with her four children. Although she might have been eligible for residence right under EU law in Germany, and perhaps actually did hold an EU residence certificate there, that issue was never highlighted in the appeals case, and did not appear to be considered relevant by the Appeals Board. While the latter decision is questionable under Danish social welfare law for similar reasons as the abovementioned decision from December 2005 – and possibly also raises problems under EU law – it cannot as such be considered an impediment to the free movement of workers between Member States.

Five Appeals Board decisions from 2009 as well as one from 2010 upheld the *acquisition of the status of worker in Denmark* upon return as the decisive criterion for the application of the EU exemption from the residence requirement for payment of full social assistance. All of these cases concerned Danish citizens, and were admitted by the National Social Appeals Board with a view to clarification of the EU rules pertaining to applications for social assistance. In the first case, the Danish citizen had returned to Denmark after staying in Germany for around 1½ years, and it is not entirely clear whether and to which extent she had been employed in Germany. As she had only been temporarily employed for one day upon return, she was found not to have acquired the

104 ECJ judgment of 26 May 2003 *Tsiotras* (C-171/91). Particular reference was made to para. 11 of the judgment.

105 National Social Appeals Board, decision of 14 December 2005. Reported in A-1-06.

106 National Social Appeals Board, admissibility decision of 3 March 2006.

107 National Social Appeals Board, decision of 30 August 2006. Reported in A-34-06.

status of worker in Denmark, and the Appeals Board held that her period of residence in Germany could ‘therefore’ not be taken into account on equal terms with residence in Denmark.¹⁰⁸

The second case dealt with the special issues relating to the child of a Danish citizen working and residing in another Member State. While acknowledging the principle that family members derive rights from workers under EU law, the Appeals Board again here focused merely on the status of worker in Denmark. As he was working and residing in Belgium, the applicant’s father could not be considered a worker in Denmark, and the applicant could ‘therefore’ not invoke derived EU rights from him in Denmark, just as the applicant himself had not acquired the status of worker in Denmark since he had returned for educational purposes and had been applying for social assistance when he left school.¹⁰⁹

In the third of the 2009 decisions, the Appeals Board held the Danish citizen to have acquired the status of worker after 18 days of actual employment upon return to Denmark. The applicant had been working on a non-temporary contract conditions, and was unable to work due to illness caused by an assault after this short period of employment. As the applicant was considered a worker in Denmark, the previous residence in another Member State would count towards the residence requirement on equal terms with residence in Denmark.¹¹⁰ The applicants in the most recent three cases were, on the other hand, not considered to have acquired the status of worker or self-employed person upon return to Denmark from other Member States. Consequently, they were found not to be entitled to full social assistance under the EU exemption from the residence requirement.¹¹¹

The abovementioned decisions did not discuss the possible relevance of recent ECJ judgments, in particular *Collins*, *Trojani*, *Eind* or *Vatsouras*.¹¹² While the interpretation adopted by the Appeals Board is probably at variance with the legislative intentions behind the EU exemption in the Act on Active Social Policy, it also seems unsustainable under EU law at least since the *Eind* judgment which established that upholding EU rights upon return to the country of origin is not contingent on the EU citizen’s renewed acquisition of the status of worker in that country. Furthermore, the Appeals Board does not appear to have considered the principled issue of reverse discrimination as a separate problem under EU law as regards the interpretation and application of this residence requirement in Danish legislation.

2.2 *Specific issue: the situation of jobseekers*

According to Section 12 a of the *Act on Active Social Policy*,¹¹³ EU/EEA citizens residing in Denmark as first-time jobseekers on the basis of Community law, as well as persons with a right to stay until 3 months without administrative formalities, are entitled to no other economic assistance than coverage of costs related to the return to their home country. This provision was inserted into the Act in implementation of the political agreement on access to the labour market

108 National Social Appeals Board, decision of 29 April 2009. Reported in No. 137-09.

109 National Social Appeals Board, decision of 29 April 2009. Reported in No. 138-09.

110 National Social Appeals Board, decision of 15 July 2009. Reported in No. 180-09.

111 National Social Appeals Board, decisions of 24 September 2009, 17 December 2009 and 25 March 2010. Reported in No. 207-09, No. 6-10 and No. 112-10, respectively.

112 ECJ judgments of 23 March 2004 *Collins* (C-138/02), 7 September 2004 *Trojani* (C-456/02), 11 December 2007 *Eind* (C-291/05), and 4 June 2009 *Vatsouras and Koupatantze* (C-22/08 and C-23/08).

113 Consolidation Act No. 946 of 1 October 2009.

following the EU enlargement.¹¹⁴ According to the available information, the National Social Appeals Board (‘Ankestyrelsen’) has not examined any cases concerning Section 12 a.¹¹⁵ Section 3 (2) of the *Act on Active Social Policy* makes it a precondition for entitlement to benefits of longer duration – defined as more than half a year, cf. Section 3 (3) – that the recipient be either a Danish citizen or an EU citizen or a family member who has a right of residence under EU law, or have such entitlement under an international agreement.

Provided that these provisions are administered on the basis of a correct understanding of the EU rules on residence right, they should not give rise to violations of Articles 24 (2) or 27 of Directive 2004/38 or Article 7 (2) of Regulation No. 1612/68. However, the impact of ECJ judgments such as *Collins*, *Trojani*, *Ioannidis* and *Vatsouras*¹¹⁶ on the application of the Act on Active Social Policy has not yet been clarified by the National Social Appeals Board. In particular, the latter judgment would seem to limit the applicability of Section 12 a of the Act to first-time jobseekers in the strict sense of this notion.

