Report on the free movement of workers in the Netherlands in 2011-2012

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REPORT
on the Free Movement of Workers in the Netherlands in 2011-2012

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EFFORTS TO REDUCE FREE MOVEMENT

The center-right coalition agreement, depending on the support of the party of Geert Wilders (PVV), that handed its resignation in April 2012, made a series of proposals to amend Directive 2004/38/EC, specified in a position paper of March 2011 and in a letter of the Minister of Social Affairs to the Second Chamber of April 2011. They include (a) widening the public order exception, (b) allow for the expulsion of EU workers employed in another Member State for more than one year but less than five years if the worker has insufficient income (c) mandatory integration measures to be paid by the EU national themselves, (d) family reunification with third-country family members of EU migrants would be subject to the rules of Directive 2003/86. The Minister of Immigration in April 2012 announced that there was support among certain Member States for some of these ideas, but that it was unlikely that the Commission would consider proposing amendments of that directive during the current five years of the Stockholm Programme, i.e. not before the end of 2014. This did not stop the government from embarking on a stricter application of the rules on free movement regarding expulsion in case of reliance on public assistance, homelessness and conviction for a criminal offense.

In September 2011 the special parliamentary commission instituted by the Second Chamber in order to investigate the 'lessons to be learned from the recent labor migration' from EU-8 published its report. This commission concluded that the use of free movement by workers from accession states had been underestimated by experts before accession. It estimates that in January 2011 around 200,000 citizens from CEEC countries were employed or living in the Netherlands, although 60% of the migrants who came from Poland in 2003-2009 had returned by2011. The report observed the exploitation, underpayment and bad housing conditions of many CEEC workers and made recommendations to improve registration of EU-8 and EU-2 workers, better exchange of information on those workers between tax, social security and population registration agencies and compliance of employers with the law and collective labor agreements (Tweede Kamer 2011-2012, 32 680, No. 4).

The government agreed to implement most of the recommendations. In February 2012 the Minister of Social Affairs informed the Second Chamber that on 1.1.2011 a total of 114,000 workers from CEEC were registered with the social security agencies and 2,540 were receiving unemployment benefits, 1,400 were receiving invalidity benefits and 430 a widower's pension. Besides 3,170 CEEC nationals were receiving social assistance and 4,160 the general old age pension. The latter group will be mostly former refugees fleeing the communist regime in Hungary and Poland

In April 2012 the Minister of Social Affairs informed the Parliament that the Commission had asked Dutch government for explanation of its current policies regarding four issues: relation between residence rights of EU nationals applying for social assistance, Dutch language requirement and social assistance, the residence rights of job-seekers and the exclusion of frontier workers to social assistance.

TRANSITIONAL MEASURES FOR WORKERS FROM BULGARIA AND ROMANIA

The Dutch government made use of the possibility to extend the transitional measures for workers from the two Member States that acceded to the Union in 2007. The Minister of Social Affairs announced that in 2011 no more work permits would be granted for season labor by EU-2 nationals. In 2010 a total of 2,000 work permits were granted for seasonal labor by workers from Romania and 600 permits for workers from Bulgaria. The number of work permits issued in 2012 was considerably lower: in the first eight months (January-August) only 765 work permits were issued for Romanian workers and 118 for Bulgarian workers.

TRANSPOSITION AND APPLICATION OF DIRECTIVE 2004/38

With explicit reference to the judgment of the CJEU in the TA Luft case that Union law has to be implemented in binding national law and not in administrative circulars, in April 2012 the government transferred at four points rules implementing provisions of the directive from Aliens Circular to the Aliens Decree. Those rules relate to visa facilitation (Article 5 of directive 2004/38), loss of residence right in case of absence from the country (Article 11 and Article 16) and the circumstances that have to be taken into consideration by immigration authorities when applying the public order exception (Article 28).

On the other hand at several occasions important new rules have been introduced in the Aliens Circular concerning the means of proof of a 'durable relationship, duly attested', implementing the case law of the State Council, and new rules concerning the termination of residence in case of social assistance or social care. According to those new rules during the first two years of residence an appeal by an EU national on social assistance or on social care in a hostel for more than eight nights will cause an expulsion order. In the third year the criteria for an expulsion decision are: social assistance for more than two months or complementary social assistance for more than three month or social care for 16 nights or more. In the fourth year: four to six months social assistance or social care for more than 32 nights and in year five: 6 or 9 months social assistance or social care for more than 64 nights (new par. B10/4.3 of the Aliens Circular 2000).

As a result of the government's policy to encourage the voluntary or involuntary return of unemployed nationals, the number of EU nationals expelled increased considerably: 150 in 2010 and 230 in 2011. The termination of the residence right of EU-citizens and their family members, who are qualified as habitual offenders of criminal offences (i.e. if they commit three offences in five years) but cannot be expelled under Directive 2004/38/EC, is also envisaged. As a rule those decisions are accompanied by a formal ban on re-entry in the Netherlands. The case law indicates that administrative decisions still fall short concerning the requirement of a present, real and sufficient serious threat to a fundamental interest of the society.

KNOWLEDGE OF DUTCH LANGUAGE AS A REQUIREMENT FOR SOCIAL ASSISTANCE AND COMPULSORY ADULT EDUCATION

A private bill introducing language requirements for the reception of Social Assistance benefits is pending in the Second Chamber since 2010. The government repeatedly has announced its intention to introduce a similar bill. However, in answer to critical questions of the Commission, the government in 2012 assured that this bill will only propose a requirement to prove sufficient

knowledge of the Dutch language in cases where language knowledge will improve job opportunities of the applicant. This will apply to EU nationals as well. The government assured that the new requirement will be applied on a proportional and non-discriminatory basis.

The introduction of an obligation for migrant workers, especially those from Poland, to participate in the language and integration course and pass the integration exam, has been discussed in parliament repeatedly since 2004. In recent years this issue is discussed under the heading of introducing compulsory education for adults, or its recent more neutral name 'age-independent compulsory education'. After the ruling of the highest social security court in August 2011 that the obligation to participate in integration courses and pass the integration exam is a new restriction prohibited by the Association Agreement EEC-Turkey and, hence, Turkish nationals had to be exempted from this obligation, both the government and an opposition MP mentioned compulsory adult education as an alternative to oblige Polish and Turkish worker to learn the Dutch language. Currently, a bill is pending before the Senate that will end the government's responsibility for the costs of the language and integration courses. Some categories of third-country nationals may apply for a € 5,000 to € 10,000 loan from the government to pay the course fees. In 2010 approximately 9,000 EU nationals participated in language and integration course offered and funded by municipalities. Those facilities in 2012 came to an end.

EU MIGRANT WORKERS AND STUDY GRANTS

Migrant workers and their family members residing in the Netherlands have access to study grants under the same conditions as Dutch citizens. In 2011 4823 students from EEA countries (and Switzerland) received a Dutch study grant on the basis of the fact they were classified as migrant workers. A student from another Member State, who works an average of 32 hours a month, under the current policy rules, is treated as a migrant worker. It has been announced that the amount of hours will be raised to 56 hours a month as of 1 January 2013

The Dutch Study Finance Act allows students resident in the Netherlands to take their study grant with them when they study abroad, subject to the condition that he must have resided legally in the Netherlands for at least three out of the six years preceding the beginning of the course abroad. In particularly frontier workers who live in Belgium are affected by these rules. The Commission started an infringement procedure against the Netherlands (case C-542/09) and on 14 June 2012 the CJEU held this national rule to be incompatible with Article 45 TFEU and Article 7(2) of Regulation 1612/68.

THIRD COUNTRY FAMILY MEMBERS

Several court cases concerned the question which use of free movement rights is sufficient to entitle third-country national family members to accompany or join a Dutch national returning to the Netherlands. Travelling as a tourist to another Member State or looking two weeks for employment in another Member State was deemed to be insufficient. But a Dutch steersman resident in the Netherlands and employed by a Belgium company based in Antwerp according to a Dutch court making reference to the case law of the Court of Justice, as a frontier worker qualifies as beneficiary of Directive 2004/38/EC and his non-EU wife is entitled to reside with him in the Netherlands, if the economic activity qualifies as genuine and effective.

The judgments of the Court of Justice in *Zambrano*, *McCarthy* and *Dereci* have raised a lot of questions and produced many national court decisions. In an effort to draw some broad lines

the Judicial Division of the Council of State on 7 March 2012 handed down four judgments. In two of these cases, the genuine enjoyment-test should have resulted in the issuing of a residence permit respectively a long-stay visa. These cases share that there is only one parent involved in the children's care as the Dutch parent has passed away (long-stay visa) respectively disappeared from the scene with unknown destination (residence permit). The argument that the children can live with the paternal grandparents who are residents of the Netherlands without considering whether the grandparents are willing and capable of caring for the children, was dismissed by the court. According to the State Council the test is whether the children would have to leave EU-territory in order to live with their *parent(s)*, not whether there might be a third party in the Member State of which the children are a national who can care for them. It also finds immaterial the fact that the children have limited ties with the Netherlands as they have spent all or most of their lives in Indonesia where they attend an international school and do not speak the language of that country.

Several partly contradictory judgments of the Judicial Division of the State Council dealt with the issue of dual nationality after an EU migrant has acquired Dutch nationality by naturalization retaining his original nationality. It was first held that a Spanish national who has acquired Dutch nationality and has not argued that she has de facto moved to another Member State under Union law does not derive rights from Directive 2004/38/EC as, according to Article 3(1), she does not qualify as beneficiary. Four days later, the same court ruled that the presumption underlying the conclusion that a Dutch-Portuguese national who has exercised free movement rights prior to acquiring Dutch citizenship should be treated as a Dutch national who has never exercised free movement rights, is that acquisition of Dutch nationality detracts from the rights which this individual enjoys by virtue of the fact that he is also a national of another Member State.

