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

Rapporteurs: Prof. dr. R. Fernhout,
Prof. dr. C.A. Groenendijk,
Dr. P.E. Minderhoud,
Radboud University Nijmegen
Dr. H. Oosterom-Staples,
University of Tilburg

November 2010

Contents

Introduction

Two general issues

The relatively low level of unemployment in the Netherlands (5.6% of the active population in January 2010) resulted in a continued high reliance on workers from other Member States in 2009 and 2010. In 2009 social security contributions were paid for approximately 120,000 workers from Member States in Central Europe, 90% being nationals of Poland. The number of work permits granted for EU-2 workers in 2009 amounted to 3.250, slightly more than in the previous year. Almost half of the workers from EU-12 Member States are employed through the intermediary of private employment agencies. Most of those workers are employed in seasonal jobs in horticulture, but also in the food industry and in the harbours. This employment situation often results in substandard payment and employment conditions. About one fourth of those workers are housed in temporary accommodation (mobile cabins, holiday homes, former asylum seekers reception centres). This results in repeated complaints and stories about exploitation in the media.

Another new and remarkable feature is the repeated requests by leading politicians from various political parties to roll back free movement with EU-12 Member States. In December 2009 a motion stating that aim in the Second Chamber was supported both by the extreme right-wing and left-wing parties. The motion was rejected. As part of their more general anti-immigration or anti-immigrant policies some political parties in their programme for the June 2010 general elections proposed to renegotiate the rules on free movement in the EU. Several political parties during the campaign promised full use of the transitional period for the EU-2 and opposition against the accession of Turkey to the EU. The persisted requests by MPs from various parties to introduce mandatory language and integration courses for Polish workers in the Netherlands are another indication that in more than one political party free movement of EU nationals is not taken seriously or for granted.

Transposition of Directive 2004/38

Generally, the transposition of the Directive in Dutch law is correct. But the fact that the EU rules are transposed in the general immigration legislation and that, moreover, most EU rules are transposed not in the Aliens Act but in delegated legislation (Aliens Decree or Aliens Regulation) or even in the Aliens Circular increases the complexity and misunderstandings in the actual application of the EU free movement rules, the general rules being applied rather than the privileged free movement regime.

There are some exceptions of clearly incorrect or partial transposition. Three examples: (1) Article 3(1) of the Directive has been only partially transposed in Article 8.7 Aliens Decree, creating a.o. problems for TCN family members of Dutch nationals returning to the Netherlands after having used their free movement rights. (2) Furthermore, contrary to Article 8.7 Aliens Decree Article 3 Directive 2004/38 does not exclude the applicability of the Directive when a Union national lives and works in two Member States, his Member State of nationality included. (3) The Aliens Circular states that as a rule an EU national working at least 40% of the normal working time can be considered a “worker” (see B10/3.2.1 Aliens Circular). The statement itself is not incorrect. But the effect of the statement is that in practice often EU nationals working less than 40% are not considered to be workers and free movement rights that the person or his family members are denied or disregarded on that ground

or because of lack of sufficient income. That practice is clearly incompatible with Directive 2004/38 and with the ECJ case law in Geven, Megner and Genc.

Application of Directive 2004/38

A national of another Member State using his free movement rights in the Netherlands for more than only a few months, has to register with the municipal authorities of his place of residence, to acquire a social-fiscal fiscal number and to make an appointment with at one of the regional office of the Immigration and Nationality Service (that may take several months of waiting without the required documentation on the residence status). Once those administrative hurdles have been overcome and the migrant has been issued the right documents, (s)he will, generally, be treated by official authorities in accordance with the privileged position of EU nationals. However, those who have not yet made it so far - many Polish workers do not even take the trouble because they are working less than 6 months at a time – those who the immigration authorities want to expel from the country or those who are to a certain extent in a marginal position (third country family members or frontier workers) often experience special problem in realizing their free movement rights.

* *Third-country nationals* have special problems related with proving a "*durable relation*", with a registration in the Schengen Information System and when returning to the Netherlands with a Dutch spouse or partner after a stay in another Member States. Repeated political discussion about the so-called Belgium route and "abuse" of free movement has resulted in more rigorous check by the IND and a sharp increase of the percentage of applications for registration of their free movement status being refused: 11% in 2008 and 27% in 2009. A study commissioned by the Ministry of Justice revealed few indications of fraud and abuse. It appeared that only a small minority of TCN spouses/partner are coming with a returning Dutch national; more than three quarter is accompanying a national of another MS.
* *Frontier workers* experience problems with double health insurance, access to study grants and other social and fiscal benefits (?) in case a Dutch national lives in Belgium but works in the Netherlands.
* The issue of *nationals of other Member States* who after a criminal conviction have been issued an *entry ban* on the basis of national law, making further residence a crime under Dutch penal law, rather than the EU public order exception, has not been structurally solved yet.
* *EU nationals* are subjected to immigration detention because they are unable to show a valid passport on the spot, partly. as result of a restrictive interpretation of the *Oulane* judgment by the Council of State

Other problem issues

* Indirect discrimination in the legislation on study grants (the three out of six years rule); the Commission has started an infringement procedure on this issue.
* Recognition of qualifications obtained in or recognized by other Member States
* Residence related documents issued by other Member States: in some cases the relevance of such documents is disregarded and in other cases Dutch immigration officers incorrectly make their decision dependent on a document from another Member State rather than making their own judgment.

Positive developments

* Polish nationals have started to use the Equal Treatment Commission (*Commissie Gelijke Behandeling*) as an institution that may assist in counteracting discrimination on the basis of nationality by employers or other actors, such as car rental companies.
* National courts tend to refer more often to ECJ case law and comply with the judgments of the Court, if they have been properly informed of the relevant judgments.

Chapter I
The Worker: Entry, Residence, Departure and Remedies

1. ENTRY

Texts in force

In the Netherlands, the core of Directive 2004/38/EC was incorporated in the Aliens Decree, but the implementation of this Directive also brought amendments to the Aliens Act 2000, the Social Assistance Act and the study grant legislation (WSF). The policy guidelines, found in Chapters A2 and B10 of the Aliens Circular 2000, were amended to ensure their compatibility with Directive 2004/38/EC (see the 2007 national report).

On 29 January 2009, Chapters A2 and B10 of the Aliens Circular 2000 were amended again to establish in clearer and more precise terms the entry formalities to be satisfied by family members of EU/EEA citizens and Swiss nationals. At the same time the policy rules concerning the administrative formalities for unmarried partners of EU citizens were clarified (Besluit van de Staatssecretaris van Justitie van 23 January 2009, nr. 2009/1, houdende wijziging van de Vreemdelingencirculaire, *Staatscourant,* 29 January 2009, No. 1380, entry into force: 31 January 2009). In particular, the notion of a 'durable relationship, duly attested', in Article 3(2)(b) of Directive 2004/38/EC and Article 8.7(4) of the Aliens Decree 2000, was clarified in a new paragraph (Aliens Circular 2000, Chapter A2/6.2.2.2). See further: Chapter 2 of this report. The text of this paragraph now runs: 'A relationship is considered durable where the partners have had a common household during at least six months or where there is a common child'. Furthermore, Chapter B10/5.3.2.1 of the Aliens Circular 2000 was amended to bring Dutch law in line with the ECJ's judgment in the *Eind* case; on return to the Netherlands a Dutch national benefits from his free movement rights, even if he is not economically active (confirmed in: Judicial Division of the State Council, 12 November 2009, 200900969, LJN: BK3910, see on this case: Chapter 2(1), *Judicial Practice*).

On 23 September 2009, The Draft Act *Modern Migration Policy* was presented to Parliament (Tweede Kamer 2008-2009, 32 052 Nos. 1-3). This Bill will introduce faster admission procedures for regular migrants in the Netherlands. It does not apply to asylum seekers, or to beneficiaries of free movement rights.

Judicial practice

For cases concerning durable relationships and admission of family members if Dutch nationals who have exercised free movement rights, see Chapter 2.

Literature

T Abali & R Benevento, Gedreven wetenschap, interview with prof. Kees Groenendijk, *Migrantenrecht* (2009–1), pp. 15-17.

WODC-rapport *"Migratie naar en vanuit Nederland: een eerste proeve van de Migratiekaart",* april 2009.

2. RESIDENCE

Texts in force

Union citizens and their family members who hold a valid identity card or passport have the right of residence for a period of up to three months in another Member State without any formalities (Article 6 of the Directive). This right is implemented in Article 8.9(1) of the Aliens Decree for (a) holders of a valid identity card or valid passport or for (b) a person who can prove his identity and nationally unequivocally with other means (see also: Aliens Circular 2000, Chapter B10/2.5.1). The optional clause of Article 5(5), concerning the obligation to report to the authorities within a reasonable time for residence up to three months, has not been implemented in the Aliens Decree 2000. According to Chapter B10/2.3 of the Aliens Circular 2000, Union citizens are exempted from the obligation to report.

Article 7 of the Directive concerning the right of residence for more than three months, has been transposed by Article 8.12 of the Aliens Decree 2000 in a rather complicated way due to the much-differentiated categorisation of family members. Article 8.13 of the Aliens Decree 2000 concerns the right of residence for more than three months of third-country national family members. In the Aliens Circular 2000, the right of residence for more than three months is elaborated on in Chapter B10/2.5.2 and B10/5. The obligation to report intended stays longer than three months is embedded in Article 8.12(4) of the Aliens Decree 2000; an EU citizen has to register with the local council and the alien's administration (the Immigration and Naturalisation Service). The obligation is sanctioned in Article 108(5) of the Aliens Act 2000, with a maximum sentence of one month imprisonment or a fine of the second category (max. € 3 700; Article 23, Penal Code). After registration the Immigration and Naturalisation Service issues a registration certificate (Article 8.12 (6) of the Aliens Decree 2000) in the form of a sticker that is placed in the passport or attached to another identity paper. Once registered, an EU citizen is, in principle, entitled to stay in the Netherlands for as long as (s)he wishes.

The position of job seekers is subject of Article 8.12(1) of the Aliens Decree 2000. They are treated on the same footing as workers and self-employed persons. According to Article 8.12(1) of the Aliens Decree 2000, a job seeker is entitled to a right of residence for more than three month if he is able to provide evidence that he is still looking for a job and has a real opportunity to acquire a position (see also: Aliens Circular 2000, B10/3.1). Like all other EU citizens, a job seeker has to register himself with the Immigration and Naturalization Service when the initial period of three months residence expires. The same restrictions - public policy, public security or public health - apply.