EU-10 workers are reported to have experienced problems in a number of cases where they, upon dismissal from jobs in which they had been working for a longer period, applied for social assistance while seeking new jobs in Denmark.. The social administration in some municipalities seem to have very precise information about EU citizens’ entitlement to social cash benefits and to administer the rules accordingly, whereas other municipalities seem to base their practice on an incorrect understanding of the rules, probably confusing the abovementioned provision on first-time jobseekers and the general rules concerning EU workers’ access to social assistance on equal terms with Danish citizens. The National Directorate of Labour (‘Arbejdsdirektoratet’) apparently suggested patience towards the municipalities, but stated its preparedness to consider the need for additional guidance on the applicable law.¹¹⁷

More general guidelines concerning the right of EU/EEA citizens to social cash benefits under the Act on Active Social Policy were issued by the National Directorate of Labour in April 2008.¹¹⁸ As the guidelines appear less than clear on various aspects of the law, and they do not take heed of the abolishment of the transitional rules concerning EU-10 workers, they may be expected to be updated in the near future.

114 Act No. 282 of 26 April 2004. Guidance on the new provision was issued by the National Directorate of Labour (‘Arbejdsdirektoratet’) in Guidelines No. 33 of 4 May 2004. The transitional arrangements as well as their gradual abolishment were described in previous FMoW Reports.

115 Search result from the list of appeals cases examined by the National Social Appeals Board (‘Ankestyrelsen’), available at www.ast.dk/afgoerelser/principafgoerelser, accessed on 17 June 2010.

116 ECJ judgments of 23 March 2004 *Collins* (C-138/02), 7 September 2004 *Trojani* (C-456/02), 15 September 2005 *Ioannidis* (C-258/04), and 4 June 2009 *Vatsouras and Koupatantze* (C-22/08 and C-23/08).

117 See *A 4* No. 17, weekly newsletter from the Danish Confederation of Trade Unions (‘LO’), 11 May 2009.

118 Guidelines on EU/EEA citizens’ right to social cash assistance and starting assistance, No. 19 of 4 April 2008, National Directorate of Labour.

Chapter V

Other Obstacles to Free Movement

Nothing to report.

Chapter VI Specific Issues

1. FRONTIER WORKERS

Texts in force

Laws

The Act on *Pay-as-you-earn Taxation* ('Kildeskatteloven')¹¹⁹ Part I A deals with frontier workers.¹²⁰

Sections 5 A-5 D provides the frontier worker with a choice on how his/her income should be taxed.

As a frontier worker does not reside in Denmark, the rules on unlimited tax liability in the Act on Pay-as-you-earn Taxation Section 1 do not encompass the worker. Instead the rules in Section 2 on limited tax liability apply, which limits the access to tax relief.

However, Section 5 A states that provided the frontier worker earns at least 75 % of his/her global income in Denmark in the form of payment for personal work or profit from performing business, he/she may choose access to deduction for expenses, cf. Sections 5 B-5 C, i.e. tax relief, resulting in the frontier worker being in a position similar to an unlimited tax liable, cf. Section 1.

Administrative rules

The *EU Residence Order* Section 7 (1) (iii) read in connection with Section 20, implements Directive 2004/38 Art. 17 (1) (c) on the right to permanent residence for persons no longer working in the host MS.¹²¹ Section 7 (1) (iii), cf. Section 7 (1), states that an EU citizen who works as an employee or self-employed in another Member State while retaining residence in Denmark to which the EU citizen return, as a rule, at least once a week, has a right to residence for more than the 3/6 months mentioned in Aliens Act Section 2 (1), provided the EU citizen has had business activity and resided in Denmark continuously for at least the previous 3 years.

As mentioned above Chapter I on Art. 17, Section 7 (3) states that as for an EU citizen falling within Section 7 (1) (iii), periods of paid employment or self-employment completed in another Member States are considered as having been completed in Denmark for the purpose of acquisition of the rights mentioned in subsection (1) (i) and (ii).

Regarding the compatibility of the residence requirement in Section 7 (1) (iii) with *Hartmann*, the Ministry of Refugee, Immigration and Integration Affairs states that *Hartmann* does not concern the issue of permanent residence.¹²² Thus, the Ministry has the view that the provision is not against the ruling in *Hartmann*.¹²³ In more detail regarding *Hartmann*, the Ministry states that the

119 Consolidation Act No. 1086 of 14 November 2005 and amendments.

120 The rules on frontier workers were originally introduced by Act No. 1095 of 20 December 1995 on the background of the Commission's recommendation 1993-12-21 and the judgments in C-279/93 and C-80/94. The rules took effect from the income year 1992.

121 See above Chapter I.

122 ECJ judgment of 18 July 2007 (C-212/05).

123 It should be noted, however, that Section 7 (1) (iii) might be read as forming the legal basis of an 'independent' residence right (i.e. a residence right not dependant on Section 20 on permanent residence). This is caused by the fact that Section 20 states that persons with a *right of residence* in Denmark under Section(s) 7 [...] have a *right to*

case concerns issues on social security under Regulation 1612/68 which, according to the Ministry, do not apply directly to the rules on rights of residence of EU citizens and their family members under Directive 2004/38. The Ministry further states that frontier workers residing in Denmark and working in their home-country are considered to be persons of sufficient resources in terms of Directive 2004/38; see below. As a justification of this, the Ministry refers to COM (2009) 313, p. 4.¹²⁴

Miscellaneous (administrative practices, etc.)