OTHER PROBLEMS

- The Dutch Social Assistance system does not provide the possibility of additional social assistance benefits for frontier workers, who work in The Netherlands, but earn less than the social minimum. According to the Commission this is not in line with the equal treatment provision of article 7 of Regulation 492/2011.
- A Bill is pending before parliament that will increase the cases in which Dutch nationality, and thus Union citizenship, is lost upon voluntary acquisition of the nationality of a non-EU country. The government has argued that the ratio of the Rottmann judgment does not apply, because that case concerned withdrawal of the nationality not the automatic loss of nationality. The loss of Union citizen in its opinion is the consequence of a free choice of the person concerned. Problems may arise if the former EU-national has exercised free movement rights.

OTHER DEVELOPMENTS

- National courts increasingly take into account the case law of the Court of Justice on Directive 2004/38. In 2011 the Administrative Law Division of the Council of State in several judgments made explicit reference to the 2009 Guidelines of the Commission on the application of that Directive (COM(2009) 313), e.g. with regard to the prove of a 'durable relationship' or how to ascertain whether a marriage qualifies as one of convenience.

- The Bill abolishing the requirement of Dutch nationality for the appointment as a notary has been adopted in the First Chamber of Parliament in June 2012 after the CJEU judgement of 24 May 2011 on the nationality requirement for notaries (case C-47/08, C-50/08, C-51/08, C-53/08, C-54/08 and C-61/08). However, the government has promised to introduce a new Bill that will re-establish the nationality requirement for third-country nationals, effectively restricting the exemption to nationals of Member States only.
- The rules of Article 5(2) of directive 2004/38 on visa facilitation of third-country national family members have been implemented in Article 8.9 Aliens Decree in April 2012. Moreover, the entry into force of the Visa Code necessitated an overhaul of the rules on the crossing of external borders in *the* Aliens Circular. The new rules regarding family members of EU-citizens are a clarification aimed at ensuring compliance with the rules in directive 2004/38/EC.

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

A. ENTRY

Texts in force

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

Nevertheless, the chapters A2 and B10 of the Aliens Circular 2000 are still amended regularly. In this reporting year important amendments concerned the means of proof of a 'durable relationship, duly attested' as mentioned in Article 3.2(b) and Article 8.7(4) Aliens Decree 2000 (new par. B10/1.7) and new rules concerning the termination of residence in case of social assistance or social care (new par. B10/4.3); see below under *Administrative practise.*

On 23 September 2009 a Draft Act Modern Migration Policy was presented to Parliament (Tweede Kamer 2008-2009, 32 052 nrs.1-3). This Bill concerns faster admission procedures for regular migrants in the Netherlands. It does not apply to asylum seekers neither to the free movement of Union citizens. On 16 July 2010 the Bill was published in the Official Journal (*Staatsblad* 2010, 290) with a proposed entry into force 1 January 2011, on 31 March 2011 postponed for an indefinite period due to ICT problems, Tweede Kamer 2010-2011, 30573, no.66.

On 30 July 2010 a Modern Migration Policy Decree was published (*Staatsblad* 2010, 307), which amends the Aliens Decree 2000 in order to implement the Modern Migration Policy Act (postponed for an indefinite period), to transpose the Knowledge Migrants Directive 2009/50 (implemented 19 June 2011) and to introduce the stricter criteria of the public order policies. The latter part of the decree came into force 31 July 2010. To implement the new public order policies the paragraphs A5, B1, C4 and C8 of the Aliens Circular were amended (WBV 201/11A, *Staatscourant* 30 July 2010, no. 11415). In 2012 even more stricter criteria were introduced by an amendment of Article 3.86 of the Aliens Decree 2000 (*Staatsblad* 2012, no.158), but this amendment has not yet come into force (see below under C. Departure and Detention, Administrative practice).

Judicial practice

Judicial Division of the Council of State 6 September 2011, 201009139/1/V1 [LJN: BS1678], *Jurisprudentie Vreemdelingenrecht* 2011/429, concerned the interpretation of 'durable relationship, duly attested' while using the Guidelines of the European Commission of 2 July 2009 con-

cerning the application of Directive 2004/38. According to the Judicial Division the Directive does not define when there is a duly attested durable relationship. Therefore, the minister has, within the limits set by Community law, a certain margin of discretion (cf. ECJ, 15 June 2000, *Brinkmann*, C-365/98).

According to the Guidelines the requirement of durability of the relationship must be assessed in the light of the objective of the Directive to maintain the unity of the family in a broad sense. National rules on durability of partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable. However, in this case national rules would need to foresee that other relevant aspects such as for example a joint mortgage to buy a home are also taken into account. Evidence may be adduced by any appropriate means.

The Directive does not preclude a lasting relationship that will only be accepted if it is shown that the unmarried partner and a citizen of the Union, who exercises his right of free movement, are at least six months in a relationship and share during this term a common household. Furthermore, convincing evidence of that cohabitation may be required. However, by accepting only a civil registration (*GBA, Gemeentelijke Basisadministratie*) for six months, or the birth of a child, as evidence the minister applies a too narrow interpretation of the term 'duly attested durable relationship. Moreover, the registration in the GBA is only possible when the alien is a lawfully resident. That means in essence that the evidence – registration in the GBA – contains the requirement of prior lawful residence. Thus, the minister makes it in some cases virtually impossible to claim residence based on Article 8.7 (1) and (4), in conjunction with art. 8.12 (1)(h) of the Aliens Act 2000. Interpretation of these articles in conformity with the Directive implies that if a statement about a lasting relationship is underpinned by evidence, the Minister must evaluate such proof, and where appropriate should motivate why the existence of a lasting relationship is not demonstrated. The Minister may in that case not merely refer to the absence of the aforementioned GBA registration.

Along the same lines Judicial Division of the Council of State 20 September 2011, 201006829/1/V4 [LJN: BU3580], *Jurisprudentie Vreemdelingenrecht* 2011/464. In Judicial Division 26 October 2011, 2010009737/1/V4 [LJN: BU3404], *Jurisprudentie Vreemdelingenrecht* 2012/11 the applicants did not succeed in proving with other documents a common household of at least six months. District Court Amsterdam, 23 December 2012, AWB 11/24531 gives an example in which the applicants indeed succeed in proving their common household for at least six months with other documents, i.e. a cohabitation contract by a notary and an application for a common sickness insurance.

Judicial Division of the Council of State 14 September 2011, 201012035/1/V3 [LJN: BT1936], *Jurisprudentie Vreemdelingenrecht* 2011/462 (with annotation T.P. Spijkerboer) concerned the Lebanese, not registered unmarried partner of a Dutch national who was detained on 3 November 2010 while his residence was not lawful. Detention was lifted on 26 November 2010 since he provided a passport and a ticket. According to the Judicial Division Article 3(2)(b) of Directive 2004/38 obliges Member States merely, in accordance with its national legislation to facilitate entry and residence for the unmarried partner of a Union citizen. Therefore, entry and residence of the unmarried partner are not based on the Directive but on national law. Since a passport was only provided on November 24, the requirement of holding a valid passport was not fulfilled during the detention and therefore there was no lawful residence during this period. While a passport was lacking during detention the issue of the durability of the relationship did not need to be addressed.

Dual nationality (Portuguese/Dutch) played a role in Judicial Division 2 November 2011, 201011940/1/V1 [LJN: BU3411], *Jurisprudentie Vreemdelingenrecht* 2012/45 (with annotation

P. Boeles): in the judgment McCarthy, the ECJ under paragraph 43 held that that Article 3(1) of Directive 2004/38 is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

Unlike the case to which that judgment applies, the applicant has exercised his right of free movement. The argument of the Minister that although the applicant in his capacity as Portuguese citizen has exercised his right of free movement, but by his naturalization has come in the same position as Dutch nationals, who never have used their right to free movement, supposes that obtaining the Dutch nationality may affect the rights the applicant derives from EU law in his capacity as a citizen of another Member State. For this assumption is, given the Court's case law, no ground. Along the same lines District Court Maastricht, AWB 09/46039 [LJN: BU3168].

To the contrary: Judicial Division 28 October 2011, 201012858/1V1 [LJN: BU3406], *Jurisprudentie Vreemdelingenrecht* 2012/44 the applicant is born in the Netherlands and has never resided or worked in another Member State. At the time of her birth she possessed the Spanish nationality and required in later life Dutch citizenship. But she never moved to another Member State and used her right to free movement. Therefore, Article 3(1) Directive 2004/38 does not apply. Annotator Boeles (see above) considers this decision as an one-time mistake of the Council of State.

Administrative practice

On 14 April 2011 the Minster of Social Affairs and Employment informed Parliament about measures to regulate the labour migration from Central and Eastern Europe (Tweede Kamer vergaderjaar 2010-2011, 29 407, no. 118). The actual number of labour migrants from these countries amounts 200.000 and will increase when on 1 January 2014 the work permit obligation for Bulgarian and Romanian workers will be abolished (see also 'De Nederlandse Migratiekaart', see below Literature). Measures are announced concerning registration, information exchange, combating fraud, social security and social care, housing, integration and expulsion. To execute the measure concerning social security and social care Chapter B10 of the Alien Circular 2000 is amended op 23 December 2011 (*Staatscourant*, no. 23324) which amendment came into force on 1 January 2011. In par. B10/4.3 new rules concerning the termination of residence in case of social assistance or social care are introduced. During the first two years of residence an appeal on social assistance or on social care in a hostel for more than 8 nights will cause an expulsion order. In year three the criteria for an expulsion decision are: social assistance for more than 2 months or complementary social assistance for more than three month or social care for 16 nights or more. In year four: 4 or 6 months social assistance or social care for more than 32 nights and in year five: 6 or 9 months social assistance or social care for more than 64 nights.