Article 8.17 of the Aliens Decree 2000, implements a Union citizen's right to permanent residence on completion of a continuous period of legal residence in the host-Member State of five years (Article 16 Directive 2004/38/EC). The enumeration of conditions which do not affect the 'continuous' nature of residence, listed in Article 16(3) of Directive 2004/38/EC, is found in the second paragraph of Article 8.17 of the Aliens Decree.

The conditions in Article 17 of Directive 2004/38/EC (acquisition of permanent prior to the completion of the five years residence requirement set out in Article 16 of the Directive) are, more or less literally, transposed by Article 8.17(3)-(5) of the Aliens Decree 2000. The special rules for family members in Article 17(3) and (4) of the Directive are implemented by Article 8.17(6) and (7) of the Aliens Decree 2000.

To satisfy the obligation to issue Union citizens who qualify as permanent residents, as soon as possible, a document certifying permanent residence upon verification of the dur-

ation of their residence (Article 19 of the Directive) a new document entitled 'permanent residence for EU citizens' was introduced on 1 May 2006 (Article 8.19 Aliens Decree 2000). This document is issued automatically upon application to Union citizens whose duration of residence in the Netherlands exceeds the required five years when the validity of their old document expires. The fees for this document are € 41 (since 1 August 2009, Regeling van de Minister van Justitie van 13 juli 2009, nr. 5608162/09, houdende wijziging van het Voorschrift Vreemdelingen 2000 (negentigste wijziging), *Staatscourant* 2009, No. 11141). Member States shall issue third country national family members who qualify as permanent residents a residence card certifying their right. This document is automatically renewable every 10 years (Article 20 of the Directive implemented by Article 8.20 Aliens Decree 2000). Permanent residence is elaborated on in Chapter B10/2.5.3 of the Aliens Circular 2000.

On 21 June 2009 an amended *Regeling verstrekkingen bepaalde categorieën vreemdelingen* entered into force *(Staatscourant* 2009, No. 111). This amendment entitles Union citizens who are the victim of human trafficking or honour related or domestic violence to social security assistance during the initial period of three months residence.

3. DEPARTURE

Texts in force

The right of permanent residence is only lost through absence from the host-Member State for a period exceeding two consecutive years (Article 16(4) of the Directive). The list of circumstances leading to the loss of the permanent residence status, implemented by Article 8.18 of the Aliens Decree 2000, includes serious reasons of public order and public security amongst the reasons that justify the withdrawal of this right (see also: Article 28(2) of the Directive).

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in case of abuse or fraud, such as marriages of convenience (Article 35). Article 8.25 Aliens Decree 2000 is drafted in a more general fashion:

> "The Minister may withdraw the right of residence if the alien has submitted wrongful information or has withheld information which should have had resulted in the withholding of entry or residence permission".

The wording of this provision suggests that a residence right may be withdrawn in cases that are not actually covered by Article 35 of the Directive.

Chapter VI of the Directive contains the restrictions on the right of entry and residence on grounds of public policy, public security or public health. In the Aliens Decree 2000, public health is mentioned in Articles 8.8(1)(b) (entry) and 8.23 (residence). The Aliens Decree 2000 mirrors the limitation in the Directive that only allows for a refusal or withdrawal of rights for reasons related to public health during the first three months after entry. The relevant diseases are those listed in the relevant instruments of the World Health Organisation (WHO) and diseases that are subject of protective measures taken by the host-Member State. Article 8.23 of the Aliens Decree 2000 refers to the lists of the WHO and other infectious or contagious parasitic diseases which are subject of protective measures where Dutch citizens are concerned. The Explanatory Memorandum mentions in this respect plague, chol-

era and yellow fever and recent diseases as SARS (*Staatsblad* 2006, No. 215, p. 32, 33 and 46).

For public policy and public security, the relevant provisions in the Aliens Decree 2000 are: Article 8.8(1)(a) and (b), entry; Article 8.18(b), permanent residence; and Article 8.22, general clause. These provisions implement Article 27 of the Directive that codifies the case law of the ECJ concerning public policy and public security, namely that the personal conduct of the individual concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Article 28(1) of the Directive, according to which Member States shall take into account of a number of personal considerations, has not been transposed in Article 8.22 of the Aliens Decree 2000, though the Council of State advised otherwise. This is problematic as the general, but less specified, clause concerning the weighing of interests in Article 3:4 of the General Administrative Law Act (AWB) is applied. According to Article 28(2) of the Directive, as transposed by Article 8.1(b) of the Aliens Decree 2000, acquisition of the right of permanent residence restricts the possibility of expulsion to situations where this is required by serious grounds of public policy or public security. After 10 years legal residence or in cases concerning minors an expulsion order is only justified if indicated by imperative grounds of public security as provided for in Article 28(3) of the Directive and transposed by Article 8.22(3) of the Aliens Decree 2000.

The notification provision of Article 30 of the Directive is not transposed, as such, in the Aliens Decree 2000, but Article 8.8(2) of that Decree does stipulate in a general fashion that a refusal to grant entry permission shall be notified in writing. The procedural safeguards in Article 31(2) and (4) of the Directive are embedded in Article 8.24(1) and (2) of the Aliens Decree 2000. The maximum period of three years for the submission of an application to have a public policy or public security exclusion order reviewed, found in Article 32 of the Directive, is transposed in Article 8.22(6) of the Aliens Decree 2000 that provides for the possibility of automatic review of the expulsion order after two years.

The departure of EU citizens is elaborated on in Chapter A4/3 of the Aliens Circular 2000 and the policy rules on the right to restrict the right of entry and residence for reasons related to public policy, public security or public health concerns are found in Chapter B10/71.1.1.

Judicial practice

For cases concerning family members of EU citizens, see Chapter 2.

- A Bulgarian national was detained on 16 October 2008, because the Border Police had their doubts about his identity card and the detainee had made contradictory statements regarding his nationality (Turkish or Bulgarian). On 21 October 2008 the Secretary of State for Justice received a valid Bulgarian passport and lifted the detention measure accordingly. The doubts regarding the identity card initially submitted and the contradictory statements made by the detainee, were found to justify the Secretary of State for Justice's initial detention decision as she was not obligated to treat the alien as a Bulgarian national at that point in time. (Judicial Division of the Council of State, 10 March 2009, 200808240/1, LJN: BH6981).
- As a decision to declare a person undesirable means that continued residence in the Netherlands is an offence under Article 197 of the Penal Code. EU citizens are regularly prosecuted for this crime. An example of a ruling handed down by the Supreme Court concerned the revision (with retroactive effect) of a conviction of an EU citizen based on

Article 197 of the Penal Code, following the annulment by the Secretary of State for Justice of the decision on 'undesirability'. (Supreme Court 10 March 2009, 08/01151H – 08/01154H, 08/01156H and 08/01157H, LJN: BH5418).

- The President of the Utrecht District Court issued a temporary injunction because he felt that the Secretary of State for Justice had not provided an adequate justification ed why the applicant's conduct represented a genuine, present and sufficiently serious treat (conviction for a drug related crime without determination of a penalty). The President's decision takes into account the fact that an earlier conviction based on Article 197 Penal Code had proven to be issued on insufficient grounds. (District Court The Hague, Aliens Chamber Utrecht 27 April 2009, AWB 09/3953, LJN: BI3459).

Administrative practice

In the 2008 national report we concluded that in many instances the administrative decisions concerning undesirability do not satisfy the ECJ's case law, This is particularly the case concerning the requirement that the personal conduct of the person concerned should be taken into account. As stated above, a decision to declare a person undesirable implicates that continued residence in the Netherlands is an offence according to Article 197 of the Penal Code. Even EU citizens find themselves prosecuted for violation Article 197 of the Penal Code. The sentences of the Criminal Court Amsterdam (29 November 2007, 13/421598-07, 13/421609-07, *Jurisprudentie Vreemdelingenrecht* 2008/93 - mentioned in the 2007 national report) and of the Criminal Court Maastricht (11 April 2008, 03/700720-07 and 03/700035-08 [LJN: BC9282] – see the 2008 national report) revealed the existence of an internal instruction for the public prosecutors not to instigate proceedings under Article 197 of the Penal Code in cases where there is no clear motivation why the personal conduct constitutes a 'present threat'. Subsequently a lawyer asked the Secretary of State for Justice about the consequences of this instruction. In her answer dated 21 July 2009 the Secretary of State declared that when arresting EU citizens for violation of Article 197 of the Penal Code the police immediately contact the Immigration and Naturalisation Service (IND). The IND the reconsiders the decision on undesirability according the criteria set out by Union law. If the initial decision does not satisfy these criteria, the police informs the EU citizens that (s)he may request the IND to annul the decision on undesirability.

In a letter of 13 August 2007 the Secretary of State for Justice informed Parliament about the efficiency of the public order policies (TK 2006-2007, 19 637, No. 1168). The more restrictive criteria of the 'sliding scale' introduced in 2005, will continue to be applied until the evaluation is completed in the autumn of 2008. Several measures to enhance the efficiency of the public order policy have been proposed, inter alia a pilot in the police regions of The Hague and Rotterdam to gain more insight in the notion of a 'present threat'. The aim is to label more Union citizens who are involved in criminal violence, as undesirable aliens and then expel them. On 17 December 2008 the Secretary of State for Justice informed Parliament about the delays in the evaluation research (TK 2008-2009, 19 637, No. 1244). In May 2009 the State Secretary had to postpone the presentation of the evaluation results again (TK 2008-2009, 19 637, No. 1286). Finally, the report was published on 13 August 2009: WODC-rapport *"Toepassing en aanscherping van de glijdende schaal* (available at: http://www.wodc.nl/onderzoeksdatabase/openbare-orde.aspx). Research reveals that for the withdrawal of residence permission, the so-called 'sliding scale' is only of limited importance. Of the 797 cases in which the sliding scale could have been applied, a residence permit was only withdrawn in 134 cases (28%) following the application of the sliding scale. In 351

cases (28%) the withdrawal was justified on other grounds. The sliding scale is mainly effective in cases where the period of residence does not exceed a five years residence period. Stricter criteria are felt to only have a limited added value, as the group of convicted migrants with short residence is rather small.