According to information obtained from the Ministry of Refugee, Immigration and Integration Affairs, frontier workers residing in Denmark and working in their home-country are considered to be persons of sufficient resources.¹²⁵ In more detail, the legal status of frontier workers and their family members is regulated as follows:

Regarding an EU citizen's family members being third-country nationals, Aliens Act Section 9a (1) lays down rules on the issue of residence permits to third-country nationals on the basis of employment or self-employment. Moreover, and with the particular purpose of providing for an enhanced integration in the Oresund region, Aliens Order Section 30 (5) provides for a work permit to be issued to aliens residing outside of Denmark when essential employment or business considerations make it appropriate, cf. Aliens Act Section 9a (1). This may be of relevance to family members of EU citizens being third-country nationals and residing in for instance Sweden. As for specific situations of frontier workers, the Ministry further informs these to be as follows:

- When for instance a German citizen takes up residence in Denmark and works in Germany, the German citizen is considered to be of sufficient resources in terms of Directive 2004/38.
- When for instance a German citizen takes up work in Denmark and maintains his/her residence in Germany, there are no consequences in terms of residence rights.
- When a Danish citizen takes up residence in Sweden and works in Denmark, this has no consequences in terms of residence rights as the person is a Danish citizen.¹²⁶ However, regarding the rights to family reunification, the interpretation of the EU rules on family reunification applied by the Danish immigration authorities results in a Danish citizen taking up residence in Sweden and working in Denmark to be considered as being of sufficient resources due to the fact that the person's means originates from another EU country. Thus, the Danish citizen will achieve the right to family reunification under the EU rules upon return to Denmark, cf. Directive 2004/38 Article 7 (1), litra b.
- When a Danish citizen maintains his/her residence in Denmark and works in Sweden, this has no consequences in terms of residence rights and no rights to family reunification are derived from the EU rules.¹²⁷

permanent residence without satisfying any further conditions. It thus seems as if Section 7 (1) (iii) forms the legal basis of a residence right above 3/6 months but not being permanent, whereas Section 20 forms the legal basis of a right to permanent residence (corresponding that of Directive 2004/38 Art. 17 (1) (c)).

124 Cf. e-mail of 11 May 2010 from an official within the Ministry of Refugee, Immigration and Integration Affairs.

125 Cf. e-mail of 11 May 2010 from an official within the Ministry of Refugee, Immigration and Integration Affairs.

126 This is most likely due to the special Nordic rules.

127 Cf. in general e-mail from an official within the Ministry of Refugee, Immigration and Integration Affairs of 27 July 2009.

2. SPORTSMEN/SPORTSWOMEN

Football

Nationality quotas

Comparing with last year's report, there are no changes to the rules.¹²⁸

As described in detail in the previous report, the rules on the Danish Football Association ('Dansk Boldspil-Union', DBU),¹²⁹ a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF),¹³⁰ Fédération Internationale de Football Association (FIFA)¹³¹ and the Union des Associations Européennes de Football (UEFA)¹³² and under the competence of the Court of Arbitration for Sport (CAS)¹³³ and the International Football Association Board (IFAB), do not contain nationality quotas with regard to players with citizenship from countries within Europe generally applicable. However, in 2009 DBU adopted rules on *home-grown players* covering only the best Danish football league; the *SAS league*. Hence, in an official first team of 25 players, DBU's rules require the teams in the SAS league to have a minimum of 8 home grown players.¹³⁴

As for international matches ('landskampe'), only players who are Danish citizens and entitled to play for a Danish club or an alien club organized under a football federation which is a member of FIFA, must be selected. Regarding players with citizenship from countries outside of Europe, nationality quotas are applied.

Transfer fees

Comparing with last year's report, there are no changes to the rules.¹³⁵

According to the rules on the Danish Football Association ('Dansk Boldspil-Union', DBU), FIFA's Regulations for the Status and Transfer of Players apply regarding *training compensation*. In the event of transfer between Danish clubs, there is no requirement on payment of training compensation.

As for *solidarity contribution*, DBU specifically refers to FIFA's Regulations on the Status and Transfer of Players - Annex 5, which requires a proportional solidarity contribution to be paid to any of the player's training or education club(s) when a professional player is transferred during the course of his contract. The solidarity contribution equals 5 % of the compensation paid to his former club, not including training compensation.

128 Cf. also e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

129 Official website: www.dbu.dk.

130 Official website: www.dif.dk.

131 Official website: www.fifa.com.

132 Official website: www.uefa.com.

133 Official website: www.tas-cas.org.

134 Cf. e-mail of 18 August 2009 from an official within the Ministry of Culture..

135 Cf. also e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

Basketball

Nationality quotas

Comparing with last year's report, there are no changes to the rules in the area.¹³⁶

As described in detail in the previous reports, the rules on Denmark's Basketball Federation ('Danmarks Basketball-Forbund', DBBF),¹³⁷ a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF)¹³⁸ and the International Basketball Federation (FIBA Europe),¹³⁹ do not contain nationality quotas as regards players with citizenship from countries within Europe. However, nationality quotas are applied with regard to players with citizenship from countries outside of Europe. Furthermore, special rules apply to national teams.

Transfer fees

Comparing with last year's report, there are no changes to the rules in the area.¹⁴⁰

As described in detail in the previous reports, transfer fees are not applied in Danish basketball. However, on 13 June 2009, DBBF adopted rules on young players, prescribing a *compensation sum* to be paid to the club of origin when the young talent plays in the best series later on.¹⁴¹ The compensation sum currently amounts to approximately 270 Euro (2,000 DKK) per season for men, and approximately 130 Euro (1,000 DKK) per season for women.