In the same amendment of the Aliens Circular 2000 the above mentioned decision of the Judicial Division of the Council of State 6 September 2011, 201009139/1/V1 [LJN: BS1678], *Jurisprudentie Vreemdelingenrecht* 2011/429 is implemented. According to par. B10/1.7 the common household of six month can be proven not only by the civil registration (GBA), but also by inter alia rental contracts, mortgages or copies of bills in both names during that period of six months.

Literature

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T. de Lange, *Kroniek arbeidsmigratie*, Asiel&Migrantenrecht 2011, nr. 9

WODC/CBS, *De Nederlandse Migratiekaart*, Den Haag 2011 (see also Tweede Kamer, vergaderjaar 2011-2012, 30 573, no. 91)

B. RESIDENCE

Texts in force

Union citizens and their family members who hold a valid identity card or passport have the right of residence for a period of up to three months in another Member State without any formalities (Article 6 of the Directive). This rights is contained in Article 8.8(1) of the Aliens Decree 2000 for (a) holders of a valid identity card or valid passport or for (b) a person who can prove his identity and nationally unequivocally with other means (see also the Aliens Circular 2000 B10/2.4). The optional clause of Article 5(5) concerning the obligation to report to the authorities within a reasonable time is not materialized in the Aliens Decree 2000 for residence for a period for up to three months. According to B10/2.3 of the Aliens Circular 2000 Union citizens are exempted from the obligation to report. Only in cases of residence for more than three months they are obliged to report to the authorities.

Article 7 of the Directive concerns the right of residence for more than three months. Article 7(1) distinguishes workers and self-employed, non-actives, students and the family members of these groups. The right of residence for more than three months is transposed by Article 8.12 of the Aliens Decree 2000 in a rather complicated way due to the much differentiated categorization of family members. Article 8.13 concerns the right of residence for more than three months of third-country family members. In the Aliens circular 2000 the right of residence for more than three months is elaborated in B10/2.5.2 and 5. The obligation to report is embedded in Article 8.12(4) of the Aliens Decree 2000. After the period of residence for up to three months of Article 8.11 the migrant has to register himself with the alien's administration (the Immigration and Naturalisation Service). The obligation is sanctioned in Article 108(5) of the Aliens Act 2000, with a maximum of imprisonment for a period of one month or a fine of the second category. The documents which should be provided (Article 8.12(5) Aliens Decree 2000) are since 1 July 2011 enumerated in Article 7.2a of the Aliens Regulation 2000 (see *Staatscourant* 30 June 2011, no. 11720). After registration the Immigration and Naturalization Service issues a registration certificate (Article 8.12 (6) of the Aliens Decree). This is a sticker that is placed in passports or attached to other identity papers and costs since 1 January 2012 € 40 (*Staatscourant* 30 December 2011, no. 23963). Once registered, an EU citizen is in principle entitled to stay in the Netherlands for as long as (s)he wishes.

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

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

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

Upon application Member States shall issue Union citizens entitled to permanent residence after having verified the duration of residence as soon as possible with a document certifying permanent residence (Article 19 Directive). A new document 'permanent residence for EU citizens' was introduced form 1 May 2006 on (Article 8.19 Aliens Decree). It will be issued automatically to Union citizen who have already resided for more than five years in the Netherlands when the validity of the old document expires and costs since 1 January 2012 € 40 (*Staatscourant* 30 December 2011, no. 23963). Member States shall issue to third country family members entitled to permanent residence a permanent residence card, automatically renewable every 10 years (Article 20 Directive), which is implemented in Article 8.20 Aliens Decree. Permanent residence is elaborated in B10/2.5.3 of the Aliens Circular.

On 21 June 2009 an amended 'Regeling verstrekkingen bepaalde categorieën vreemdelingen' came into force (*Staatscourant* 2009, nr. 111). According to the amended Regulation inter alia community citizens who are the victim of human trafficking or honour related or domestic violence are entitled to social security assistance during the first period of up to three months.

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

Judicial practice

In Judicial Division of the Council of State 21 February 2011, 201003057/1/V2 [LJN: BP5947], *Jurisprudentie Vreemdelingenrecht* 2011/157, with annotation B.K. Olivier the Council of State decided that the date on which the document of lawful residence is issued, not proves the date since the EU citizen required lawful residence in the Netherlands. It only indicates that the document is valid for five years from that date on. The Directive does not exclude the possibility that national law provides the possibility to determine the date on which lawful residence took a start. But the Aliens Act 2000 has not implemented this possibility. Therefore, the Secretary of State of Justice was not competent to determine from which date on the applicant had lawful residence in the Netherlands. See also District Court Amsterdam 23 December 2011, AWB 11/24531: the Minister is not competent to establish the effective date of the lawful residence of the applicant.

The same question played a role in District Court Amsterdam 19 January 2011, AWB 10/05635, 10/36566 [LJN: BP5352]. The District Court is of the opinion that the date of registration in the aliens registration (BVV) and in the civil registration (GBA) is only declaratory. According to the applicant these dates are in administrative practice used as the date on which

lawful residence took a start and they decide the date on which the document 'permanent residence for EU citizens' can be issued. The District Court nevertheless rejected the appeal. There is no legal obligation to use the dates of registration in the BVV and GBA as determining legal residence and the applicant is free to prove from which day on she enjoyed legal residence in the Netherlands.

District Court Haarlem 27 January 2011, AWB 10/37306, 10/37307 [LJN:BO2080], *Jurisprudentie Vreemdelingenrecht* 2011/266 concerned an Egyptian national who requested a document 'lawful residence as a community national'. The application was rejected because there is reason to believe that the consular marriage between plaintiff and referent of Hungarian nationality is a sham marriage in order to enjoy the right of free movement and residence laid down in the Directive. Given the specific characteristics in this case, consular marriage between a man of Egyptian nationality and woman from one of the Eastern European countries and the fact that the Minister in similar previous cases had established that there was a sham marriage, the Minister could conclude that there was an application with the same characteristics. Therefore, he was allowed to proceed to further investigations. From a systematic study of certain groups of immigrants was no question. On the basis of the fact that the applicant and referent provided contradictory statements regarding the way that they have met, the run-up to the wedding and the events during and after the ceremony, the Minister could conclude to a sham marriage so that the Residence Directive does not apply.

In District Court Zwolle 6 April 2011, AWB 10/20219 the Minister for Immigration and Asylum refused the refunding of the paid fee of € 288,00 while the applicant, a Spanish national, had requested an ordinary residence permit for residence with her Dutch spouse instead of residence on EU law. According to the Minister it is up to the applicant to decide on which ground she wants to reside in the Netherlands. The court disagreed. The applicant is an EU-citizen which is according to the Court of Justice her primary status. Based on the data provided by the applicant the minister has to decide on his own initiative which body of law is applicable.

District Court Haarlem 26 April 2011, AWB 10/12844, 08/42013 [LJN: BQ5774] concerned the Thai partner of a Dutch national (the referent). It is not alleged or proven that the Dutch partner of the applicant has or had a right of residence in the meaning of Article 7(1) of the Directive in a Member State other than that whose nationality he possesses. Nor can the applicant herself claim a right of residence based on Article 6 of the Directive. To the extent the applicant has argued that the referent moves regularly to Germany and there exercises the right of residence of Article 6(1) of the Directive, this article gives the applicant a right of residence in Germany only. That the referent during his (brief) stays in Germany receives services does not lead to a different conclusion. While residence of the referent in Germany is mainly brief, the residence of the applicant (in Germany) is of a similar nature and equal duration, ie for the duration of the receiving of the services.

In District Court Amsterdam 28 June 2011, AWB 10/27914 residence was denied to the spouse of a Dutch worker (the referent) who lives in the Netherlands and works in Antwerp as a navigating officer for a Belgian company, based in Antwerp. According to the Minister there is no situation where a referent moves to or stays in another Member State under Article 3 of the Directive. The court disagreed. The text of the Directive does not explicitly cover a situation like this where a Dutch national works in another Member State but is domiciled in the Netherlands. However, this situation also falls under Article 3 of the Directive. Giving from the *Geven*-judgment of 18 July 2007 the court concludes that the right to free movement should not only be awarded to 'permanent' employees, but also to frontier workers who are real and genuine workers, as in this case. The argument of the Minister that the referent could rely in Belgium

on the Directive is inconsistent with the jurisprudence of the ECJ. The denial of residence in the Netherlands to his spouse implicates for the referent an unlawful restriction on the exercise of his right to free movement, at least as regards his choice of domicile. Art. 8.7 Aliens Decree 2000 should be interpreted as encompassing under its scope also the Dutch worker who lives in the Netherlands and as a frontier worker performs work in another Member State, and his spouse who joins him in the country where the worker lives.

District Court Roermond 5 July 2005, AWB 10/43172 [LJN: BR3056] concerned a Lithuanian asylum seekers whose asylum request was denied. The court is of the opinion the applicant still has lawful residence while according to Article 15 in conjunction with Articles 30 and 31 Directive 2004/38 an expulsion decision is needed to end the term of lawful residence. The denial of a residence permit is not an expulsion decision. Article 30(1)(b) Aliens Act 2000 excludes the possibility of an asylum request during the period of lawful residence. During lawful residence the applicant is sufficiently protected. Along the same lines Judicial Division of the Council of State 27 July 2011, 201103921/1/V1 [LJN: BR3786] concerning a Romanian asylum seeker**.**

In Judicial Division Council of State 30 December 2011, 20101028671/V2, *Jurisprudentie Vreemdelingenrecht* 2012/98, lawful residence as community citizen was denied to a Surinam national who accompanied her daughter (with Dutch nationality) during a Christmas holiday in Belgium in 2008. For the effective exercise of the rights to free movement by the daughter during a short stay as a tourist in another Member State it is not necessary that she will be accompanied by the applicant.