On 30 October 2009, the Minister and the Secretary of State for Justice informed Parliament about their conclusions (TK 2009-2010, 19 637, No. 1306). First of all, stricter criteria for serious crimes will be introduced. Secondly, the possibility of accumulating convictions and measures will be extended to migrants with residence permits entitling them to permanent residence. Thirdly, even stricter criteria are to be introduced for habitual offenders (*veelplegers*) and there will be fewer exceptions for minors. Finally, the IND is determined to apply the amended sliding scale more frequently than in the past. The Minister and Secretary of State for Justice both recognize that where EU citizens are concerned, only Directive 2004/38/EC applies.

Literature

D.P.L.M. van Dam, Openbare orde-voorbehouden in het vrij verkeer van personen, *Migrantenrecht* (2009–5), pp. 180-185.

M. Goeman & E.C.C. van Os, *Alleen en opgesloten – Vreemdelingenbewaring en grensdetentie*, *Migrantenrecht* (2009–4), pp. 137-143.

A. Pahladsingh, De burger van de Unie en de openbare orde exceptie bij toegang en verblijf vanuit Europees perspectief, *Migrantenrecht* (2009–6), pp. 258-265.

Raad voor de Strafrechtstoepassing en Jeugdbescherming, *Advies Vreemdelingenbewaring*

M.L. van Riel, *Recente ontwikkelingen in de rechtspraak inzake vrijheidsbeneming van vreemdelingen*, Migrantenrecht (2009–4), pp. 124-131.

M. Stronks, Anton van Kalmthout en de detentieomstandigheden, *Migrantenrecht* (2009–4), pp. 147-150.

M.C. Stronks, Tineke Strik en openbare orde, *Migrantenrecht* (2009–5), pp. 204-207.

F. Wassenaar, Ongewenst verklaring en TBS '*The twain shall never meet'*, *Migrantenrecht* (2009–5), pp. 191-195.

M. van Wijngaarden, The dark side. Strafrechtelijke aspecten van ongewenstverklaring, *Journaal Vreemdelingenrecht* (2009–25).

A. Woltjer, Convergerende rechtsordes, *Migrantenrecht* (2009–5), pp. 188-190.

4. REMEDIES

Judicial practice

- To be admissible in court proceedings regarding the date that a residence card was issued, the applicant has to prove that and why he would have been in a more favourable position if the document had been issued earlier. (Judicial Division of the Council of State 15 April 2009, 200804524/1, *Jurisprudentie Vreemdelingenrecht* 2009/237).
- On 5 January 2009 the applicants received a document 'permanent residence for EU citizens'. They claimed that they were entitled to this document on an earlier date. According to the District Court Assen, the Secretary of State for Justice is not competent to determine with binding force the date that the permanent residence document is issued, as there is no legal provision that empowers her to take such decisions. Where the applicants have a legal interest in establishing that their right to permanent residence predates the date in the document, they are entitled to submit 'any means of proof', as mentioned

in Article 21 of Directive 2004/38/EC. (District Court The Hague, Aliens Chamber Assen 17 December 2009, AWB 09/254, 09/255, LJN: BK7600, *Jurisprudentie Vreemdelingenrecht* 2010/79).

5. SPECIFIC ISSUES OF CONCERN

Transposition of provisions specific for workers

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

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

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

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

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

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

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

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

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

Situation of jobseekers

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

According to Aliens Circular B10/3.1:

> "EU/EEA and Swiss nationals are entitled to look for employment in the Netherlands for up to three months. In principle a rights of residence for jobseekers continues as long as there are real opportunities to get employment (see also Article 8.16(2b) Aliens Decree).
> The right of residence of an EU/EEA/Swiss jobseeker can be terminated when the jobseeker:
> - constitutes an actual threat to public policy or public security;
> - suffers infectious diseases as mentioned in Article 8.23 Aliens Decree.
> From the moment on the EU/EEA/Swiss national is engaged in genuine and effective employment or is self-employed the provisions of a worker or a self-employed person apply. When the EU/EEA/Swiss jobseeker has sufficient resources – not from employment but from other sources – he may be entitled to a right of residence as a non-economically active person".

Other issues of concern

As mentioned above (and in the 2008-2009 national report): in many instances the administrative decisions concerning undesirability are not in conformity with the case law of the EC Court of Justice, particularly not with the requirement that the personal conduct of the person concerned should be taken into account. A decision to declare a person undesirable implicates that a continued residence in the Netherlands is an offence according to Article 197 of the Penal Code. Even EU nationals are regularly prosecuted according to Article 197 of the Penal Code. Recently an internal instruction was revealed according to which the police are instructed to contact immediately the Immigration and Naturalization Service (IND) when arresting EU citizens based on Article 197 of the Penal Code. The IND will reconsider the decision on undesirability according the community criteria. If the decision proves not to be in conformity with community law, the police will inform the EU citizens that (s)he may request the IND to annul the decision on undesirability.

Chapter II
Members of the Family

1. THE DEFINITION OF FAMILY MEMBERS

Administrative practice
As reported in the 2008-2009 Dutch report, the concept of 'durable relationship, duly attested' was redefined in order to facilitate the detection of fake relationships (Aliens Circular 2000, B10/1.7, see also: Chapter 1). The SP (Socialist Party) and the SGP (*Staatkundige Gereformeerde Partij*, Political Reformed Party) are both uncomfortable with this amendment (Hand. TK, 2008 2009, No. 46, p. 4007-4026), but were unable to convince the Secretary of State for Justice to change her policy. The Secretary of State has committed herself to use her general discretionary powers if special circumstances merit an exception to this policy rule (TK 2009-2010, 32 175, No. 6, p. 5).

Judicial practice
- As a valid passport had not been submitted and the applicant and his partner had not signed a *relatieverklaring*, attesting the existence of a durable relationship, when the aliens detention commenced, the latter is not considered irregular. (District Court The Hague, Aliens Chamber Zwolle, 3 February 2009, AW 09/895, LJN: BH5746).
- An application for a short-stay visa by a third-country national family member of an EU citizen was rejected, as the durable nature of their relationship is questioned, because the existence of a recent common household for at last six months has not been substantiated by objective evidence. The court finds that although in general objective evidence can be required, in this case, over a hundred of documents (confirmations of email messages, written correspondence, photo's, telephone logs, written statements of family and friends and copies of flight tickets) have been submitted to substantiate the claim that the couple met in Cuba in 2005 and their relationship has since blossomed into one that should be recognized as durable. The court also refers to *Ambtsberichten* of the Ministry of Foreign Affairs establishing that Cubans are not allowed to have contact with non-nationals, and that it is therefore hard to substantiate a relationship with official documents. E.g. an attempt to register at the same address was rejected and no written confirmation was supplied. Recalling the ECJ's case law (ECJ cases 59/85, *Reed* [1986] ECR I-1283, C-424/98, *Commission* vs. *Italy* [2000] ECR I-4001, C-215/03, *Oulane* [2005] ECR I-1215, C-255/04, *Commission* vs. *France* [2006] ECR I-5251, C-526/04, *Laboratoires Boiron* [2006] ECR I-7526 and C-161/07, *Commission* vs. *Austria*, [2008] ECR I-10671), the court establishes that the onus of proof my not make it (virtually) impossible to provide the evidence required. The refusal is found to breach Article 8.7(4) Aliens Decree. (District Court The Hague, Aliens Chamber Amsterdam, 13 May 2009, AWB 09/8231, 09/8231, LJN: BI8771, *Jurisprudentie Vreemdelingenrecht* 2009/279).
- In her decision of 29 April 2009, no. 0808-04-1235, the Secretary of State for Justice decided that the requirement of a common household for at least six months is a strong

indication, but not an absolute requirement to prove a durable relationship. Other indications concerning the durability are also to be taken into account.

- The Vietnamese spouse of a Dutch national who has two places of abode, one in the Netherlands and one in Germany, and pursues economical activities in at least four Member States, applied for a declaration of lawful residence in the Netherlands that would enable her to return to the Netherlands were she has resided with her spouse since 2008 prior to her stay in Vietnam for family matters. The rejection of this application is subject to scrutiny by the full Aliens Chamber Amsterdam, that establishes that the scope of application of Article 8.7 Aliens Decree, that intends to implement Article 3(1) of Directive 2004/38/EC, does not mirror the latter as the words 'aliens who are nationals of a State Party to the Treaty establishing the European Community' (aliens, i.e., v*reemdeling,* is defined in Article 1(m) Aliens Act as everyone who does not have Dutch nationality and who does not have to be treated as a Dutch national according to law) excludes Dutch nationals who have exercised free movement rights in another Member State and want to return to the Netherlands or have established an inter-State link through their economical activities from invoking EU law as the legal basis for their third-country national family member's right of entry and residence in the Netherlands. Arguing that an application in Germany would have been considered under EU free movement rules, the full Chamber establishes that Article 3(1) of Directive 2004/38/EC has a broader meaning than its Dutch counterpart and that therefore the latter is incompatible with the wording and objective of Article 3(1) of Directive 2004/38/EC and the ECJ's ruling in the *Carpenter* case (ECJ case C-60/00 [2002] ECR I-6279). The full Chamber also relies on: District Court The Hague, Aliens Chamber Amsterdam, 18 April 2008, AWB 07/28736, 06/61137 en 06/60811, LJN: BD0949. Article 8.7 Aliens Decree is therefore read as including Dutch nationals who benefit from free movement rules. As applicant's Dutch spouse has been employed by a German firm since September 2007, he is to be treated as a worker within the meaning of Article 7(1)(a) Directive 2004/38/EC (Article 8.12 Aliens Decree). As the relationship has been acknowledged as a 'durable relationship, duly attested', his third-country national family member enjoys a derived right of residence in the Netherlands under European law. A declaration of lawful residence has to be issued within two weeks following the decision. (District Court The Hague, full Aliens Chamber Amsterdam, 7 July 2009, AWB 0828060, 0828068, LJN: BJ2237).

2. REVERSE DISCRIMINATION

Administrative practice

Although the implications of the ECJ's judgment in *Eind* (ECJ case C-291/05, 2007 [ECR] I-10719) and *Metock* (ECJ case C-127/08, 2008 [ECR] I-6241) have been acknowledged and incorporated into Dutch policy (see the Dutch report 2008-2009), this did not silence the political debate on free movement rights for EU citizens and their family members.