Volleyball

Nationality quotas

Compared with last year's report, there are no changes to the rules in the area.¹⁴²

As described in detail in the previous report, the rules on the Danish Volleyball Federation ('Dansk Volleyball Forbund', DVBF),¹⁴³ a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF),¹⁴⁴ the International Volleyball Federation (FIVB)¹⁴⁵ and the International Volleyball Federation's European Volleyball Confederation (CEV),¹⁴⁶ do not seem to contain nationality quotas. However, DVBF imposes residence requirements on non-Danish citizens upon participation in certain tournaments and special rules apply to national teams. Furthermore, DVBF is subject to the rules issued by FIVB as regards the number of alien players hired per team in the clubs and alien players simultaneously on court. However, DVBF has not

136 Cf. also e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

137 Official website: www.danmarksbasketballforbund.basket.dk.

138 Official website: www.dif.dk.

139 Official website: www.fibaeurope.com.

140 Cf. also e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

141 Cf. e-mail of 18 August 2009 from an official within the Ministry of Culture.

142 Cf. also e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

143 Official website: www.volleyball.dk.

144 Official website: www.dif.dk.

145 Official website: www.fivb.com.

146 Official website: www.cev.lu.

implemented the regulations of FIVB on limitation of the number of players from other national federations simultaneously on court.¹⁴⁷

Transfer fees

Compared with last year's report, there are no changes to the rules in the area.¹⁴⁸

As described in detail in the previous report, the Danish Volleyball Federation ('Dansk Volleyball Forbund', DVBF) is subject to FIVB's rules on transfer. As for international transfer, FIVB requires a transfer fee of 2,000 USD to be paid when an alien player is to play international matches for a Danish club during a season.¹⁴⁹ Moreover, according to the rules on DVBF, a fee of 1,000 Euro must be paid to DVBF for the issuance of the transfer certificate upon transferring to an alien club.

Handball

Nationality quotas

Compared with last year's report, there are no changes to the rules in the area.¹⁵⁰

As described in detail in the previous report, the rules on Danish Handball Federation ('Dansk Håndbold Forbund', DHF),¹⁵¹ a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF),¹⁵² the International Handball Federation (IHF),¹⁵³ the European Handball Federation (EHF)¹⁵⁴ and the Scandinavian Handball Federation ('Skandinavisk Håndbold Forbund', SkHF) do not contain nationality quotas. However, DHF is subject to the regulations of the federations and both DHF and the international federations are contemplating on a regularly basis to adopt regulations limiting the number of alien players in Danish Handball. According to information obtained from the Ministry of Culture, DHF is aware of the limitations for such regulations following the EU rules on free movement.¹⁵⁵

Transfer fees

The Danish Handball Federation ('Dansk Håndbold Forbund', DHF) is subject to the rules of IHF and EHF on transfer and applies *education compensation*. Moreover, a fee must be paid for the issuance of an international player certificate upon transferring to/from an alien club.¹⁵⁶ The size of the fee varies depending on whether the player is an amateur or a professional player, whether the transfer is to/from a European country or a country outside of Europe and whether the player

147 Cf. e-mail of 18 August 2009 from an official within the Ministry of Culture

148 Cf. also e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

149 Cf. e-mail from an official within the Ministry of Culture of 18 August 2009.

150 Cf. also e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

151 Official website: www.dhf.dk

152 Official website: www.dif.dk

153 Official website: www.ihf.info/front_content.php?idcat=57.

154 Official website: www.eurohandball.com.

155 Cf. e-mail of 30 June 2008 from an official within the Ministry of Culture.

156 There is no fee on the issuance of a Danish player certificate.

is on contract. If the player is not on contract and is being transferred within EU, only an administration fee is required. DHF's regulation specifically refers to the EU rules on free movement and in particular the *Bosman Case* and its consequences for the transfer regulations.¹⁵⁷ It is noted that the *Bosman Case* overrides part of the transfer regulation for which reason it is of crucial importance knowing the player's nationality. As an alternative to transfer of a player in contract, DHF mentions the possibility of hiring out the player.

The *education compensation* may be requested for contract players at the age of 16-23, who has been on contract within the past 12 months provided the player appears on the match report for the season on question. The education compensation may amount to a maximum of 2,500 Euro for each season the player has been on contract between the player's 16th to 23th year. Moreover, an additional compensation of 500 Euro for each year the player has been on contract and played for a youth national team may be requested. Hence, the education compensation may amount to a maximum of 24,000 Euro (8 x 3,000).

Ice-hockey

Nationality quotas

Comparing with last year's report, there are changes to the rules in the area.¹⁵⁸

The rules on Denmark's Ice-Hockey Association ('Danmarks Ishockey Union', DIU),¹⁵⁹ a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF)¹⁶⁰ and the International Ice Hockey Federation (IIHF),¹⁶¹ do contain nationality quotas, as a club at any time is allowed to have 8 players on contract who do not hold Danish citizenship. In this context, players on contract encompass players on try-out and players playing on the club's first team without having entered into a contract with the club.

Transfer fees

As described in detail in the previous report, Denmark's Ice-Hockey Association ('Danmarks Ishockey Union', DIU) is under the rules on transfer of IIHF. Moreover, a fee of approximately 1,000 Euro (8,250 DKK) must be paid for the issuance of the transfer card. 5,000 DKK of these are paid to IIHF and the national association releasing the player. The remains of the fee are an administrative fee.

¹⁵⁷ ECJ judgment of 15 December 1995 *Bosman* (C-415/93).

¹⁵⁸ Cf. also e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

¹⁵⁹ Official website: www.ishockey.dk.

¹⁶⁰ Official website: www.dif.dk.

¹⁶¹ Official website: www.iihf.com.

Rugby**Nationality quotas**

Compared with last year's report, there are no changes to the rules in the area.¹⁶²

As described in detail in the previous report, the rules, the rules on the Danish Rugby Association ('Dansk Rugby Union', DRU),¹⁶³ a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF),¹⁶⁴ the International Rugby Board (IRB),¹⁶⁵ the Association Européenne Rugby (FIRA-AER)¹⁶⁶ and the Scandinavian Rugby Union (SRU) do not contain nationality quotas.

According to the most recent membership statement from 2009, DRU has 1,703 members. This makes DRU DIF's smallest federation and its activities are solely performed on an amateur basis. Thus, neither nationality quotas nor transfer fees exist in Danish rugby.¹⁶⁷

Transfer fees

See above on nationality quotas.