Literature

M.C. Stronk, Vraag & Antwoord: kan een ongehuwde partner van een Unieburger na het verbreken van de relatie aanspraak maken op voortgezet verblijf?, *Asiel&Migrantenrecht* 2011, nr. 1

H.U. Jessurun d'Oliveira, Unieburger in eigen land!, *Asiel&Migrantenrecht* 2011, nr. 2

G. Davies, Ruiz Zambrano en de non- EU ouders van (bijna) Nederlandse kinderen, *Asiel&Migrantenrecht* 2011, nr. 7

C. DEPARTURE AND DETENTION

Texts in force

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

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

Chapter VI of the Directive contains the restrictions on the right of entry and residence on grounds of public policy, public security or public health. In the Aliens Decree 2000 public health is mentioned in Articles 8.8(1), sub b (entry) and 8.23. For public policy and public secu-

rity the relevant Articles are: 8.8 (1), sub a and b (entry), 8.22 and 8.24. Public health may only be applied as a restriction on the right of entry during a three-month period from the date of arrival. This is also the case in the Aliens Decree 2000. The relevant diseases are diseases defined by relevant instruments of the World Health Organization (WHO) and other diseases if they are the subject of protection provisions applying to nationals of the host Member State. Article 8.23 of the Aliens Decree refers to the lists of the WHO and other infectious diseases or contagious parasitic diseases which are subject of protection provisions applying to Dutch citizens. The Explanatory Memorandum mentions in this respect plague, cholera and yellow fever and recent diseases as SARS (*Staatsblad* 2006, no. 215, p 32, 33 and 46).

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

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

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

Judicial practice

Judicial Division of the Council of State 18 January 2011, 201009741/1/V3 [LJN: BP1919], *Jurisprudentie Vreemdelingenrecht* 2011/115, concerned an alien who wanted to move with his EU-partner to Germany. Although he did no longer possess a valid passport, he claimed that he could be admitted to Germany based on the *BRAX* decision. The Judicial Division disagreed. Germany is not under the obligation to admit him. An alien who cannot prove his identity with a valid passport cannot rely on EU law, unless he proves his identity by other means. The document presented by the alien (copy of passport, letter Liberian embassy and 'travel certificate') cannot be considered as sufficient prove of identity in the meaning of the BRAX decision, while they are only copies and not originals. Therefore the authenticity is not established.

President District Court Amsterdam 16 March 2011, AWB 10/44784, 10/44785 suspended the declaration as undesirable alien of a Surinam national. based on the Zambrabo decision of the EU Court of Justice while her daughter, born in 2008, has the Dutch nationality. The applicant did not have any longer a relationship with the father.

President District Court 's-Hertogenbosch 21 March 2011, AWB 10/42898 [LJN: BP8895} suspended the declaration as undesirable alien of Polish citizen, who was convicted several times for shoplifting. No present, real and serious threat. To the same effect President District Court Rotterdam 14 April 2011, AWB 11/1691 [LJN: BO1518].

In line with Judicial Division of the Council of State 3 May 2010, 201002977/1/V3 [LJN: BM5541, *Jurisprudentie Vreemdelingenrecht* 2010/247 (see last year's report) District Court Utrecht, AWB 11/12844 [LJN: BR1998] ruled that for legal residence it is required that besides proof of a durable relation the alien possesses a valid passport. While a passport is lacking the detention can be continued and the issue of the durability of the relationship does not need to be addressed.

District Court Amsterdam 28 July 2011, AWB 11/8182 {LJN: BR0766] concerned the declaration as undesirable alien of an Italian national who during 18 of the last 20 years committed smaller crimes and was detained for more than 15 years. Appeal against the declaration rejected with reference to the Court of Justice decision Polat: a smaller number of convictions which considered in itself are not sufficient to provide a genuine and sufficiently serious threat affecting a fundamental interest of society, may nevertheless under circumstances justify a measure of expulsion.

According to *Framework Decision 2004/757/JHA* illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States. Therefore the Judicial Division of the Council of State 5 October 2011, 201100780/1/V1 [LJN: BT8385] considers the personal conduct of the applicant a present, real and sufficient serous threat to a fundamental interest of the society. In the light of Article 32 (Duration of exclusion orders) of Directive 2004/38 the applicant has to substantiate in his application for lifting the declaration as undesirable alien that there has been a material change in the circumstances which justified the decision. The applicant failed in this respect. He still committed crimes very recently and was convicted in 2009 and 2010.

Judicial Division of the Council of State 14 September 2011, 201012035/1/V3 [LJN: BT1936], *Jurisprudentie Vreemdelingenrecht* 2011/462 (with annotation T.P. Spijkerboer), concerned the Lebanese not registered, unmarried partner of a Dutch national who was detained on 3 November 2010 while his residence was not lawful. Detention was lifted on 26 November 2010 since he provided a passport and a ticket. According to the Judicial Division Article 3(2)(b) of Directive 2004/38 obliges Member States merely, in accordance with its national legislation to facilitate entry and residence for the unmarried partner of a Union citizen. Therefore, entry and residence of the unmarried partner are not based on the Directive but on national law. Since a passport was only provided on November 24, the requirement of holding a valid passport was not fulfilled during the detention and therefore there was no lawful residence during that period. While a passport was lacking during detention the issue of the durability of the relationship did not need to be addressed (see for the same decision also above under Entry, Judicial practice).

In District Court Haarlem 26 October 2011, AWB 11/30211 [LJN: BU7257] the President of the Court suspended the expulsion order and the declaration as undesirable alien of a German national while the Minister could not conclude to an present threat to the public order merely on

the fact that the applicant had not disclosed the reason why he was detained in the forensic Psychiatric Center in Scheveningen.

In District Court Haarlem 8 November 2011, AWB 11/17436, 11/16378 [LJN: BU5206] the court considered the personal conduct of a Romanian national as a present, real and sufficient serous threat to a fundamental interest of the society while the applicant was sentenced to a term of 4 years for participating in a criminal organization, burglary, theft, money laundering and skimming.

In Judicial Division of the Council of State 13 December 2011, 201102012/1/V2, *Jurisprudentie Vreemdelingenrecht* 2012/85 the applicant, a Czech national, was declared as undesirable alien in 2003 and expelled in 2005. In 2009 she was kept in custody during a police surveillance in Tilburg. In 2010 her declaration as undesirable alien was renewed. With reference to the Guidelines concerning the application of Directive 2004/38 District Court 's-Hertogenbosch 13 January 2011, AWB 10/23494 annulled the decision. The Judicial Division agreed and considered the appeal of the Minister manifestly unfounded. Although the Minister rightly points out that the Guidelines by itself are not binding, they provide an instrument for the interpretation of the provisions of the Residence Directive. With this in mind the guidelines can not be deprived of any meaning. The minister himself refers to the Guidelines to justify his policies (see Judicial Council 6 September 2011 mentioned above under Entry, Judicial practice). The District Court also has used the guidelines for its opinion, but it can not be inferred that its judgment is purely based on the guidelines, without taking note of the relevant jurisprudence of the Court of Justice.

The Minister also argues that the court has not recognized that recidivism is not important since the alien has committed a similar offense for which she previously was convicted criminally. The court held that the Minister's assessment of whether there is a present, real and serious threat is not properly carried out. By referring for the severity of the threat to a conviction in 2002 and for the present threat to a conviction in 2009 the Minister has the individual elements wrongly assessed separately. With the consideration that there is no evidence that the alien is likely to recur in her previous behavior, the court only intended to underline that the separate elements should be assessed in conjunction with each other.

Administrative practice

In the previous national reports we concluded that in many instances the administrative decisions concerning undesirability are not in conformity with the case law of the EC Court of Justice, particularly not with the requirement that the personal conduct of the person concerned should be taken into account. The above mentioned case law indicates that administrative decisions still fall short concerning the requirement of a present, real and sufficient serous threat to a fundamental interest of the society. In so far the case law corrects the policy aim to declare more frequently Union citizens who are involved in criminal violence, as undesirable aliens and to expel them (Tweede Kamer 2006-2007, 19 637, no. 1168). Against this background is is not a surprise that in the 'Roadmap' concerning changes of European legislation required by the new (but now caretaker) cabinet of the Netherlands (Tweede Kamer vergaderjaar 2010-2011, 30 573, no. 61) Directive 2004/38 is included in relation to the public order policy. The Netherlands still advocates its policy to extend the possibilities to terminate residence and to declare convicted EU citizens as undesirable aliens. The right to free movement should not be limited, but according to the Minister of Immigration and Asylum further explanation and interpretation of existing frameworks are very well possible (see also Tweede Kamer, vergaderjaar 2010-2011, 32 175, no. 18).

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

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

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

Article 3.86 Aliens Decree 2000 is amended on 26 March 2012 (*Staatsblad* 2012, no. 158). Its' coming into force is not yet announced in the Official Journal (*Staatsblad*).

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

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

On 19 January 2012 The National ombudsman announced an investigation on his own initiative regarding aliens detention.