On 4 November 2008, the Secretary of State for Justice answered parliamentary questions about the "Europe-route" thus revealing that the number of requests for assessment of applications for residence permission under Union law had increased in the period 2005-2007. The need for more research on the actual number of requests, the circumstances under which third country nationals rely on European law and whether there is evidence that in

those cases there is "abuse of rights" was felt (Tweede Kamer 2008-2009, Aanhangsel, No.. 552). The WODC (*Wetenschappelijk Onderzoek- en Documentatiecentrum*, Scientific Research and Documentation Centre of the Ministry of Justice was requested to conduct this research.

On January 27, 2009, the parliament once more summonsed the Secretary of State for Justice to elaborate on the measures she had and was intending to adopt to put a halt to irregular use of free movement rights in the Second Chamber. During this debate she argued that until a study, conducted under the direction of the WODC (, was completed, the measures she had already put into place following earlier debates in parliament, was all that she could do. The report, titled *Gemeenschapsrecht en gezinsmigratie; Het gebruik van het Gemeenschapsrecht door gezinsmigranten uit derde landen* (Regioplan, (WODC, November 2009) available at: http://www.wodc.nl/publicaties) was completed in November 2009 and sent to the Second Chamber on 18 December 2009 (TK 2009-2010, 32 175, No. 6).

The report *Gemeenschapsrecht en gezinsmigratie; Het gebruik van het Gemeenschapsrecht door gezinsmigranten uit derde landen* reveals that the number of applicants invoking a right of residence under Directive 2004/38/EC increased considerably in the period 2005-2008 (the figures are: 2005: 923; 2006: 896; 2007: 1622; 2008: 2558; first 9 months of 2009: 1886, estimated for 2009: 2500). The number of permits issued, however, has remained the same (in 85% (5999) of the applications a residence permit was issued), indicating that the number of rejections has increased (in 2008 the number of rejections was 11% as opposed to 27% in the first nine months of 2009) and suggesting that the IND's efforts to combat abuse and fraudulent use of free movement rights are successful (TK 2009-2010, 32 175, no. 6, p. 3). 16% of the applications concerned family members of Dutch nationals whereas 75% of the applications were family members accompanying nationals of the other EU Member States. In the remaining 9% insufficient information is available. On average, in most cases, the application was made by women applying for permission to reside with their male EU citizen (67% Dutch nationals; 64 % non-Dutch EU-citizens) spouse/partner. A significant difference between Dutch nationals and non-Dutch EU citizens is that applications lodged by the family members of non-Dutch EU citizens more often concerned a partner relationship (27% as opposed to 8% for Dutch nationals). Although the researchers have succeeded in collecting a lot of information on EU citizens and their family members applying for residence permission in the Netherlands (*infra*), the Secretary of State feels that abuse of European rules requires further consideration of individual cases. The Commission's 2009 guidelines are being used to establish whether, in an individual case, free movement rights are abused or whether the relationship should be labelled as one 'of convenience' (Communication from the Commission to the European Parliament and the Council on Guidance for better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the territory of the Member States, 2 July 2009, COM(2009) 313, p. 15-20).

The majority of applications made by family members of Dutch nationals (72%) concern Dutch citizens who were born in the Netherlands and marriages convened more than a year prior to the application (66%). Residence in another Member State satisfied the condition 'effective and genuine residence'. Only 11% of the applications involved residence for a period shorter than six months. The top three nationalities of family members for the period 2004-2008 are: Turkish (112 or 15%), Moroccan (80 or 11%) and Brazilian (54 or 7%). According to the Secretary of State, the vast majority of Dutch nationals are using free movement rules as intended (TK 2009-2010, 32 175, No. 6, p. 4).

Most applications by family members of non-Dutch EU citizens concern family members of Germans, citizens of the United Kingdom and Portuguese. Their family members originate from countries which are logically explained by their historical, cultural or geographical ties (UK citizens: USA, Australia and Israel; Germans: Turkey, USA and Israel; Portuguese: Brasilia and the Cape Verde Islands). Less obvious combinations, e.g. Polish-Egyptian couples, are seen and subject to further investigations. In 40% of the applications, family member(s) join the non-Dutch EU citizen within a year. The data, it is felt, suggests that applications made by family members of non-Dutch EU citizens are partly genuine use of free movement rules. Indications of fraud and 'relationships of convenience' to obtain free movement rights, however, are found amongst the applications made by family members of non-Dutch EU citizens. Suggestions of marriages of convenience are deduced from the nationalities of the couple (e.g. Polish-Egyptian and Bulgarian-Turkish), applications made shortly after a relationship starts to blossom and multiple applications on other grounds prior to an application under Directive 2004/38/EC. These applications are subject of further, in-depth scrutiny.

The Parliamentary questions which lead to the research assumed that a high number of family migrants seized the opportunities offered by the 'Europe route' to obtain permission to stay in the Netherlands with their Dutch partners or spouses of Turkish or Moroccan origin. The research reveals that in the four years considered, a total of no more than 753 "Dutch" requests were received. Only a maximum of 25% of the Dutch nationals who used the 'Europe route' had a Turkish or Moroccan background. In the public debate it was also assumed that the 'Europe route' would be used on a massive scale to regularize rejected asylum seekers, as was the case in the *Metock* case. However, it appeared that only 3% of the applications had previously applied for asylum.

On 18 December 2009, the State Secretary of State of Justice reacted to the research presented in the report (Tweede Kamer 2009-2010, 32 175, No. 6). Due to the increase in the use of the 'Europe route' the letter contains, above all, a catalogue of measures already taken against "abuse and fraud". These measures (see also Dutch report 2009-2010) will be continued and new measures are envisaged. New measures concern the exchange of information and tracking down of indications of fraud and abuse (INDIGO), systematic and thorough checks on consular marriages and closer cooperation at the European level with a view to extend the application of the national measures to the European level (TK 2009-2010, 32 175, No. 6, p. 5-7). The State Secretary prides herself on "that the Netherlands during the preparation of the guidelines has argued for the recognition of the fact that circumvention of national admission rules can result in 'abuse of rights', to which Member States may adopt measures on the basis of Article 35 of the Directive". Without further guidance by the Court of Justice on the concept of "abuse of rights", the interpretation by the Secretary of State of that concept is at the very least questionable. The Commission is much more nuanced. According to the Commission rights are only abused when EU citizens move to another Member State for "the *sole* purpose of evading, upon return to their home Member State, national law that frustrated their family reunification efforts. The defining characteristics of the line between 'genuine' and 'abusive' use of European law should be based on the assessment whether the exercise of Union rights in the Member State from which an EU citizen and their family members return was **genuine and effective**. If this is the case, EU citizens and their families benefit from the European rules on free movement of persons. This assessment is made on an individual basis. If, in a concrete case on return, the use of Union rights was genuine and effective, then the Member State of origin should not inquire into the personal

motives that triggered the previous move". If this means that national admission conditions are deliberately or unwittingly undermined, this does not affect reliance on Union law. This notion is lacking in the reaction of State Secretary to the report and the measures announced.

Judicial Practice

- In November 2009, the Judicial Division of the Council of State ruled on a case concerning a Jordanian-Dutch couple returning to the Netherlands after a stay of just over five months in Antwerp where the Dutch spouse had been hospitalised. The Jordanian spouse entered the Netherlands on a short stay visa a few days before the Dutch spouse was admitted to hospital in the Netherlands. After two days the Dutch spouse was transferred to the University Hospital of Antwerp (Belgium) and the Jordanian spouse took up residence in *Ter Weyde*, accommodation provided for by the University Hospital, for the duration of the hospitalization of her husband.
  Relying on *Luisi and Carbone* (ECJ joined cases 286/82 & 26/83, [1984] ECR 377, cons. 16), the Judicial Division of the Council of State argued that services within the meaning of Article 1(b) of Directive 73/148/EEC - the applicable law at the time when the Dutch spouse was admitted to the Antwerp hospital (namely 15 April 2006) - includes medical treatment in another Member State. Relying on the ECJ ruling in *Oulane* (ECJ case C-215/03 [2005] ECR I-1256) it then argued that the conditions for residence shorter than three months were not amended by Article 6 of Directive 2004/38/EC, when Directive 73/148/EEC was repealed following the entry into force of Directive 2004/38/EC. Therefore, during the initial three months of their stay in Belgium the couple did not have to provide evidence of sufficient financial means to support themselves.
  The Council of State then moved on to the conditions regarding their stay after the initial three months. Relying on points 3 and 4 of the recitals of Directive 2004/38/EC, it argued that service providers, who benefitted from Directive 73/148/EEC in the past, now derive their right of residence where this exceeds a period of three months from Article 7(1)(b) of Directive 2004/38/EC. Although it is up to the EU citizen to provide evidence that the conditions in Article 7(1)(b) – sufficient financial resources and health insurance - are satisfied, general principles of European Union law, in particular the principle of proportionality, dictate that when the evidence submitted by the EU citizen amounts to a presumption that these conditions are satisfied, the burden of proof shifts to the Secretary of State. Evidence that sufficient financial means were available to the couple, is found in the fact that their health insurance company took care of all medical costs entailed by the hospitalisation of the Dutch spouse in Belgium. As for the spouse, the court argued that the accommodation for family members provided for by the Antwerp Hospital was intended to reduce the costs for family members where a longer period of hospitalization is required.
  The final considerations concern the pursuit of an economic activity by the Dutch spouse on return to the Netherlands. Evidence that an economic activity is resumed upon return is provided through a declaration of the local council that the couple does not receive social benefits. (Judicial Division of the State Council, 12 November 2009, 200900969, LJN: BK3910 and *Jurisprudentie Vreemdelingenrecht* 2010/32 with comments by E Hilbrink).
- The Middelburg Aliens Chamber had to rule on a case concerning Dutch-Uruguay partners, claiming residence in the Netherlands as partners with a durable relationship, duly attested. The Dutch partner had resided in Spain without her Uruguayan partner who was

seeking residence permission travelling directly from Uruguay. The application for a residence permit for the third-country national partner was refused as no Spanish residence permit had been submitted along with the application and no evidence of residence in Spain as partners in a durable relationship, duly attested was provided. Distinguishing the situation at hand – no evidence of a durable relationship, duly attested in Spain – from the ECJ's ruling in *Metock*, the court finds no reason to treat the Uruguayan as a family member within the meaning of Article 3(2)(b) of Directive 2004/38/EC. (District Court The Hague, Aliens Chamber Middelburg, 4 February 2009, AWB 08/4100, LJN: BH2718, Jurisprudentie Vreemdelingenrecht 2009, 160).