3. THE MARITIME SECTOR

As described in detail in the previous reports, the Commission filed an *opening statement regarding breach of Article 39 (2) of the EC Treaty and Articles 7 and 8 of Regulation 1612/68* in October 2004. The disputed issue was the fact that the Act on a Danish International Ship's Register Section 10 (2) determined that Danish collective agreements regarding wages and working conditions on board ships could only apply to persons living in Denmark or persons who should be put at an equal footing with Danish nationals on the basis of international obligations.¹⁶⁸ In practice this provision has been construed by the Danish authorities to mean that the *place of residence* is the decisive factor, which has been upheld by the Industrial Court ('Arbejdsretten').¹⁶⁹

According to governmental information obtained in 2007, the Danish Ministry of Justice has been awaiting the Commission's response on the proposed legislative amendment.¹⁷⁰

By Act No. 214 of 24 March 2009, entering into force on 1 April 2009, the Act was amended. Consequently, on 8 October 2009 the Commission informed the Danish Ministry of Foreign Affairs that the case was waived.¹⁷¹

162 Cf. also e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

163 Official website: www.rugby.dk.

164 Official website: www.dif.dk.

165 Official website: www.irb.com.

166 Official website: www.fira-aer-rugby.com.

167 Cf. e-mail of 21 May 2010 from an official within the Danish Ministry of Culture.

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

169 Official website: www.arbejdsretten.dk. Cf. cases No. 96.017, No. 2001.335, cf. cases No. 2004.435, No. A2007.250 and A2007.255.

170 E-mail of 13 April 2007 from an official within the Danish Ministry of Justice.

171 Cf. Notification from the Danish Ministry of Foreign Affairs of 19 October 2009, available at <http://www.eu-ophlysnings.dk/upload/application/pdf/c099ccbc/0931.pdf>, accessed on 21 March 2010.

4. RESEARCHERS/ARTISTS

Compared to last year's report, no major amendments have been made.

According to information obtained from the Ministry of Employment, no rules on the interpretation of the concept of worker apply specifically to researchers and artists.¹⁷² Hence, the general rules requiring such cases to be dealt with on a case-by-case basis, apply, comprising criteria such as the requirement on the employment to be real and genuine and not to be regarded as marginal or of such limited extent that the income appears as a purely marginal supplement to a person's other income or means in order to serve as the basis for the residence right. Moreover, the minimum requirement on the duration of employment of 10-12 hours on a weekly basis, apply as a main rule. Regarding fixed-term and short-term employment contracts in particular, the Danish Immigration Service emphasises the requirement on dealing with the cases on a case-by-case basis. While referring to practice from the ECJ, the Danish Immigration Service states that no lower limit on the duration of employment may be set.¹⁷³

5. ACCESS TO STUDY GRANTS

Compared to last year's report, no major amendments have been made.

Texts in force

Laws

The Act on *the State Education Grant* ('SU-loven') Section 2 a (2) states that students who are EU/EEA citizens and their family members can obtain study grants for education in Denmark and abroad on the conditions following from the EU rules or the EEA agreement.¹⁷⁴ Section 2 a (2) and (3) states that EU/EEA citizens who are *not workers or self-employed* and their family members do not acquire the right to study grants until they have resided for 5 consecutive years in Denmark.

Administrative rules

Executive Order on *State Education Grant* ('SU-bekendtgørelsen') Section 67¹⁷⁵ states that an EU/EEA citizen may obtain study grants on equal conditions to Danish citizens when the alien is either

- considered a *worker or self-employed person* under the EU rules, or
(the following categories are also considered to be encompassed by the concepts of worker or self-employed:

172 Cf. e-mail of 15 July 2009 from an official within the Ministry of Employment.

173 Cf. *Guidance on Residence under the EU Residence Order* issued by the Danish Immigration Service to the Regional State Administration, published on 25 May 2009, referring to ECJ judgment of 6 November 2003 *Franca Ninni-Orasche* (C-413/01) on short-term employment of 10 weeks duration, available at www.nyidanmark.dk/NR/rdonlyres/BB2D02FD-6E1F-4E09-878A-C059BF80ED54/0/vejledning_til_statsforvaltningerne_vedr_ophold_efter_eu_opholdsbekendtgørelsen.pdf, accessed on 21 March 2010.

174 Consolidation Act No. 661 of 29 June 2009 and amendments.

175 Executive Order No. 455 of 8 June 2009.

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- an EU/EEA citizen who has been working in Denmark as an employee or self-employed person, when there is relation between the education and the former work in terms of contents and time
- an EU citizen who is involuntarily unemployed and as a consequence of health grounds or structural circumstances in the labour market is in need of re-education with the purpose of employment in a profession without relation to the former work in Denmark in terms of contents and time)
- a *spouse* of an EU/EEA citizen who is considered to be a *worker or self-employed* under the EU rules, if he/she is or has been residing with the EU/EEA citizen in the period of time when the EU/EEA citizen was a worker or self-employed in Denmark, or
- a *child* of an EU/EEA citizen who is considered a *worker or self-employed* under the EU rules, if the child resided in Denmark with the EU/EEA citizen and is or has been residing with the EU/EEA citizen in the period of time when the EU/EEA citizen was a worker or self-employed in Denmark. It is a condition that the student is not of such age or status making it unreasonable to attach importance to the parent's circumstances. If the child is not residing in Denmark at the time of the commencement of the education, the child is entitled to study grants only if the EU/EEA citizen is considered to be a worker or self-employed under the EU rules and has provided for the child until the time of the commencement of the education, or
- a *parent* to an EU/EEA citizen who is considered to be a *worker or self-employed* under the EU rules, when the parent is provided for by the EU/EEA citizen and resides with or has been residing with the EU/EEA citizen in a period of time when the EU/EEA citizen is or was a worker or self-employed in Denmark, or
- an *EU/EEA citizen or family member* thereof who has resided for *5 consecutive years* in Denmark, cf. Consolidation Act No. 661 of 29 June 2009 Section 2 a (3), according to which the stay in Denmark is not considered to be interrupted due to temporary stays outside the country when these stays do not exceed 6 months a year in total or when the stay abroad is of longer duration due to obligatory military service or if one stay of maximum 12 consecutive months is caused by special circumstances, such as pregnancy and birth, serious illness, studies or foreign assignment. In cases of more than 2 years consecutive stay abroad, the right to study grants cannot be required until a following stay in Denmark of 5 consecutive years.