Literature

P. Boeles, Kroniek Openbare Orde, *Asiel&Migrantenrecht* 2011, nr. 1
B. van Dokkum, Kroniek vrijheidsontneming, *Asiel&Migrantenrecht* 2011, nr. 8

ACVZ, *Advies inzake de conceptwijziging van het Vreemdelingenbesluit (Vb) 2000 (aanscherping glijdende schaal)*, wetsadvies 022/2011, 23 August 2011

Amnesty International, *Vreemdelingendetentie in Nederland: het moet en kan anders*, Amsterdam, October 2011

D. REMEDIES

Judicial practice

In District Court Amsterdam 4 May 2011, AWB 10/29769 [LJN: BQ8294], a family member of an EU national received a residence sticker 'not valid for employment'. According to the Minister for Immigration and Asylum an appeal is not admissible while a sticker is not a decision in the meaning of the General Administrative law Act and cannot be equated with such a decision as provided for in Article 72(3) Aliens Act 2000. The Court disagreed and considered the appeal admissible. According to the Court the IND may not place a sticker in the passport that states that the third-country national family member is not entitled to work, if the family relationship with the EU migrant is not disputed, but the IND wants to conduct further investigations. The sticker establishing the right to take up employment as provided for in Article 23 of Directive 2004/38/EC merely has declaratory effect. The right to labour market participation exists from the moment that it is apparent that the third-country national is a family member of an EU-citizen within the meaning of Directive 2004/38/EC. To the same effect District Court Amsterdam 11 May 2011, AWB 11/10661 [LJN: BQ8666], *Jurisprudentie Vreemdelingenrecht* 2011/302; District Court Amsterdam 25 May 2011, AWB 11/11586 [LJN: BR1183], *Jurisprudentie Vreemdelingenrecht* 2011/330 and District Court Haarlem 16 November 2011, AWB 11/13451 [LJN: BU5201].

According to Judicial Division of the Council of State 15 July 2011, 201105838/1/V1 [LJN: BR3851] *AB* 2011, 249 (with annotation R.J.G.M. Widdershoven) and *Jurisprudentie Vreemdelingenrecht* 2011/383, Directive 2004/38 contains no (explicit) provisions on the procedures for the submission of arguments. As stated in paragraph 47 of the ECJ judgment *Alassini and others* (18 March 2010, C 317/08, C-318/08, C-319/08 and C-320/08, it is settled case law that in the absence of EU Legislation it is in the first place a matter of domestic law of each Member State to adopt rules for the judicial proceedings that serve to protect the rights which individuals may derive from Union law derive while at the same time the Member States are required in each case to protect those legal rights effectively. The period within which arguments must be filed applies to an alien who may benefit from EU law as to an alien who may benefit from national law and that period does not make exercise of Union rights in practice impossible or excessively difficult. Therefore the principles of equivalence and of effectiveness are satisfied (paragraph 48 above). Along the same lines: District Court Haarlem 25 August 1011, AWB 09/14864 [LJN: BT2902], *Jurisprudentie Vreemdelingenrecht* 2011/417.

E. SPECIFIC ISSUES OF CONCERN

Transposition of provisions specific for workers

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

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

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

Article 14(4 a-b) of the Directive concerning the retention of the right of residence of workers, self-employed and job-seekers 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 job-seekers as long as they have not find employment, even not when they have resided in the Netherlands for more than three months,
c. other Union citizens, who have resided for more than three months but less than five years in the Netherlands are entitled to social assistance on an equal footing as nationals. In such instances their right of residence may be terminated on policy grounds. Such a decision should be taken on a case by case basis and should be proportional,
d. Union citizens who have resided in the Netherlands for more than five years are entitled to social assistance on an equal footing without any consequences for their right of residence.

According to the new Article 2.2 of the Study Grants Act 2000 students from EU, EEA Member States and Switzerland are in principle equally treated as Dutch citizens, irrespective whether they reside in the Netherlands or not, but by a Royal Decree, the Study Grants Decree 2000, groups of students may be designated who are only entitled to a reimbursement of the enrollment 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 enrollment fees only.

Situation of job-seekers

Job-seekers are treated in Article 8.12(1) of the Aliens Decree on the same footing as workers and self-employed. According to Article 8.12(1a) a job-seeker is entitled to a right of residence

for more than three months when he is able to prove that he is still looking for a job and has a real opportunity to get a job (see also Aliens Circular B10/3.1). As other EU citizens a job-seeker has to register himself with the Immigration and Naturalization service after the period of residence for up to three months. The same restrictions on grounds of public policy, public security or public health apply.

According to Aliens Circular B10/3.1:

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

Chapter II
Members of the Family

The amendments to the policy rules concerning the position of family members of EU-citizens are limited. The entry into force of the Visa Code necessitated an overhaul of the rules on the crossing of external borders in *Vreemdelingencirculaire* 2000, A2. The amendments regarding family members of EU-citizens aimed at ensuring compliance with the rules in directive 2004/38/EC and have to be viewed as a clarification rather than an amendment, as will be discussed in section 2 of this Chapter.[1] An important amendment to the policy rules concerns the extension of evidence that can be submitted to prove a durable relationship, duly attested that will be discussed in section 1 of this Chapter.[2] Though amendments to legislation and policy rules were few, the case law load has increased compared to the previous report, in particular the number of rulings by the Judicial Division of the Council of State. Judgments handed down by the latter Court, which are serving as precedents concern the evidence that must be accepted as proof of a durable relationship duly attested (see section 1) and the status of the sticker affixed to a passport as evidence of the right to take up paid employment (section 5).

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

1.1. The definition of family members

After the Judicial Division of the Judicial Division of the Council of State established that the policy rule listing the evidence that can be submitted to establish a durable relation, duly attested in the Netherlands was a too restrictive reading of that concept,[3] the policy rules were adapted to accommodate for this decision.[4] The Judicial Division of the Council of State sets out by recognising that the absence of a definition of a durable relationship, duly attested leaves the Dutch authorities with a margin of appreciation. However, it argues, THIS

1 Besluit van de Minister voor Immigratie en Asiel van 23 september 2011, nr. WBV 2011/11, houdende wijziging van de Vreemdelingencirculaire 2000 [Decision of the Minister for Immigration and Asylum of 30 September 2011, No. WBV 2011/11, amending the Aliens Circular 2000], *Staatscourant* 20 September 2011, No. 17496.

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

3 Afdeling Bestuursrechtspraak Raad van State, 6 September 2011, 201009139/1/V4, LJN: BS1678, *JV* 2011/429. See also: *Ibid*, 10 May 2012, 201105665/1/V4, 4 May 2012, 201004915/1/V4, *ibid*., 4 May 2012, 201012514/1/V4, *ibid*., 26 April 2012, 201008207/1/V4, LJN: BW 5635, *ibid*., 12 April 2012, 201007067/1/V4; *ibid*., 23 March 2012, 201012514/1/V4; *ibid.*, 24 February 2012, 201011515/1/V4,; *ibid*., 30 December 2011, 201100112/1/V1; *ibid*., 27 December 12011, 201012900/1/V4; *ibid*., 2 December 2011, 201108034/1/V4; *ibid*., 24 November 2011, 201108566/1/V4; *ibid*., 21 November 2011, 201106238/1/V4; *ibid*., 21 November 2011, 201009090/1/V4 & *ibid*., 11 October 2011, 201100799/1/V4.

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

is not an open invitation to determine single handed what this concept entails. Like the minister, it turns to the Commission's 2009 guidelines on the implementation of Directive 2004/38/EC[5] arguing that though they acknowledge that Member States may, in their national rules, refer to a minimum amount of time as a qualifying criterion to determine whether there is a durable relationship, duly attested, this cannot be the only qualifying criteria. It points out that these Guidelines explicitly state that any appropriate evidence can be submitted and, more specifically, mention a joint mortgage for the purchase of living accommodation as evidence that has to be taken into consideration. Consideration 6, which is also mentioned in the Commission's 2009 Guidelines, obliges Member States to assess evidence attesting the durable nature of the relationship in the light of the purpose of Directive 2004/38/EC, namely to ensure family unity. The six month period is found compatible with the Citizens Directive, but not the restriction of evidence that can be submitted as proof to the registration in the *Gemeentelijke Basisadministratie* (GBA) [Municipal population administration] or the birth of a child. Key to the ruling of the Judicial Division of the Council of State is the fact that though evidence other than a GBA-registration is admissible, this is only the case in exceptional situations and that the Minister is not capable of providing any examples when this might be the case. A further reason for the Judicial Division of the Council of State to label the policy rule as 'unmistakably unreasonable' is the fact that registration in the GBA is only possible if there is evidence that residence in the Netherlands is lawful, where the GBA-registration is evidence of lawful resident. A final interesting point is that the State authorities have to substantiate why they feel that there is no durable relation, duly attested if evidence of a durable relationship has been presented by the applicant. A mere reference that there is no registration in the GBA is insufficient according to the Judicial Division of the Council of State.[6]

By extending the list of admissible evidence with 'rental contract or other considerable and lengthy legal/financial commitments such as a mortgage for the purchase of living accommodation, bank statements on both partners names' in policy rules *Vreemdelingencirculaire* 2000 A2/6.2.2.2 (Admission of EU Citizens and Nationals of the EER-States and Switzerland) and B10/1.7 (Nature of Residence EU Citizens) preceded by the words '*valt te denken aan'* [can be thought of] the policy rules now reflect the objective of Directive 2004/38/EC (preserve family unity), the Commission's 2009 Guidelines and the Judicial Division of the Council of State 's findings.

1.2 Reverse Discrimination

No amendments have been made to the policy rules spelling out the position of Dutch nationals under EU law which are found in *Vreemdelingencirculaire* 2000, B10/5.3. The Judicial Division of the Council of State has handed down two cases on the rights of Dutch citizens who have acquired Dutch nationality through naturalisation and a further decision on the rights of Dutch nationals who return to the Netherlands claiming rights as non-static EU-citizens.

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

6 Afdeling Bestuursrechtspraak Raad van State, 6 September 2011, 201009139/1/V4, LJN: BS1678, *JV* 2011/429, cons. 2.4-2.4.3.

Return Cases

Though not many, the Judicial Division of the Council of State has handed down various cases on returning Dutch nationals claiming rights for their third-country national family members upon return under Directive 2004/38/EC and the Court of Justice's ruling in the *Surinder Singh* case law.[7] Two decisions handed down by this court ruling on the substance of the claim will be discussed here.[8] The cases share that no rights were derived from the rules on free movement.