- In February 2009, Council of State Judicial Division ruled that a "Bescheinigunggemäss Par. 5 FreizügigkeitsGesetz EU" (see Article 8(2) of Directive 2004/38/EC) and a German "Residence card of a family member of Union citizen" (Article 10 Directive 2004/38/EC) provided sufficient proof of previous lawful residence of an Iranian citizen in another Member State. (Judicial Division of the Council of State, 19 February 2009, 200805159/1, MigratieWeb ve09000305).
- In June 2009, the District Court The Hague, Aliens Chamber Haarlem, relying on the Metock (ECJ case C-127/08, 2008 [ECR] I-6241) and Surinder Singh (ECJ case C-370/90, 1992 [ECR] I-4265) rulings, found that the obligation to provide a short-stay visa to a third-country national family member free of charge and as soon as possible, had been breached in the case of a Moroccan spouse of a Dutch citizen, who had resided in Belgium, but wanted to travel to the Netherlands where the Dutch spouse awaited urgent surgery for a serious medical complaint. The reason for not issuing a short-stay visa in accordance with Article 5(2) of Directive 2004/38/EC was a denial to recognise the Dutch national as a returning EU citizen who benefits from European free movement rules. (District Court The Hague, Aliens Chamber Haarlem, 18 June 2009, AWB 09/19354, LJN: BJ4210).
- Refusal to issue a residence permit to the Vietnamese partner of a Dutch national who resides and works in the Netherlands and in Germany is not allowed under Article 3(1) Directive 2004/38/EC that does not exclude the applicability of the Directive when a Union national lives and works in two Member States. Article 6.7 of the Aliens Decree 2000 is an incorrect implementation of Article 3(1) of the Directive. If the application for a residence permit had been addressed to the German authorities, it would have been processed in accordance with Directive 2004/38/EC. (District Court Amsterdam, 7 July 2009, AWB 08/28060, 08/28068, LJN: BJ2237).
- The President of the Aliens Chamber Amsterdam was asked to decide on the legitimacy of a refusal to issue a short-stay visa to a Moroccan family member of a Dutch national resident in Germany whilst studying in the Netherlands that would allow her to visit her parents-in-law in the Netherlands. Relying on its findings in its decision of 7 July 2009 (President of the District Court The Hague Aliens Chamber Amsterdam, 7 July 2009, AWB 08/28060, 08/28068, LJN: BJ2237), that Article 8.7 of the Aliens Decree is an incorrect implementation of Article 3(1) Directive 2004/38/EC, the President of the Aliens chamber argued that if the short-stay visa application had been applied for in Germany rather than the Netherlands, it would have been processed in accordance with Directive 2004/38/EC with no questioning. As it would not be in keeping with the object and purpose of Article 3(1) of that Directive if the rules applied to an application for a short-stay visa by third-country national family member differed, depending on the Member State

where the application was lodged, the refusal to issue a short-stay visa was found to breach free movement rules.

President of the District Court The Hague, Aliens Chamber Amsterdam, 21 August 2009, AWB 08/44151, LJN: BJ6325 (See also *infra*: District Court The Hague, Aliens Chamber Amsterdam, 2 October 2009, AWB 08/44150, LJN: BK2224, *MigratieWeb* ve09001381)

Literature

P. Boeles, Interview Gart Adang en de Europa route, *Migrantenrecht* (2009-3), p. 89-91.

K. Groenendijk & R. Fernhout, Vrij verkeer, Europa-route en omgekeerde discriminatie: wie houdt wie voor de gek? 1 *Asiel en Migrantenrecht* (2010-1), p. 4-16.

H. Verschueren, Enkele denkpistes ter oplossing van het probleem van omgekeerde discriminatie bij gezinshereniging, *Migrantenrecht* (2009-3), p. 76-86.

G. Davies, Wat is gelijkheid? Zijn de thuisblijver' en de migrant te vergelijken?; Een reactie op H. Verschueren, *Migrantenrecht* (2009-3), p. 87-88.

M. Tjebbes, WBV 2009/1: een 'noodverordening' om de 'Europa-route' te barricaderen? *Migrantenrecht* (2009-3), p. 92-96.

A. Venekamp, Het arrest Metock. Een snel arrest met belangrijke gevolgen, 15 *Nederlands Tijdschrijft Europees Recht* (2009-3), p. 84-89.

3. ENTRY AND RESIDENCE RIGHTS

Texts in force

No amendments were made to the Aliens Act and the Aliens Decree. An amendment to Article 3.34h of the Aliens Regulation has meant that all applicants for a residence permit issued under Directive 2004/38/EC lodged after August 1, 2009, are charged € 41 (Regeling van de Minister van Justitie van 13 juli 2009, nr. 5608162/09 houdende wijzing van het Voorschrift Vreemdelingen 2000 (negentigste wijziging), *Staatscourant* 23 July 2009, No. 11141).

An amendment to the Aliens Circular confirms that third-country national family members are exempted from the obligation to posses a valid entry visa for short-stays if they have been issued a valid residence permit in accordance with Article 10 of Directive 2004/38/EC by another Member State, and that where this is not the case there is an obligation to issue a short-stay visa through an accelerated procedure and free of charge (Besluit van de Staatssecretaris van Justitie van 23 January 2009, nr. 2009/1, houdende wijziging van de Vreemdelingencirculaire 2000, *Staatscourant* 29 January 2009, No. 1380).

Judicial Practice

In 2009 the Dutch courts were asked to rule on various issues relating to entry and residence rights of third-country national family members. A number of these cases are directly related to the *Metock* case law and have therefore been discussed *supra*. A number of cases concerning other issues are discussed here.

Sufficient resources

- Mother and daughter of Romanian nationality have applied for residence permission to reside with their spouse/father in the Netherlands who will support them financially. The Secretary of state for Justice requires proof that they fulfil the minimum income norm in the *Wet werk en bijstand* (Work and Social Assistance Act).] The District Court Zutphen rules that according to Article 8(4) of the Directive and Article 8.12(3) of the Aliens Decree 2000, Member States may not lay down a fixed amount that is to be regarded as "sufficient resources". (District Court The Hague, Aliens Chamber Zutphen 4 November 2009, AWB 09/2982, 09/2984 LJN: BK3936).

Border police patrols

- A Dutch-Moroccan couple are stopped by the Dutch military police performing ad random controls in the border zone (*Mobiel Toezicht Vreemdelingen*, MTV) just after they have crossed the Belgium-Dutch border into the Netherlands. The couple have travelled to the Netherlands as the Dutch spouse requires medical care. They also intend to visit family whilst in the country. At the time they are stopped, they submit their marriage certificate, drawn up in French, and explain that although their marriage certificate has been authenticated by both the Belgian Consul in Morocco and the Moroccan Consul in Belgium, it still awaits certification and registration by the Belgium authorities.
  Recalling the ECJ's case law establishing an obligation for the receiving Member State to independently assess whether the alleged family relationship is genuine (ECJ case C-291/05 *Eind* [2007] ECR I-10719), the Judicial Division of the State Council finds that the Secretary of State should have considered whether, under Dutch international private law (i.e. Article 5(1) & (4) *Wet conflictenrecht huwelijken*), the marriage had to be recognised as such. (Judicial Division of the State Council, 9 July 2009, 200903451/1/V3, LJN: BJ3840, *MigratieWeb* ve09001011).

Aliens detention

- An Albanian national, claiming a 'durable relationship, duly attested' with an EU citizen has been detained as he was not able to submit a valid passport to the competent authorities, as required by Article 6(2) of Directive 2004/38/EC. At the time of the court proceedings the Secretary of State had been informed that applicant's valid passport was available through his partner, but had not acted upon this communication. As this information was only communicated a week before the court proceedings, the court felt that the Secretary of State had not acted inadequately and, therefore, the continuation of aliens detention was not unlawful. (President of the District Court The Hague, Aliens Chamber Amsterdam, 14 January 2009, AWB 08/45055, LJN: BH3538).
- A Dutch-Surinamese couple have expressed their intention, substantiated by a letter specifying their address, to leave the Netherlands and take up residence in Belgium. The Surinamese spouse has never been lawfully resident in the Netherlands; in 2006 she was summonsed to leave the Dutch territory and return to Surinam and at that time she was offered a 'departure arrangement' by the Dutch authorities that she declined. The proceedings concern the legality of aliens detention imposed on the Surinamese spouse. Under Article 59(3) of the Dutch Aliens Act detention of aliens is not permitted if the in-

tention to leave the Netherlands has been expressed and there is opportunity to leave the country.
The Judicial Division of the Council of State establishes that the couple derive their right of lawful residence in Belgium from Directive 2004/38/EC if there is proof of their family relationship (ECJ case C-459/99, *MRAX* [2002] ECR I-6660) even if entry conditions, i.e. the visa requirement, are not satisfied at the time of entry. As the intention to leave Dutch territory and the submission of an address in Belgium did not occur until after the Surinamese partner was subjected to detention measures, the latter is lawful until 27 May 2009, the date when the address details were submitted in the court proceedings in first instance. (Judicial Division of the State Council, 24 July 2009, 200903992/1/V3, LJN: BJ4395, *Jurisprudentie Vreemdelingenrecht* 2009, 363).

Expulsion measure

- As the applicant and his wife (Sudanese-Dutch) have provided sufficient evidence that they have taken up residence in Belgium, the provisional judge finds the upcoming execution of an expulsion measure to Khartoum, Soudan, disproportional. Documentation submitted includes a marriage certificate, rental agreement and a registration certificate issued to the Dutch spouse by the Belgium authorities and sufficient evidence that an application has been lodged with the Belgium authorities to authorise applicants stay in Belgium though the latter have still to decide on this application. The court explicitly states that it is for the Belgium authorities to consider the merits of applicant's application and that for the purpose of the current proceedings it is only necessary to provide evidence that applicant has accompanied his wife to or joined her in Belgium.
(Provisional judge District Court The Hague, Aliens Chamber Haarlem, 29 July 2009, AWB 09/27125, LJN: BJ4407).