Chapter VII

Application of Transitional Measures

- 1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS**

- 2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA**

According to a political agreement of 4 December 2008, the transitional rules were to be abolished altogether. The Bill implementing that agreement was tabled before the Parliament on 25 February 2009,¹⁷⁶ adopted by the Parliament on 21 April 2009, and entered into force as of 1 May 2009.¹⁷⁷

176 Bill No. L 141/2008-09.

177 Act No. 313 of 28 April 2009, amending the Aliens Act.

Chapter VIII

Miscellaneous

1. RELATIONSHIP BETWEEN REGULATIONS 1408/71-883/04 AND ART. 45 TFEU AND REGULATION 1612/68

Both principled and practical aspects of the interaction of Regulation No. 1408/71 and Danish social welfare legislation – not least concerning the delimitation of benefits covered by the Regulation – seem to come increasingly into focus at various administrative levels, and the National Social Appeals Board (‘Ankestyrelsen’) has clarified the impact of Regulation No. 1408/71 in a number of important decisions in recent years.

In 2005 the Appeals Board examined three cases of a principled nature pertaining to Regulation No. 1408/71. The first case concerned a Spanish citizen receiving partial Danish old-age pension who had applied for a social pension supplement under Danish law, which was to be calculated in accordance with Regulation No. 1408/71.¹⁷⁸ In the second case, the Appeals Board held that a Danish citizen, resident in Spain, was entitled to certain health-related benefits during his temporary stay in Denmark. Being formerly employed within the EU, and now receiving old-age pension from Denmark, he was eligible for benefits under Regulation No. 1408/71, and the specific kind of benefit was to be delivered by Denmark during his stay here, according to Art. 31 of the Regulation.¹⁷⁹ The third case also involved mobility issues, the Appeals Board here finding that an EU citizen who had resided in Denmark for 22 years and who was now receiving Danish old-age pension, would be entitled to continued receipt of this social pension upon removal to an African country, since Art. 3 (1) of Regulation No. 1408/71 had been amended and residence within the territory of the EU Member States was therefore no longer required.¹⁸⁰

In 2006 the Appeals Board re-examined a case concerning the right to payment of medical services in other Member States that had been brought before the Parliamentary Ombudsman. While acknowledging the potential difference between recent ECJ judgments and the rules laid down by the Danish Health Ministry, the Appeals Board held that the applicant in the concrete case did not fulfil the general conditions for access to medical services under Danish law.¹⁸¹ Two other 2006 decisions from the Appeals Board regarding Regulation No. 1408/71 concerned more specific issues. One case in principle pertained to free movement, yet it dealt with a question regarding the geographical delimitation between Danish and German legislation in connection with the particular conditions for frontier workers according to Arts. 4 and 13 (2) of the Regulation.¹⁸²

178 National Social Appeals Board (‘Ankestyrelsen’), decision of 17 November 2004. Reported in P-2-05 (available at www.ast.dk/afgoerelser/principafgoerelser).

179 National Social Appeals Board, decision of 15 June 2005. Reported in C-30-05. In its decision, the Appeals Board makes reference to two statements from the Ministry of Social Affairs.

180 National Social Appeals Board, decision of 19 October 2005. Reported in P-30-05.

181 National Social Appeals Board, decision of 30 August 2006. Reported in S-2-06.

182 National Social Appeals Board, decision of 23 November 2005. Reported in N-2-06.

Another decision was based *ex contrario* on the listing of social security benefits in the Regulation.¹⁸³

Both of the Appeals Board decisions from 2007 clarified principled aspects of the obligations incumbent on the social welfare authorities under Regulation No. 1408/71. One of the appeals decisions concerned the extent of the obligation to provide information from the authorities in other Member States as a basis for decision-making, and the Appeals Board set aside an administrative decision refusing to re-examine an application for social pension, due to the failure of the Danish administration to apply the rules on administrative assistance laid down in Regulation No. 1408/71.¹⁸⁴ In the other decision, concerning the payment of child's allowance to a mother whose child was living with the father in France, it was stated that due to the direct effect and the primacy of Regulation No. 1408/71, a residence requirement in the domestic Act on Child Family Allowances could not be enforced.¹⁸⁵

In an important 2008 decision, the Appeals Board accepted the principle of retroactive effect of ECJ judgments clarifying the impact of Community legislation. Hence, the applicant German citizen, residing in Canada, was granted old-age pension retroactively – although only for a period of 5 years according to Danish legislation on limitation – under the Danish-Canadian Convention on social security which was considered applicable to him on equal terms with Danish citizens, in accordance with the ECJ's interpretation of Article 39 TEC in respect of bilateral treaties with third countries.¹⁸⁶ Another decision concerned frontier workers,¹⁸⁷ one decision the prioritisation between Denmark and another Member State in which one of the spouses was working and residing,¹⁸⁸ whereas three decisions dealt with more specific issues concerning the application of Regulation No. 1408/71 in Danish law.¹⁸⁹

[This Section might be updated with recent Appeals Board decisions Nos. 104-09, 207-09, 7-10, 8-10, 34-10, 35-10, 47-10, but it does not really seem to fall within the scope of the FMoW Report]

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS

As mentioned above Chapter VI.1, the Ministry of Refugee, Immigration and Integration Affairs states that *Hartmann* (C-212/05) concerns issues on social security under Regulation 1612/68 which, according to the Ministry, do not apply directly to the rules on rights of residence of EU citizens and their family members under Directive 2004/38. The Ministry further states that frontier workers residing in Denmark and working in their home-country are considered to be persons

183 National Social Appeals Board, decision of 26 April 2006. Reported in S-1-06.

184 National Social Appeals Board, decision of 15 August 2007. Reported in R-7-07.

185 National Social Appeals Board, decision of 10 October 2007. Reported in B-6-07.

186 National Social Appeals Board, decision of 12 March 2008. Reported in P-9-08. Particular reference is made in the Appeals Board's decision to the ECJ judgment of 15 January 2002 *Gottardo* (C-55-00).