The first case concerns a claim had been made by the Dutch daughter of the third-country national mother who had travelled to Belgium with her mother where they had spent their Christmas holiday in 2008. Arguing that as a tourist the daughter qualified as recipient of services on her return to the Netherlands, EU law was invoked as the legal basis for the mother's right of residence. The Judicial Division of the Council of State acknowledged that recipients of services qualify for rights under EU-law.[9] However, it argued though in general there is a right to qualify as a beneficiary of EU free movement rights in the capacity of a recipient of services, the Judicial Division argues that in a case when the duration of residence in the host-Member State is so short as in this case, the enjoyment of free movement rights is not affected if the third-country national family member is not accorded residence rights under EU law upon return as the effective enjoyment of that right does not require the third-country national family member to accompany the EU-citizen to the host-Member State.[10] As the situation at hand does not fall within the scope of European law, Article 7 of the Charter is found not to apply under the *Dereci* ruling.[11] The case is not considered in the light of Article 8 ECHR, as this provision cannot lead to the issuing of a registration certificate ex Article 9(1) *Vreemdelingenwet* (Article 8(2) Directive 2004/28/EC).[12]

In the second case both the Dutch national and the third-country national family member had stayed in Estonia for two weeks. As the purpose of their travels was to investigate the career chances of the third-country national family member as a professional Basketball player in that Member State, the Judicial Division of the Council of State ruled that not applying the rules on free movement to the third-country national's application for residence upon return did not equate to an obstacle for the Dutch national exercising free movement rights. Crucial in the ruling is that the exercise of European rights was not 'genuine and effective'.[13] A further point that is mentioned is that residence in Estonia was not part of the Dutch national's activities as a cross-border service provider.[14]

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7 ECJ case C-370/90 [1992] ECR I-.4265.

8 Afdeling Bestuursrechtspraak Raad van State, 30 December 2011, 201010287/1/V2, *Jurisprudentie Vreemdelingenrecht* 2012/98 and *idem*., 29 February 2012, 201006036/1/V2., Examples of cases which were found 'unfounded' are: Afdeling Bestuursrechtspraak Raad van State, 16 February 2012, 201103487/1/V4, *idem*, 13 February 2012, 201100234/1/V4, *idem*, 13 February 2012, 201108229/1/V4, and *idem*, 13 December 2012, 201012607/1/V4.

9 Reference to Afdeling Bestuursrechtspraak Raad van State, 7 September 2010, 201000977/1/VI, *Rechtspraak Vreemdelingenrecht* 2010, 35, with commentary by H. De Waele (see also: 2010-2011 Dutch report).

10 Afdeling Bestuursrechtspraak Raad van State, 30 December 2011, 201010287/1/V2, *Jurisprudentie Vreemdelingenrecht* 2012/98, cons. 2.1.4.

11 *Idem*., 2.2.2.

12 *Idem*., cons. 2.2.1.

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

14 Afdeling Bestuursrechtspraak Raad van State, 29 February 2012, 20100636/1/V2, LJN: BV7338, *Jurisprudentie Vreemdelingenrecht* 2012/259, cons. 2.3.

A final case of interest was handed down by the District Court Amsterdam ruling that a steersman resident in the Netherlands and employed by a Belgium company based in Antwerp qualifies as beneficiary of Directive 2004/38/EC. As his wife wants to reside with him in the Netherlands, it had been argued that the condition to join or accompany in Article 3(1) of the aforementioned Directive had not been satisfied. However, the Amsterdam District Court argued that in its case law, the Court of Justice has held that frontier workers qualify as workers within the meaning of Article 45 TFEU if their economical activity qualifies as genuine and effective. Like all workers, it is argued, their EU free movement rights cannot be subject of obstacles that might deter them from using them. By de facto imposing a residence choice to trigger the application of Directive 2004/38/EC to the wife's residence application, the Dutch authorities are obstructing the exercise of free movement right of a frontier worker; a right that should be exercised under objective conditions of freedom and dignity according to consideration 5 of Directive 2004/38/EC.[15]

Dutch Nationality through Naturalisation

On October 28, 2011 and November 2, 2011 the Judicial Division of the Council of State handed down a judgment applying the rules in section 5.3.2.3, on the position of Dutch citizens who have acquired Dutch nationality by naturalisation who were previously or still are a national of another Member State. According to the policy rules, which are modelled on the Court of Justice's ruling in the *Scholz* case,[16] rights acquired under European law prior to naturalization are retained post-naturalization. For the position of family members this means that family ties which existed and reunification that was accomplished prior to naturalization are still treated in accordance with European standards.

In both cases the court in first instance had, relying on a decision of the Judicial Division of the Council of State of July 15, 2008, decided that there is an inter-State link that triggers EU-free movement rules if a Dutch-Portuguese/Dutch-Spanish national applies for family reunion with a third-country national partner. In its 2008 decision the Judicial Division of the Council of State, relying on *Garcia Avello, Chen* and *Micheletti*,[17] had found that residence in the Netherlands in a case in which the applicant was a dual national, Dutch/Spanish, did not justify a refusal to apply European free movement rules because of a lack of an inter-State link.[18] In the 2011 cases the Minister appealed the decision of the first instance court arguing that the Judicial Division of the Council of State's 15 July 2008 ruling did not provide a solution for the case at hand as the conditions in Article 3 Directive 2004/38/EC were not satisfied. In both cases the Judicial Division of the Council of State's reading of consideration 43 of the *McCarthy* judgment is that Directive 2004/38/EC does not apply to cases in which an EU-citizen who is a national of two Member States, but has always resided in a Member State of which s/he is a national. Applying this to the two cases it finds on October 28, 2011 that a Spanish national who has acquired Dutch nationality later in life and has not argued that she has de facto moved to another Member State under Union law does not derive rights from Directive 2004/38/EC as, according to Article 3(1), she does not qualify as beneficiary.[19] Four days later, it rules that the presumption underlying the conclusion that a

15 References to: ECJ cases C-419/92, *Scholz* [1994] ECR I-505; -18/95, *Terhoeve* [1999] ECR I-345; C-385/00, De Groot [2002] ECR I-11819; and C-213/05, *Geven* [2007] ECR I-6347.

16 ECJ case C-419/92 [1994] ECR I-505.

17 ECJ cases C-148/02 [2003] ECR I-11613; C-200/02 [2004] ECR I-9925; & C-369/90 [1992] ECR I-I-4239.

18 Afdeling Bestuursrechtspraak Raad van State 15 July 2008, 200800488/1, J+LJN BD8585, *JV* 2008/356.

19 Afdeling Bestuursrechtspraak Raad van State, 28 October 2011, 201012858/1/V2, LJN: BU3406, *JV* 2012/44, cons. 2.4.2.

Dutch/Portuguese national who has exercised free movement rights prior to acquiring Dutch citizenship should be treated as a Dutch national who has never exercised free movement rights, is that acquisition of Dutch nationality detracts from the rights which this individual enjoys by virtue of the fact that he is also a national of another Member State.[20] In his commentary Boeles argues that the 2 November 2011 decision rectifies the 28 October 2011 ruling and is compatible with the *McCarthy* ruling. He points out that close reading of consideration 39 of that decision reveals that according to the Court of Justice the inter-State link that triggers free movement rules, as laid down in Article 3(1) of Directive 2004/38/EC, only applies '*in so far as* the Union citizen concerned has *never* exercised his right of free movement and has always resided in a Member State of which he is a national (emphasis added)'; a finding that 'cannot be influenced by' (consideration 40) the dual nationality of the EU-citizen.

1.3. Ruiz Zambrano and Dereci

As reported in the 2010-2011 Dutch report the Minister for Immigration and Asylum made a public statement regarding the implications of the *Ruiz Zambrano* case for the Netherlands on March 31, 2011.[21] In a letter to the Dutch Second Chamber he informed the MPs that the concise justification offered by the Court of Justice in *Ruiz Zambrano* for its 'genuine enjoyment-test' implied that that Court had merely envisaged to find a solution for a particular case, which he felt would not easily occur in the Netherlands as children born in the Netherlands who do not acquire a nationality at birth have to wait for three years before they are eligible for Dutch nationality. Accordingly the genuine enjoyment-test would only have implications in cases in which:

- both parents are nationals of a third-country,
- the minor is stateless at birth and acquires Dutch nationality through option after having resided in the Netherlands lawfully for three years,
- after the child acquires Dutch citizenship, the parents (no longer) have a valid residence permit; and
- the minor child is fully dependent of the parents.

Following a number of decisions from first instance courts showing a mixed, albeit restrictive reading of the genuine enjoyment-test,[22] the first occasion on which the Judicial Division of the Council of State expressed its views on the *Ruiz Zambrano* ruling was March 7, 2012, when it handed down four cases.[23] In three of these cases the refusal to grant a resi-

20 Afdeling Bestuursrechtspraak Raad van State, 2 November 2011, 201011940/1/V1, LJN: BU3411, *JV* 2012/45, with commentary P. Boeles, cons. 2.4.2.

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

22 On this case law, see: H. van Eiken, Ruiz Zambrano the aftermath: De impact van artikel 20 VWEU op de Nederlandse rechtspraak, 18 *Nederlands Tijdschrift voor Europees Recht* (2012-2) p. 41-48 and H. Oosterom-Staples, Het effectieve genot van het reis- en verblijfsrecht; drie arresten en een veelvoud aan vragen, *Journaal Vreemdelingenrecht* 2012, forthcoming.