Entry ban

- Applicant claims that Directive 2004/38/EC provides him with a right to attend the proceedings concerning his request to lift an *ongewenstverklaring* (entry ban) and report in the (N)SIS in person. Without considering whether the claim that Directive 2004/38/EC applies to this individual case, the provisional judge establishes that neither Article 31, nor Article 32 of Directive 2004/38/EC provide an unconditional right to be admitted to the territory for the purpose of attending court proceedings regarding entry and residence. (Provision judge, District Court The Hague, Aliens Chamber Amsterdam, 11 September 2009, AWB 09/32463, *MigratieWeb* ve09001265).
- A Russian spouse of a German citizen, lawfully resident in Germany and in possession of a German residence permit, has been convicted to a three year prison sentence for attempted manslaughter by the *Roermond* Criminal Court. Following this conviction an *ongewenstverklaring* is issued and a report is made in the (N)SIS. The applicant claims that he visits the Netherlands regally, i.e. once a week to shop on the market and on other occasions for touristic reasons and that therefore, the *ongewenstverklaring* and SIS-report have to comply with the European notion of public policy as defined in Article 27(2) of Directive 2004/38/EC. The court finds that though the Secretary of State claims to have taken into consideration that applicant and his spouse are a regular visitor to the Netherlands, it is not clear how and to what extent. As the issuing of an entry ban makes

it impossible for applicant to accompany his wife on her visits to the Netherlands and it amounts to an obstacle to the German spouse's free movement rights. The Secretary of State is requested to reconsider the *ongewenstverklaring* in the light of the European public policy notion and, if she finds that *ongewenstverklaring* is compatible with European law, then a balancing of interests along the lines of Article 8 ECHR is dictated.
The court also reads Article 25(2) SIA as an obligation for the Dutch authorities to contact the German authorities before they make a report in the SIS with a view to establish whether the latter authorities consider that the circumstances justify the withdrawal of the residence permit. If this is not the case then a report in the national database is the only option available to the Dutch authorities. (District Court The Hague, Aliens Chamber 's-Hertogenbosch, 14 September 2009, AWB 08/34755, *MigratieWeb* ve09001299).

- In October 2007, following his marriage to a Dutch citizen with whom he resides in Belgium, the Dutch Secretary of State removes a report on a Bosnian spouse in the SIS. Marriage and residence as a beneficiary of Directive 2004/38/EC in Belgium, however, does result in the lifting of the entry ban (*ongewenstverklaring*).
The District Court finds that the implementation of Article 3(1) Directive 2004/38/EC in Article 8.7 Aliens Decision is unsatisfactory as it precludes its application to situations where the individual derives rights from Directive 2004/38/EC by virtue of his/her residence in another Member State, but is not actually in the Netherlands (See supra, President District Court The Hague, Aliens Chamber Amsterdam, AWN 08/44151, LJN: BJ6325, for the same conclusion regarding the provision implementing Article 3(1) Directive 2004/38/EC); the implementation provision allows the Secretary of State to postpone a decision on the lifting of an *ongewenstverklaring* until permission to enter the Dutch territory is sought, which will be refused because of the *ongewenstverklaring*, which can then be contested in the proceedings instigated against the entry refusal. Relying on the text, purpose, objective and the effectiveness of Article 3(1) Directive 2004/38/EC, the court rules that an individual who benefits from European law should be able to exercise his/her rights under the best possible circumstances. This is not the case if an application to have an *ongewenstverklaring* reconsidered in the light of the European public policy-concept is only possible after lodging an application for entry permission which is refused by the official authorities. The court finds support for its reading of Article 3 of Directive 2004/38/EC in the ECJ's decision in case C-503/03, *Commission* vs. *Spain* ([2006] ECR I-1097). (District Court The Hague, Aliens Chamber Amsterdam, 2 October 2009, AWB 08/44150, LJN: BK2224, *MigratieWeb* ve09001381, JV 2009/452, RV 2009, 32, with comments H Oosterom-Staples).
- A Dutch-Moroccan couple meet and marry in Morocco. Two children are born out of this relationship. As the Moroccan spouse was issued an entry ban in 1997, the children live with their mother in the Netherlands and spend longer periods with their father in Morocco. The Dutch spouse travels to Morocco on regularly to visit her husband. In October 2006 the Moroccan spouse is convicted for irregular residence in the Netherlands and in May 2008 the Dutch spouse moves to Belgium with the children where they derive a right of residence from EU free movement rules. An application to reconsider and lift the entry ban is refused as the Dutch spouse is not recognized as a beneficiary of EU free movement rights by the Dutch authorities, who argue that the applicant should apply for entry permission in Belgium, and then that Member State can approach the Netherlands for more details on the (N)SIS report. Relying on earlier national decisions and recalling the ECJ's broad reading of free movement rights, the court establishes that

Article 8.7 Aliens Decree is a too restrictive reading of Article 3(1) Directive 2003/28/EC. Relying on the principle of effective rights, the court argues that European rights have to be enjoyed under the most favourable conditions and that, therefore, the possibility to lodge an application to have an entry ban and a (N)SIS report reconsidered in the light of EU free movement law cannot be subject to the requirement that free movement rights are actually being exercised. (District Court The Hague, Aliens Chamber Amsterdam, 3 March 2010, ASE 08/44901, LJN: BL 9814)

3. ACCESS TO WORK

Nothing to report.

4. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

Nothing to report.

Chapter III
Access to employment. (a) Private sector and b) public sector

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

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

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

a.2. Language requirements

There are no explicit statutory requirements as to the knowledge of the Dutch language for private employment. In practice, for most white collar jobs applicants will be required to be proficient in the Dutch language

According to a judgement of the Equal Treatment Commission (Opinion 2009-46, full text can be found at www.cgb.nl.) a psychology institute discriminated a Dutch citizen, who was born in Britain by refusing him a job because of his British accent.

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

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

The parliamentary debate regarding a Bill abolishing the requirement of Dutch nationality for the appointment as a notary is still pending, waiting for the outcome of a decision of the ECJ (Case C-157/09) in an infringement procedure against The Netherlands(see: TK 30 350 and 31 040, M).

b.2. Language requirements

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

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

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

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

b.4. Other aspects of access to employment

Nothing to report.

Chapter IV
Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

The Equal Treatment Commission published a preliminary decision in 2008 on discrimination between EU citizens and own nationals (Opinion 2008-127, full text can be found at www.cgb.nl.). In this case a Polish worker had complained that he was systematically paid less than his non Polish colleagues. Further research showed that all Polish workers were seasonal workers and the Dutch workers not and that the Polish workers, doing the same job as their Dutch colleagues, received a lower salary. This is a form of indirect discrimination based on nationality for which the employer is asked to provide a justification. As the employer failed to do so, the final opinion confirms the preliminary one (Opinion 2010-36)

Working conditions in the public sector

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

2. SOCIAL AND TAX ADVANTAGES

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

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

Nothing to report.

2.2. Specific issues: the situation of jobseekers

Case C-22/08 and C-23/08, 4 June 2009, Athanasios Vatsouras and Josif Koupatantze v *Arbeitsgemeinschaft (ARGE) Nürnberg 900*
In this case the ECJ confirmed that the concept of worker is independent of the limited amount of remuneration and a short duration of the professional activity. It also ruled that a job-seeker can receive a benefit of a financial nature intended to facilitate access to employment. Such a benefit is not seen as social assistance, which Member States may refuse to job-seekers according to Article 24(2) Directive 2004/38/EC. To be entitled to such a benefit the job-seeker can be required to establish genuine links with the labour market of the Mem-

ber State, for example by providing evidence that the person has actually sought work in that Member State for a reasonable period.

In the Netherlands, the Vatsouras decision led to questions in parliament (TK 2009-2010 Aanhangsel van de Handelingen No. 684). The benefit enjoyed under the Dutch *Wet Werk en Bijstand (WWB*) is classed as a social assistance benefit and not as a benefit that facilitates access to employment, like the German benefit. The government confirmed that an economic active EU citizen who has performed effective and genuine activities and has become involuntary unemployed has a right to a WWB benefit during the six months period he retains his status as a worker (according to Article. 7(3)(c) Directive 2004/38/EC). After that period the Immigration and Naturalisation Service decides on an individual basis whether a WWB benefit justifies termination of the right of residence because the EU citizen has become an unreasonable burden on the financial means of the host-Member State.

Chapter V
Other Obstacles to Free Movement

On 12 February 2010, the Equal Treatment Commission published its opinion on a complaint lodged by the Anti-discrimination Office *Hollands Midden en Haaglanden*, the Hague, against a French school that only admitted children with the French nationality (CGB 2010-20, available at: www.cgb.nl). The school did not deny that admission occurs on the basis of nationality, but justified their admission policy by relying on Dutch law (Articles 2(5)(a) and 7(2) *Wet gelijke behandeling*).

The Commission finds no justification for the alleged difference in treatment in either of the provisions. Reliance on the first provision fails as the rules on admission are drawn up by the school, a private institution, not a State organ. As far as Article 7(2) is concerned, there is no evidence that a nationality condition contributes towards the realisation of the objective it serves, i.e. the dissemination of knowledge of the French language and culture, which it finds is actually best served if non-French children are admitted to the school. In 2008-2009 one pupil was not admitted due to the nationality requirement.

In another opinion of the Equal Treatment Commission (Opinion 201-14, also available at: www.cgb.nl) a car rental company was found guilty of discrimination on the ground of race and nationality because it had refused to rent out a car to a person with a Polish driving licence. The company held that their policy not to rent out cars to people with a driving license issued by the authorities of an Eastern European country was justified because of the risk of fraud.

Chapter VI
Specific Issues

1. FRONTIER WORKERS

In 2009, 90.000 persons who lived in Belgium or Germany were employed in the Netherlands. It is estimated that 20.000 people live in the Netherlands and work in Belgium or Germany (www.grensarbeid.nl).

In April 2009 Eures Maas Rijn published six reports on mobility obstacles encountered by frontier workers living and working in Belgium, Germany or the Netherlands.

Most problems are tax or social security related. See: http://www.eures-emr.org/index.php?option=com_docman&task=cat_view&gid=73&Itemid=34.

In December 2009 there was a special debate on the administrative obstacles for the health care insurance of family members of foreign frontier workers (TK 26834, nr. 32).

Retired people living in the Netherlands with a Belgian or German pension must pay the mandatory health insurance premium introduced further to the Health Insurance Act (ZWV) in 2006. In a number of cases this has led to a major change in the income status of retired workers living on this side of the border. Many cross-border workers saw a major drop in their monthly income. The Commission Frontier Workers recommends a temporary income compensation measure for these people. In February 2009 Secretary of State for Social Affairs refused to accept this recommendation (TK 26834, No. 21). In November 2009 the recommendation was also rejected by the Second Chamber (TK 26834, No. 26).