187 National Social Appeals Board, decisions of 5 November 2008 (reported in No. 22-09). See also decision of 18 March 2009 (reported in No. 104-09).

188 National Social Appeals Board, decision of 22 October 2008 (reported in No. 29-09).

189 National Social Appeals Board, decisions of 13 February 2008 (reported in B-2-08), 11 September 2008 (reported in D-25-08) and 10 December 2008 (reported in No. 31-09).

of sufficient resources in terms of Directive 2004/38. As a justification of this, the Ministry refers to COM (2009) 313 p. 4.¹⁹⁰

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

A clear aim of increased recruitment of foreign labour and attracting highly qualified labour to Denmark has had an impact on Danish legislation.¹⁹¹ Examples of this have been described in the previous Chapters¹⁹² and another example is the Act on *Pay-as-you-earn Taxation* ('Kildeskatteloven') Sections 48 E and 48 F¹⁹³ on optional 25 % gross taxation for key employees and researchers who are migrant workers residing in Denmark for a maximum of 36 months and optional 33% gross taxation for 5 years. The provisions have the purpose of making it more appealing for highly educated and qualified employees to reside in Denmark for a longer period of time.

3.1 Integration measures

EU citizens are not encompassed by the Danish Act on *Integration*, cf. Section 2 (3).¹⁹⁴ However, the clear aim of increased recruitment of foreign labour and attracting highly qualified labour to Denmark influence the legislation covering EU citizens to a certain extent.

As mentioned above in Chapter III, a.2 on Danish courses, the Ministry of Refugee, Immigration and Integration Affairs introduced a bill to amend the Act on *Danish Courses for Adult Aliens et al.* and the Act on Integration on 25 February 2009 with the purpose of attracting highly qualified employees to Denmark.¹⁹⁵ The Bill establishes a free vocational offer on Danish courses on the internet ('Online Dansk'), cf. Section 16a.¹⁹⁶ Furthermore, a specific provision on *EU/EEA frontier workers* was proposed adopted in the Act. The provision provides the legal basis for EU/EEA frontier workers to have a right to Danish courses on equal terms with aliens issued with a residence permit and residing in Denmark, cf. Section 2a. The explanatory memorandum to the Bill specifically refers to Regulation 1612/68 Art. 7 (2) on social (and tax) advantages and states that legitimate compensation claims from EU/EEA citizens who up to now themselves have defrayed the expenses for Danish courses will be covered.¹⁹⁷ The Bill was adopted by the Parliament on 12 June 2009 entering into force on 1 July 2009.¹⁹⁸

Moreover, the Ministry of Refugee, Immigration and Integration Affairs introduced a bill to amend the Act on *Danish Courses for Adult Aliens et al.* on 11 November 2009 providing a

190 Cf. e-mail of 11 May 2010 from an official within the Ministry of Refugee, Immigration and Integration Affairs. See more in Annex II.

191 See http://uk.fm.dk/Publications/2009/~media/Publikationer/Imported/2009/DK%20nationale%20reformprogram/Denmarks_national_reform_programme_2009_web.ashx, accessed on 21 April 2010.

192 See above Chapter III, a.2.

193 Consolidation Act No. 1086 of 14 November 2005 and amending Act No. 522 of 17 June 2008.

194 Consolidation Act No. 1593 of 14 December 2007.

195 Bill No. L 140/2008-09.

196 See www.nyidanmark.dk/en-us/Integration/online_danish/ for a description, accessed on 20 March 2010.

197 Explanatory memorandum to Bill No. L 140/2008-09, general remarks 4.2 *in fine*.

198 Act No. 485 of 12 June 2009.

supplement to the ordinary Danish courses by intruding cost-free ‘intro-Danish’, i.e. Danish courses aiming at the Danish labour market for aliens above 18 residing in Denmark on a more temporary basis with the purpose of employment or encompassed by Section 2 a (frontier workers), in particular by the adoption of Section 16b. The offer of Intro-Danish applies to all aliens having ordinary employment, continuous lawful residence and a right to take up employment in Denmark, and thus applies to EU citizens and third-country nationals alike. An alien who have followed intro-Danish will have the option of joining the ordinary Danish courses within a 3-year period, provided the alien continues to have lawful residence in Denmark. According to Section 16 (4), aliens receiving starting assistance (‘starthjælp’) or social assistance (‘kontanthjælp’) are not entitled to receive an offer of intro-Danish. This does not apply, however, to EU citizens residing in Denmark on the basis of the EU rules on free movement. Thus, EU citizens receiving starting assistance (‘starthjælp’) or social assistance (‘kontanthjælp’) are entitled to receive an offer of intro-Danish.¹⁹⁹ The Bill was adopted by Act No. 1512 of 27 December 2009 and entered into force on 1 January 2010; Section 16b, however, enters into force on 1 July 2010.

Furthermore, the Ministry of Refugee, Immigration and Integration introduced a bill to amend Section 14 of the Act on *Danish Courses for Adult Aliens et al.* on 26 March 2010, making Danish courses cost-free for all aliens encompassed by the Act (as opposed to aliens encompassed by the Act on *Integration* which is the current wording of Section 14).²⁰⁰ The proposed amendment is part of the government’s debureaucratization plan having the purpose of reducing the administrative burden on businesses and simplifying and improving the procedures.²⁰¹ The Bill was adopted by the Parliament on 25 May 2010 and enters into force on 1 July 2010.