23 For an earlier decision dismissing reliance on the genuine enjoyment test on procedural ground, see: Afdeling Bestuursrechtspraak Raad van State, 12 January 2012, 201200054/2/V2, MigratieWeb ve12000216, *idem*., 14 September 2011, 201012035/1/V3, LJN: BT1936, *JV* 2011/462 with commentary T.P. Spijkerboer. For an injunction decision, see: Pres. Afdeling Bestuursrechtspraak Raad van State, 6 September 2011, 201108763/2/V2, MigratieWeb ve1102228.

dence permit was tested against the genuine enjoyment-test[24] and in the fourth case, it was a refusal to issue a long-stay visa that was claimed to be incompatible with *Ruiz Zambrano*.[25] In all four cases the Judicial Division of the Council of State sets to work in the same fashion. It first reproduces consideration 42 of *Ruiz Zambrano* and considerations 59-69 of the *Dereci* case.[26] Regarding consideration 68 of the latter case, the Judicial Division of the Council of State observes that Article 20 TFEU does not intend to protect the right to family and private life, as this is protected by other provisions of international (Article 8 ECHR), European (Article 7 of the Fundamental Rights Charter and Directive 2004/38/EC) and national law (Article 15 *Vreemdelingenwet*), and concludes that it is, therefore, only of limited significance in the context. What has to be established, according to the Judicial Division of the Council of State, is whether there is no other choice than residence outside the territory of the European Union.[27] It is the third-country national parent who has to make a reasonable case that as a result of the Dutch measure the citizen of the Union has no other choice than to leave the territory of the European Union.[28]

On a general note, residence permission granted in accordance with *Ruiz Zambrano* falls under Article 8(a) of the *Vreemdelingenwet* [Immigration Act] that refers to Article 14 Vreemdelingenwet as the legal basis for lawful residence, rather than Article 8(e) Vreemdelingenwet that provides for lawful residence as a 'gemeenschapsonderdaan', i.e. residence ex Directive 2004/38 /EC. Though an application made under Article 8(e) *Vreemdelingenwet* will not be considered in the light of *Ruiz Zambrano*, it is possible to make a fresh application under Article 8(a) of that act. It is in the course of this procedure that the genuine enjoyment-test is applied.[29] The choice for Article 8(a) rather than Article 8(e) *Vreemdelingenwet* raises the question what the nature of the residence right is.

In three of the 7 March-cases the Judicial Division of the Council of State found that the decision not to apply the genuine enjoyment-test was inadequately substantiated. In two of these cases, the genuine enjoyment-test should have resulted in the issuing of a residence permit respectively a long-stay visa. These cases share that there is only one parent involved in the children's care as the Dutch parent has passed away (long-stay visa) respectively disappeared from the scene with unknown destination (residence permit).[30] In the long-stay visa case, the Judicial Division of the Council of State dismisses the argument that the children can live with the paternal grandparents who are residents of the Netherlands without considering whether the grandparents are willing and capable of caring for the children, as the test is whether the children would have to leave EU-territory in order to live with their *parent(s)*, not whether there might be a third party in the Member State of which the children are a national who can care for them.[31] It also finds immaterial the fact that the children have limited ties with the Netherlands as they have spent all or most of their lives in Indonesia where

24 Afdeling Bestuursrechtspraak Raad van State, 7 March, 2012, 201011743/1/V1, *idem*., 201102780/1/V1 and *idem*, 201108763/1/V2.
25 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201105729/1/V1.
26 CJ EU case C-256/11, *Murat Dereci a.O,* v. *Bundesministerium für Inneres*, 15 November 2011, n.y.r.
27 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201011743/1/V1, cons. 2.3.3, *idem*., 201102780/1/V1 cons. 2.3.5, *idem*., 201108763/1/V2, cons. 2.5.3 and *idem*., 201105729/1/V1, cons. 2.7.6.
28 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201011743/1/V1, cons. 2.3.5, *idem*., 201102780/1/V1 cons. 2.3.6, *idem*., 201108763/1/V2, cons. 2.5.5 and *idem*., 201105729/1/V1, cons. 2.7.7.
29 IND Decision, 3 February 2012, 9505-15-6105/911.001.0536, MigratieWeb ve12000517, p. 3. See also: IND Decision 11 April 2012, 9507-07-4001/091.502.9662, MigratieWeb ve12000938, p. 1.
30 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201105729/1/V1, cons. 2.1 and *idem*., 201102780/1/V1 cons. 2.3.8.
31 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201105729/1/V1, cons. 2.7.10.

they attend an international school and do not speak the language of that country.[32] In the residence permit case, the Judicial Division of the Council of State dismisses as an option the fact that the Spanish authorities have been requested to assume responsibility under the Dublin-II Regulation as the claim has not been acknowledged by Spain and it is not clear whether the claim has been or still can be executed.[33] Along the same lines as in the long-stay visa case, the presence of an uncle in Spain is labelled immaterial as the question is not whether the children will be cared for, but whether the children will have to leave the EU-territory to be with their *parent(s)*.[34]

In the two other cases the Judicial Division of the Council of State ruled that the decision to withhold residence permission did not amount to the denial of the genuine enjoyment of EU-citizenship rights notwithstanding the fact that the Dutch parent was considered unfit to care for the children. A statement establishing that the Dutch parent was unfit to take up paid employment was not considered evidence that s/he is not capable of caring for the children. In both cases the Judicial Division of the Council of State emphasizes that professional assistance is available in the Netherlands and that there is no evidence that the Dutch parent will not benefit from this public service. As Dutch nationals are, in principle entitled to public benefits, the fact that the Dutch parent is dependent on public funds for the livelihood of the children is found immaterial.[35]

Relying on its ruling of 7 March 2012 (case 201011743/1/V1), the Judicial Division of the Council of State found in favour of the State on 15 March 2012, reversing the decision in first instance.[36] Article 20 TFEU and *Ruiz Zambrano* did not entail an obligation to allow the third-country national parent to reside in the Netherlands as no case had been made that a refusal to grant residence permission would equate to an obligation to leave EU-territory for the Dutch children. Regarding the obligation to take the best interests of the child into consideration (Article 24 Charter) the Judicial Division of the Council of State acknowledges that they have been taken into consideration, but, as there are no exceptional circumstances and the application is one of first admission, they are not decisive for the final decision to withhold residence permission.[37] The applicant in this case had previously applied for asylum. In this case it had been established and upheld by the Judicial Division of the Council of State that rejection of the claim was justified as the claim was implausible due to justified doubts regarding the identity and nationality of the applicant.[38]

On 23 February 2012 the Dutch National Ombudsman referred to the *Ruiz Zambrano* and *Chen* cases in a report concerning a complaint made by a Turkish national and her daughter who had been detained following their application for a residence permit, because they could not submit a long-stay visa (*machtiging tot voorlopige verblijf*). The purpose of

32 *Idem*, cons. 2.3.4.
33 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201102780/1/V1 cons. 2.3.8.
34 *Idem*.
35 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201108763/1/V2, cons. 2.5.4 and 2.5.7. and *idem*, 201011743/1/V1, cons. 2.3.7. Reliance on latter decision: Rechtbank 's-Gravenhage, zp Middelburg, 22 March 2012, Awb 11/35478. In this case the refusal to grant the third-country national parent a residence permit was not considered to amount to an obligation to leave the EU-territory for her son who suffered from a language and speech deficiency. The father was found to be able to take on the daily care of the child, if necessary with assistance of public services. The fact that this would interfere with his work obligations was set aside by the court arguing that it was the father who would have to choose between work and the care for his son.
36 Afdeling Bestuursrechtspraak Raad van State, 15 March 2012, 201106038/1/V1, LJN: BW0011. Decision in first instance: Rechtbank 's-Gravenhage, zp Utrecht, 26 April 2011, Awb 10/38692, LJN: BQ2526.
37 Afdeling Bestuursrechtspraak Raad van State, 15 March 2012, 201106038/1/V1, LJN: BW0011, cons. 2.4.1.
38 Afdeling Bestuursrechtspraak Raad van State, 9 Ju1y 2009, 200902163/1/V3, www.raadvanstate.nl.

the reference was to show that in European law there is recognition of the rights of children in their own right, evidencing a trend that children should not become a victim of their parents' choices.[39]

1.4 Publications

L. Ankersmit & W. Geursen, Ruiz Zambrano: De interne situatie voorbij, 1 *Asiel & Migrantenrecht* 2011-4, p. 156-164

G. Davies, Ruiz Zambrano en de non-EU ouders van (bijna) Nederlandse kinderen, 1 *Asiel & Migrantenrecht* 2011-7, p. 274-283

H. van Eiken, Ruiz Zambrano the aftermath: De impact van artikel 20 VWEU op de Nederlandse rechtspraak, 18 *Nederlands Tijdschrift voor Europees Recht* 2012-2, p. 41-48

H.U. Jessurun d'Oliveira, Unieburger in eigen land, 1 *Asiel & Migrantenrecht* 2011-2, p. 78-79

K. Lenaerts, *Civis europaeus sum*': van grens- overschrijdende aanknoping naar status van burger van de Unie, *Sociaal Economische Wetgeving* (2012-1)

A.P van der Mei, S.C.G. van de Bogaert & G.R. de Groot, De arresten Ruiz Zambrano en McCarthy. Het Hof van Justitie en het effectieve genot van EU-burgerschapsrechten, 17 *Nederlands Tijdschrift Europees recht* 2011 -6, p. 188-199

H. Oosterom-Staples, Het effectieve genot van het reis- en verblijfsrecht; drie arresten en een veelvoud aan vragen, *Journaal Vreemdelingenrecht* 2012, 6

2. ENTRY AND RESIDENCE RIGHTS

To accommodate for the adoption of the Visa Code, the policy rules on the issuing of short-stay visa were amended in 2011.[40] To ensure correct application of the obligations vis-à-vis third-country national family members who qualify for admission under Directive 2004/38/EC, *Vreemdelingencirculaire* 2000, A2/4.3.1 (*Algemeen* [General]), A2/6.2.2.1 (*Overeenkomsten, betrokken landen en toepassingsgebied* [Agreements, participating States and application]) and A2/6.2.2.2 (*Onderdanen van de EU, de EER en Zwitserland (en familieleden)* [Citizens of the EU, Nationals of the EER and Switserland (and family members)]), have been rephrased. The amendment to *Vreemdelingencirculaire* 2000, A2/6.2.2.1 are administrative by nature as they aim at replacing references to national rules which are no longer in force by references to the Visa Code.