The Belgian system of educational vouchers, which includes a residence clause, means that Dutch (and French, German and Luxembourg) frontier workers are not entitled to these vouchers. It has been questioned whether this is in line with Article 7(2) Regulation (EEC) No. 1612/68. (Questions to the European Parliament E-0876/10)

Follow up Renneberg (ECJ case C-527/06, 16 October 2008)
Om 26 June 2009 the Supreme Court ruled that Renneberg can deduct from his income generated in the Netherlands for the purpose of paying taxes the difference between the *huurwaardeforfait* (rateable value) for his house in Belgium, to be calculated as if the house was located in the Netherlands, and the mortgage he has paid for the years 1996 and 1997.
Supreme Court, 26 June 2009, No. 39258bis, VN 2009/33.14

2. SPORTSMEN / SPORTSWOMEN

See for more details the 2009 questionnaire on sports.

Field Hockey: There are now over 60 men with a foreign nationality playing in the highest hockey division. This development has been criticized by experts, as it is felt to affect the development possibilities of young Dutch players.

Basketball: For the season 2009/2010 and 2010/2011 a basket ball team in the highest division must include at least five Dutch players. For the season 2011/2012 a minimum of six Dutch players is foreseen: See: http://nbb.basketball.nl/content.php/nl/213?nbid=1825

Base-ball: For the 2010 season base-ball teams in the highest league can consist of a maximum of 3 players without a Dutch passport. Before 2010 there were no restrictions for players with a passport issued by an EU Member State. A foreign player who has played for five years in the Dutch league is counted as a Dutch player**.**

The Equal Treatment Commission (Opinion 2009-33, full text available at www.cgb.nl.) ruled that a yoga club who demanded exam candidates to be resident in the Netherlands was guilty of discrimination on the grounds of race and nationality.

3. THE MARITIME SECTOR

Nothing to report.

4. RESEARCHERS AND ARTISTS

The decisions of the ECJ in the Gerritse (2003), Scoprio (2006) and Centro Equestre (2007) cases and the amendment to the Commentary on Article 17 of the OECD Model Treaty have brought major changes to the rules on taxation that apply to artists and sportsmen. Now, expenses are deductible at source and normal tax returns should be possible at the end of the year. Many countries have changed their artist and sportsman tax rules and rates, Germany being the most recent example with its drastic amendments per 2009. Some countries are still being pressurized by the European Commission, e.g. Belgium, Sweden and Spain. Only the Netherlands and Denmark no longer levy taxes. For a table with the 2009 situation see: http://www.allarts.nl/articles/2009/Artist%20and%20Sportsman%20Tax%20Rules%20-%20EN%20-%202009%20-%20AA.pdf

5. ACCESS TO STUDY GRANTS

Since September 2007, the Dutch Study Finance Act (*Wet studiefinanciering, WSF*) allows students resident in the Netherlands to take their study grant with them when they study abroad. This is subject to the condition that the student must have resided legally in the Netherlands for at least three out of the six years preceding the beginning of the course abroad (Article 2.14 (2)(c) WSF). When applied to migrant workers, including frontier workers, and their family members, this residence clause appears at odds with Article 7(2) Regulation (EEC) No. 1612/68. In particularly frontier workers who live in Belgium are affected by these rules. In December 2009, the European Commission started an infringement procedure against the Netherlands (case C-542/09).

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

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

Chapter VII
Application of Transitional Measures

The vast majority of workers from the EU-12 Member States employed in the Netherlands are nationals of Poland. Workers from Bulgaria and Rumania account for 10-15% of the workers from the EU-12.

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

In a letter to Parliament in November 2009 the government stressed the net contribution of EU-12 workers to the Dutch economy and to the public purse (TK 29407, No. 103). This letter and the government's policy with regard to workers from the EU-8 and EU-2 Member States, in general, was the subject of debate in the Committee on Socials Affairs of the Second Chamber in January 2010 (TK 29407, no. 104).

A motion of a MP of the Socialist Party, asking the government to turn back free movement rights with the EU-12 and reintroduce migration controls, was voted down in the Second Chamber in December 2009 with only the extreme right-wing and left-wing parties voting in favour (Hand. TK, 1 December 2009, p. 31-2889).

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

2.1 General information

The Netherlands continued to apply transitional measures after 1 January 2009. In reply to questions of MPs from several political parties, pleading for the extension of those measures after 2011, the government has repeatedly replied that a decision on that issue will be made towards the end of 2011 (TK 29407, Nos. 104 and 105). A study on migration from the EU-2 countries in order to prepare that decision has been commissioned.

The number of EU-2 nationals registered as resident in the Netherlands increased considerable after accession: from 4,300 registered Bulgarian residents in 2006 to 15,300 in 2010 and from 8,800 registered Rumanian residents in 2006 to 14,400 in 2010. In 2009 a total of 1,950 resident permits were issued to nationals of Bulgaria and 850 to nationals of Rumania. The total number of work permits granted for workers from the EU-2 increased again, especially for Rumanian workers: 3,327 work permits were issued in 2009 (2,974 permits in 2008 and 2,659 permits in 2007); for Bulgarian workers 924 work permits were issued in 2009 (1,085 permits in 2008 and 995 in 2007). Most of the permits were issued for employment in horticulture and agriculture: 75% of the permits for Rumanian workers and 63% of the permits for Bulgarian workers. 10% of the applications for work permits for Rumanian nationals were issued for highly qualified jobs. Most work permits are valid for 24 weeks or less; only 2% of the permits for Bulgarian workers and 6% of the work permits for

Rumanian workers were valid for one year or longer. This is a strong indication that most EU-2 workers are employed in seasonal jobs. As the number of registered EU-2 nationals by far exceeds the number of work permits issued and many seasonal workers with a work permit do not move their domicile to the Netherlands and hence do not register with the local authorities, it appears that the majority of the registered EU-2 nationals are no longer the subject of transitional measures and enjoy full free movement rights.

2.2. Texts in force

There was only one minor amendment to the current legislation in 2009. The Aliens Act 2000 (Article 17) and the Aliens Circular 200, Chapter B10/1.2 now both stipulate that EU-2 nationals are exempted from visa obligations. The Aliens Regulation provides that 'reliance on public assistance could result in loss of the residence right' should be included in the text on the residence permit issued to nationals from those two countries (Article 3.1(4) Aliens Regulation) and that employment is subject to a work permit (Article 3.2a Aliens Regulation). 2009 also saw an amendment to Article 8.26, under j, of Aliens Decree. That clause now provides that the Minister of Justice adopt rules implementing the Association Agreements with Bulgaria and Rumania (*Staatsblad* 2009, 198). From the explanatory memorandum it appears that the amendment intends to indicate that the transitional measures are still in force for the EU-2. However, the reference is not correct. The clause in Article 8.26 of the Aliens Decree should refer to the Accession Treaties with the two Member States and not to the two now defunct Association Agreements.

The rights and obligations of workers from Bulgaria and Rumania under the transitional rules are explained in detail in the Aliens Circular 2000, Chapter B10/8.

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

2.3 Future legislation

In November 2009 the Minister for Housing and Integration announced a revision of the Remigration Act. This Act provides financial support to returning unemployed migrant workers from selected countries, among which the former so-called 'recruitment countries', i.e. Greece, Italy, Spain and Portugal. In reaction to concerns voiced by the European Commission, that this legislation infringes EU free movement rules, the government has announced that it will amend the act. One of the amendments will probably be that EU citizens will benefit from financial support in the future if they entered the Netherlands for employment purpose prior to their country's accession to the European Union (TK 23123 XVIII, No. 29, p. 4). EU-2 nationals are excluded from the personal scope of the current legislation.

2.4 Practical problems and issues

- Substandard housing, wages and labour conditions -
The discovery in April 2009 of 55 Rumanian and some Polish and Portuguese seasonal workers housed in substandard conditions at a farm in Someren caused an outcry in the press (Newspaper headlines referring to "slaves"), a series of parliamentary questions (Aanh. TK 2008-2009 nos. 2885 and 2901 and 2009-2010 nos. 295 and 296) and two letters by the government elaborating on the response of the national and local authorities concerned (TK 17050 Nos. 385 and 393). It appeared that the employer had received administrative fines up to € 500,000 for not paying the minimum wage and for illegal employment in the previous years and had received work permits for part of the workers only. After the police and the labour inspectorate had discovered the situation, 36 workers 'voluntary' decided to return to Rumania; the others were temporarily housed in tents. The incident resulted in a decision to speed up distribution of leaflets in Bulgarian and Rumanian on employment and housing conditions and of forms in those languages to file complaints. Some workers were assisted with their claim for full payment of the wages due. In the policy letter of the Minister of Housing and Integration emphasized employers, employment agencies and the municipalities have a moral obligation to provide adequate housing. The main legal instrument available to the central authorities is to refuse a work permit if no suitable housing is available (TK 29407 no. 103, p. 5).

From an empirical study on the living conditions of EU-12 workers it appears that 80% live in regular housing or pensions and 20% is housed in special hostels or portable cabins, holiday parks or former reception centres for asylum seekers (Risbo 2009).

- Undocumented employment -
Generally, the total number of illegal workers detected has dropped considerably following the accession of the EU-10 and the EU-2. In 2007 the Labour Inspectorate detected 574 workers with the Bulgarian nationality and 67 with the Rumanian nationality (Boom a.o. 2008, p. 36). During the first eight months of 2009 the Labour Inspectorate detected 276 Bulgarian nationals employed without the required work permit (Aanh. TK 2009-2010, no. 296). Considering the fact that the number of work permits granted for Rumanian workers is almost three times as high as the number of permits issued for Bulgarian workers, this may be an indication that Bulgarian workers tend to be employed relatively often without the required work permit.

- Service provision by employed and self-employed EU-2 nationals -
The Minister of Social Affairs informed the Parliament about the infringement procedure instigated by the Commission against the Netherland regarding the practice of the Dutch authorities to distinguish between, on the one hand, so-called 'pure' service providers from other Member States, who only have to notify the Dutch authorities that they employ Bulgarian or Rumanian workers or third-country workers lawfully resident in another Member State and, on the other hand, 'impure' service providers who, in the opinion of the Dutch authorities, provide employees and no other services and hence are required to have a work permit. This issue is also the subject of a reference by the Dutch Council of State pending before the Court of Justice (joined cases C-307/09-309/09, *Vicoplus*). Pending the outcome of these proceedings, the Dutch authorities have announced that they will continue this practice (TK 29407, No. 105).