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

A clear aim of increased recruitment of foreign labour and attracting highly qualified labour to Denmark has had an impact on the Danish legislation relating to migrants.²⁰² Examples of this have been described in the previous report regarding the amendment of Aliens Act Section 9a on the issuance of residence permits on the basis of employment or self-employment by Act No. 486 of 17 June 2008.

In Danish immigration legislation and according to information obtained from the Ministry of Employment and the Ministry of Refugee, Immigration and Integration Affairs, there is a distinction between ordinary employment and highly qualified employment when deciding on the issue of residence permits for third-country nationals on the basis of employment.

Ordinary employment is characterized by the fact that the work may as well be performed by Danish or alien workers residing in Denmark or workers from the EU/EEA as by third-country nationals not residing in Denmark. In connection with applications on residence permits on the basis of employment, the Danish immigration authorities consult the regional councils on em-

199 Explanatory memorandum to Bill No L 64/2009-10, general remarks 3 and specific remarks Section 1, 10.

200 Explanatory memorandum to Bill No. L 189/2009-10 Section 2, 3.

201 ‘Mere tid til velfærd’ (i.e. ‘Better Regulation’), available at <http://uk.fm.dk/Initiatives/Denmarks%20Better%20Regulation%20Programme.aspx>, accessed on 20 April 2010.

202 See http://uk.fm.dk/Publications/2009/~media/Publikationer/Imported/2009/DK%20nationale%20reformprogram/Denmarks_national_reform_programme_2009_web.ashx, accessed on 21 April 2010.

ployment in case of doubt on whether there is available and qualified labour in Denmark and the EU/EEA countries within the professional area concerned. The occupational and commercial evaluation forms the basis of the processing of the case by the Ministry of Refugee, Immigration and Integration Affairs. For the issue of residence permits on the basis of employment, it is a condition that the work is of such special nature that the issue of residence permit is recommended. In general, residence permits are not issued for third-country nationals on the basis of unskilled work or ordinary skilled work.

As for highly-qualified employment, various schemes in Aliens Act Section 9a, such as the green card scheme, the positive list, the pay limit scheme and the corporate residence permit, ease the access for third-country nationals in obtaining residence permits on the basis of employment. When issuing residence permits on the basis of highly qualified employment, the Danish immigration authorities do *not* consult the regional councils on employment on whether there is available labour in the EU/EEA countries within the area concerned. Yet, the Danish authorities consider the Union preference principle as being complied with. The reasoning behind this view is the fact that EU citizens may enter and work without restrictions, whereas third-country nationals are subject to additional requirements, both administratively and materially.²⁰³

It might be questioned whether the Union preference principle can be considered as being complied with solely on the basis of requirements imposed on third-country nationals.

3.3 Return of nationals to new EU Member States

Nothing to report.

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

In Denmark, there is no establishment of specific bodies competent to deal with complaints of violation of Community Law. Hence, the complaints must be launched to the common bodies competent to deal with legal disputes, such as the courts, the sector specific complaint bodies, the administrative bodies and the Ombudsman.

5. SEMINARS, REPORTS AND ARTICLES

Legislation

All national legislation is available in Danish at: www.retsinfo.dk.

English versions of the *Aliens Act*, the *Aliens Order*, the *EU Residence Order*, the *Integration Act*, the *Act on Danish Courses for Adult Aliens* and the *Act on Ethnic Equal Treatment* are available at: <http://www.nyidanmark.dk/en-us/legislation/legislation.htm>.

All Bills are available in Danish at: www.ft.dk.

203 Cf. e-mail of 28 May 2010 from an official within the Ministry of Employment.

Studies, reports, articles and legal literature

- Publications on immigration and integration, the Rockwool Foundation, available at: <http://www.en.rff.dk/publications/immigration+and+integration>.
- Working papers on immigration and integration, the Rockwool Foundation, available at: <http://www.en.rff.dk/publications/working+papers>.
- Europa-løsningen: en vejledning i retten til familiesammenføring efter EU-reglerne*, 1st edition, Dokumentations- og rådgivningscentret om racediskrimination, 2009.
- Christina Barnow, *Deportation, especially for EU citizens*, thesis, Aarhus University, School of Law, published in 'Rettid', 2010, available at: http://www.jura.au.dk/fileadmin/site_files/filer_jura/dokumenter/forskning/rettid/2010/afh5-2010.pdf.
- Morten Broberg et al., *Free movement in the European Union*, 3rd edition, Copenhagen: DJØF 2009.
- Dinna Hansen, *Conformity Study for Denmark – Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, prepared by Milieu Ltd. in consortium with the Europa Institute, Edinburgh University 2008, available at: http://ec.europa.eu/justice_home/doc_centre/citizenship/movement/doc_citizenship_movement_en.htm (under 'V. Background information').
- Ruth Nielsen et al. (eds.), *The role of courts in developing a European social model: theoretical and methodological perspective*, 1st edition, Copenhagen: DJØF 2010.
- Nicola Offendal et al., *Internationale ansættelsesforhold: Udstationering og udenlandsk arbejdskraft i Danmark*, 1st edition, Copenhagen: Thomson Reuters 2009.
- Lynn M. Roseberry, *De juridiske aspekter vedrørende EU-udvidelsen og det danske arbejdsmarked*, Working paper no. 21, Rockwool Foundation, Syddansk Universitetsforlag 2009.
- Steinicke et al., *Grundlæggende EU-ret*, Copenhagen: DJØF 2009.
- Line Vikkelsø Slot, *Discrimination at the work place*, the Danish Institute for Human Rights, available at: [http://humanrights.dk/research/in+what+do+we+research/discrimination+at+the+work+place+\(in+relation+to+ethnicity\)](http://humanrights.dk/research/in+what+do+we+research/discrimination+at+the+work+place+(in+relation+to+ethnicity))