In 2009 service providers made a total of 1,804 notifications, concerning 7.171 foreign nationals. A total of 3.915 workers from Bulgaria and Rumania have been employed under the notification procedure for service providers, mainly for work in the construction and the metal industry.

The presence, working conditions and possible exploitation of Bulgarian and Rumanian nationals working as prostitutes in Amsterdam has been the subject of a series of parliamentary questions. The government stated that EU-2 nationals who are self-employed have full free movement rights and thus the same rights and obligations as Dutch nationals. They should register with the Chamber of Commerce and the tax authorities and the local authorities should monitor the health and working conditions (Aanh. TK 2009-2010, No. 1584).

Judicial practice

- In 2009 the Judicial Division of the State Council deciding in various appeals proceedings concerning Dutch persons and companies subject to high administrative fines by labour inspectors for having employed EU-10 workers without the required work permit. Some of those cases concerned EU-2 nationals employed without the required work permit. One judgment concerns a service provider in Romania who did not file the request for review of the decision imposing the fine in time. The company claimed that the delivery of the official letter of the Dutch Labour Inspectorate in Romania was postponed. However, the court held that the prove of the delay was insufficient
  Judicial Division of the State Council 17 June 2009, 200803820/1/V6, LJN: BI8479, *Jurisprudentie Vreemdelingenrecht* 2009/324.
- In another case it was held that the user of the building was responsible for the illegal employment of a Bulgarian national by a third person in that building and, therefore, could be fined.
  Judicial Division of the State Council 10 *March 2010, Jurisprudentie Vreemdelingenrecht* 2010/159, LJN: BL 7032.
- A person presenting a Bulgarian identity card was held in immigration detention for four days because he had declared to be of Turkish nationality and later that he and his parent were Bulgarian nationals of Turkish origin, whilst forensic inspection to see whether the identity card was false or not was under way. The person was released when the Dutch authorities received a Bulgarian passport in his name. Because the person gave contradictory information on his nationality and there was serious doubt about the quality of his identity card the Secretary of State did not have to accept that the person was a EU citizen and thus could order his detention pending expulsion.
  Judicial Division of the State Council 10 March 2009, 200808240/1, LJN: BH6981.
- It was held that a work permit for a Romanian national employed to perform body to body massage had been rightly refused on the ground that the work permit legislation explicitly forbids to issue a work permit for sexual acts with third persons or for third persons. This provision does not allow for any consideration of the individual interests of the employer or the worker.
  District Court The Hague Aliens Chamber Haarlem, 19 December 2008, AWB 08/17490, LJN: BH3573.

Literature

A. Corpeleijn, Werknemers uit Oost-Europa: recente ontwikkelingen, *CBS Sociaaleconomische trends*, 1e kwartaal 2009, p. 19-21.

A.M. Weltevrede a.o., *Arbeidsmigranten uit Midden- en Oost-Europa: Een profielschets van recente arbeidsmigranten uit de MOE-landen,* Rotterdam 2009 (Risbo)

Chapter VIII
Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION (EEC) NO. 1408/71 AND REGULATION (EEC) NO. 883/04, ON THE ONE HAND, AND ARTICLE 45 TFEU AND REGULATION (EEC) NO. 1612/68, ON THE OTHER HAND

In the Netherlands the only problems concern the WAJONG-benefit which was subject to the ECJ's judgment in the *Hendrix* case.

Judicial practice

- The Central Appeal Tribunal has requested a preliminary ruling regarding the compulsory contributions for the Dutch Health Care Act to be made by Dutch citizens living abroad. See: case C-345/09: The preliminary questions are:
  1. Should Articles 28, 28a and 33 of Regulation (EEC) No. 1408/71, the provisions of sections 1(a) and (b) of Part R of Annex VI to Regulation (EEC) No. 1408/71, and Article 29 of Regulation (EEC) No. 574/72 be interpreted as meaning that a national provision such as Article 69 of the Zvw [*Zorgverzekeringswet*] is incompatible therewith in so far as a pensioner who, in principle, has entitlements under Articles 28 and 28a of Regulation (EEC) No. 1408/71 is obliged to report to the Cvz [*College voor Zorgverzekering*], and a contribution must be deducted from that person's pension even if no registration has taken place under Article 29 of Regulation No 574/72?
  2. Should Article 39 EC or Article 18 EC be interpreted as meaning that a national provision such as Article 69 of the Zvw is incompatible therewith in so far as a citizen of the EU who in principle has entitlements under Articles 28 and 28a of Regulation (EEC) No. 1408/71 is obliged to report to the Cvz, and a contribution must be deducted from that citizen's pension even if no registration has taken place under Article 29 of Regulation 574/72?

  Central Appeal Tribunal 27 August 2009, 08/1303 ZFW + 08/1703 AOW + 08/1714 ZFW + 08/1717 ZFW + 08/1718 ZFW + 08/1721 ZFW + 09/501 ZFW e.a, LJN: BJ5891

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38/EC AND REGULATION (EEC) NO. 1612/68 FOR FRONTIER WORKERS

According to the government there is no tension between Regulation (EEC) No. 1408/71 and Directive 2004/38/EC regarding access to social assistance benefits (TK 21501-31, No. 182)

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

3.1 Integration measures

As set out in the 2008-2009 national report, nationals from the EU Member States are exempted from integration obligations as this would contravene European rules (Article 5(2)(a) of the Act of 30 November 2006, *Staatsblad* 2006, No. 625). Nevertheless, the issue of introducing mandatory integration courses for EU-8 and EU-2 migrants remained on the political agenda in 2009. In 2008 a motion proposed by MP's of the two main parties of the coalition asking the government to study the possibilities to oblige certain categories of EU migrants to participate in the integration courses was adopted by the Second Chamber in July 2008. The government, in its letter of September 2009, responded that EU law prohibits obligatory participation in integration courses (TK 29407, Nos. 90 and 95).

The current situation is felt unsatisfactory where EU-citizens from Central and Eastern European Member States are concerned (*Jaarnota Integratiebeleid 2007-2011*, TK 2009-2010, 31268, No. 25, p. 21 and *Aanhangsel van de Handelingen*, TK 2009-2010, 3506). In every day life, poor linguistic skills prove counterproductive for both the safety on the work floor and social integration in the neighbourhood. The government informed Parliament that its efforts at the EU level to allow for the introduction of mandatory integration courses for EU-12 migrants have, to date, been unsuccessful. The Stockholm Programme does not cover this issue. The government intends to renew its plea during the conference of Integration Ministers in April 2010 in Spain (TK 2009-2010, 29407, No. 104, p. 18-19).

For the time being and until such time that integration measures may be imposed on EU citizens, voluntary participation in integration courses is stimulated. The DVD entitled '*To the Netherlands*' has been translated into Polish, Bulgarian and Rumanian and is available for distribution (TK 2009-2010, 29407, No. 103). Information material in those languages has been produced. In 2009 municipalities offered the integration course to 1,800 Polish nationals, 435 Rumanian nationals and 337 Bulgarian nationals. In a large survey, 80% of the EU-12 nationals interviewed declared an interest in participation in a language and integration course (Risbo 2009). The integration of EU-citizens from the Central and Eastern European Member States into Dutch society is addressed as a shared responsibility of the employer, local authorities, the individual and the national authorities.

The government's policy to stimulate municipal authorities to offer language and integration course to EU citizens applying the same conditions as those that apply to former migrants who have acquired Dutch nationality and certain categories of third country nationals is, apparently, starting to bear fruit.

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

On October 2, 2009, the Minister for *Wonen, Werken en Integratie* and the Minister and Secretary of State for Justice sent a letter to the Second Chamber setting out their plans concerning Marriage and Family migration (TK 2009-2010, 32 175, No. 1, *Huwelijks- en gezinsmigratie (Marriage and family migration*), p. 11). The plans presented concern the problem of forced marriages and the unsatisfactory integration of unskilled third country nation-

als. Amongst the measures proposed is an amendment to the provisions in the Dutch Civil Code concerning impediments to a marriage. The intentions expressed will mean that cousins will no longer be able to marry lawfully in the Netherlands and that marriages between cousins concluded abroad will not be recognised as a ground to grant permission to reside in the Netherlands as a spouse. Exemptions for existing, long lasting relations are envisaged. Note that the Dutch language does not distinguish between cousins, on the one hand, and nephews/nieces, on the other hand. The measures envisaged will include marriages between cousins, uncle/niece, aunt/nephew, uncle/nephew and aunt/niece (TK 2009-2010, 32 005, No. 4, *Evaluatie Wet inburgering in het buitenland (Evaluation Integration Abroad Act*) p. 52). The State Committee for International Private Law has been asked for advice on the matter.

Immigration rights attached to polygamous marriages are also subject of reconsideration. Consideration is being given to the fact whether such marriages, when convened abroad, might be labelled in breach of *public order* which would allow the Dutch authorities to reject an application for family reunion and instigate criminal proceedings against Dutch nationals who enter into a polygamous marriage abroad. It is unclear whether and if so to what extent an amendment will affect EU-citizens. Research conducted by the *Utrecht Centre for European Research into Family Law* on the legal effects of polygamous marriages in five EU Member States suggests that the impact on EU free movement rights will be minimal (K Boele-Woelki, I Curry-Sumner & W Schrama, *De juridische status van polygame huwelijken in rechtsvergelijkende perspectief*, WODC, 2009). The parliamentary debate has been postponed until after the June 9, 2010 General elections, due to the fact that the subject has been classified as 'controversial' (*Asiel en Migrantenrecht* (2010-2) p. 104).

4 RETURN OF NATIONALS TO NEW EU MEMBER STATES

Nothing to report.

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

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

6. SEMINARS, REPORTS AND ARTICLES

On 9-10 October 2009, the Centre for Migration Law of Radboud University Nijmegen organized the Network's annual conference in Limassol, Cyprus, entitled 'Free Movement of Workers in time of Economic Crisis: Common Challenges and Possible Common Responses'. At this conference the book: *'Rethinking the free movement of workers: the European challenges ahead'*, edited by Paul Minderhoud & Nicos Trimikliniotis (Wolf Legal Publishers, Nijmegen) was launched.

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