The amendments to the other two sections aim at ensuring correct application of Directive 2004/38/E. Along this line the last paragraph of section *Vreemdelingencirculaire* 2000, A2/4.3.1. contains a reference to Article 8.9 *Vreemdelingenbesluit* (Article 5(2) Directive 2004/38/EC) on the exemption to hold a short-stay visa if a residence permit ex Article 10 of that Directive has been issued by one of the Member States). This exemption is, however, explicitly linked to family members whose purpose of crossing borders is to accompany or join the EU-citizen from whom they derive their right of residence under Directive

39 Nationale Ombudsman, 23 February 2012, report 2012/028, retrieved from: http://www.ombudsman.nl/rapporten.

40 Besluit van de Minister voor Immigratie en Asiel van 23 september 2011, nr. WBV 2011/11, houdende wijziging van de Vreemdelingencirculaire 2000 [Decision of the Minister for Immigration and Asylum of 30 September 2011, No. WBV 2011/11, amending the Aliens Circular 2000], *Staatscourant* 20 September 2011, No. 17496.

2004/38/EC. Interestingly, there is no further elaboration how to ascertain whether the purpose of travels by the third country national family member is to join the EU-citizen. In *Vreemdelingencirculaire* 2000, A2/6.2.2.2 the same limitation follows from the words: '*en het familielid of gezinslid dient deze onderdaan te begeleiden of zich bij hem te voegen* [and the family member should accompany or join this citizen]' which is found under the heading '*Visa'*. Elaboration on the evidence which should be submitted to establish the family relationship is found in this section, which does not address the question how to ascertain that the family member's purpose of travels is to join a beneficiary of the right to free movement of persons.

ber, within the meaning of Article 3(2)(b) of Directive 2004/38/EC (durable relationship, duly attested), enjoys a right of residence under national rather the European law.[41] Though the ruling leaves some doubt as to the legal basis for residence, Article 8.7(4) *Vreemdelingenbesluit* or Article 112 *Vreemdelingenwet*, it appears from a ruling of 9 December 2011 that the latter is the legal basis for the right of residence of family members in a dully attested durable relationship.[42] Residence conditions are found by analogy in the Chapter 8.2.2 of the *Vreemdelingenbesluit*, i.e. the provisions implementing Directive 2004/38/EC. For the initial three months this means that only a valid passport can be required from the family member (Article 8.11(2) *Vreemdelingenbesluit*). There is no obligation to register within three days, as set out in Article 22 SIA (Article 4.48 *Vreemdelingenbesluit*) for third-country nationals in general. In the case at hand, however, residence was not lawful within the meaning of Article 8.13(1) *Vreemdelignenbesluit* until the day that a valid passport was presented to the Dutch authorities. The detention measure was therefore lawful and there was no need to establish the nature of the relationship.

On 21 December 2011 the Haarlem District Court upheld the decision to refuse an entry visa as the documents submitted to attest the identity of the applicant - a birth and marriage certificate – shed doubts as to his identity. Therefore the Visa authorities could justly doubt whether the claimed marriage was valid. The application was dismissed as family ties could not be established. A reference is made to Articles 8(5) and 10(2) of Directive 2004/38/EC.[43]

On 14 December 2012 the Haarlem District Court found that the refusal to issue a residence permit to a single parent did not reflect the obligation to take into account the personal situation of the applicant as the decision that the resources were not 'sufficient' was taken on the basis of the threshold for social assistance for single parents. Relying on consideration 47 of *Commission* v. *Belgium*, where the Court of Justice argued that

> '[t]he loss of sufficient resources is always an underlying risk, whether those resources are personal or come from a third party, even where that third party has undertaken to support the holder of the residence permit financially. The source of those resources thus has no automatic effect on the risk of such a loss arising, as the materialisation of such a risk is the result of a change of circumstances',[44]

and Article 14 of Directive 2004/38/EC it found that the refusal to issue a registration ex Article 8(2) of Directive insufficiently substantiated. The fact that no rental is paid for living

41 Afdeling Bestuursrechtspraak Raad van State, 14 September 2011, 201012035/1/V3, *Jurisprudentie Vreemdelingenrecht* 2011/462, cons. 2.9-2.9.3.

42 Afdeling Bestuursrechtspraak Raad van State, 9 December 2011, 201101901/1/V1, LJN: BU8626, *Jurisprudentie Vreemdelingenrecht* 2012/58, cons. 2.4.1.

43 Rechtbank 's-Gravenhage, zp Haarlem, 21 December 2011, Awb 11/38429, LJN: BW4757.

44 ECJ case C-408/03 [2006] ECR I-2647.

accommodation and that to date no application for public assistance had been made should have been reflected in the decision.[45]

3. IMPLICATIONS OF THE *METOCK* JUDGMENT

Nothing to report.

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

2011-2012 saw no amendments of the rules regarding abuse of free movement rights. The discussions on the amendment of the Civil Code and several related legislative acts to accommodate for the entry into force of the Wet *electronische dienstverelning burgerlijke stand* [Act on online services for the Registary Office] which will require the spouses to be to make a written statement regarding the nature of their intended marriage are still ongoing. In October 2011 it was discussed by the *Vaste commissie voor veiligheid en justitie* of the *Eerste Kamer*.[46] Only *Groen Links* [the Greens] intervened on the issue of marriages of convenience. They asked the government to confirm that irregular residence would not equate to the impossibility to enter into matrimony and asked the government to explain how this proposal relates to the plans to combat force marriages (see further: Chapter VIII section 3.2 of this report).

The Judicial Division of the Council of State's decision of 23 February 2011 sheds light on the level of detail which underlies a decision to ascertain whether a marriage qualifies as one of convenience.[47] Taking the Commission's 2009 Guidelines as reference point the Judicial Division of the Council of State upholds the decision to earmark a marriage as one of convenience on the basis of the following facts:

- seven years irregular residence in the Netherlands prior to the marriage;
- the couple hardly speak a language understood by both;
- marriage shortly after first acquaintance;
- contradictory statements regarding the relationship (how it started, developed, the marriage proposal, the purchasing of the ring and its presentation), how they travelled on their holiday to Poland and the means of transport to work.

The fact that initially (in the so-called M46-procedure) a positive advice had been issued does not detract from the competence to take a closer look at the facts of the case at a later stage, according to Judicial Division of the Council of State.

45 Rechtbank 's-Gravenhage, zp Haarlem (mk), 14 December 2011, Awb 11/9080, Awb 11/9077, LJN: BV1155.

46 http//zoek.officielebekendmakingen.nl/zoeken/resultaat/?zkt=Uitgebreid&pst=ParlementaireDocumenten&vrt=32444&zkd=InDeGeheleText&dpr=Alle&spd=20120601&epd=20120601&sdt=DatumPublicatie&ap=&pnr=1&rpp=10.

47 Afdeling Bestuursrechtspraak Raad van State, 23 February 2011, 201107451/1/V4, LJN: BW5634, cons. 2.2.5.

5. ACCESS TO WORK

On 9 December 2011 the Judicial Division of the Council of State confirmed that the placing of a sticker in the passport that paid employment is not permitted is a de facto decision that can be appealed as provided for in Article 72(3) of the *Vreemdelingenwet*.[48] However, as the application was made by a family member in a durable relation, duly attested, the placing of the sticker in the passport was found lawful, as the right of residence of these family members is not found in Article 8(e) of the *Vreemdelingenwet*, but Article 112 of that Act there is no obligation to issue a sticker establishing a right to take up employment until such day that a decision on the application is taken, under Article 3.2 *Voorschrift Vreemdelingen*, or the *Wet arbeid vreemdelingen* as there is no right of residence as a *gemeenschapsonderdaan* within the meaning of Article 8(e) *Vreemdelingenwet*.[49]

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

Nothing to report.

48 Afdeling Bestuursrechtspraak Raad van State, 9 December 2011, 201101901/1/V1, LJN: BU8626, *Jurisprudentie Vreemdelingenrecht* 2012/58, cons. 2.2.1-2.2.2. Confirming: *idem*, 14 April 2011, 201011816/1, LJN: BQ2602, *Jurisprudentie Vreemdelingenrecht* 2011/251. Confirmed in: *idem*, 30 December 2011, 201100244/1/V1, cons. 2.2.1.

49 Afdeling Bestuursrechtspraak Raad van State., 9 December 2011, 201101901/1/V1, LJN: BU8626, Jurisprudentie Vreemdelingenrecht 2012/58, cons. 2.4-2.4.1. Confirming: *idem*, 14 September 2011, 20102035/1/V3, *Jurisprudentie Vreemdelingenrecht* 2011/462 (discussed in: section 2). Confirmed in: *idem*, 30 December 2011, 201100244/1/V1, cons. 2.3.1 and Rechtbank 's-Gravenhage, zp Amsterdam, 18 April 2012, Awb 11/22655, LJN: BW3718.

Chapter III
Access to Employment

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

1.1. 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.

1.2. 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 the Minister of Social Affairs the requirement of Dutch language proficiency belongs to the competence of the employer. (Tweede Kamer 2009-2010, 9 September 2010, 29 407, No. 107, p. 2)

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

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

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

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

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

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

The Bill abolishing the requirement of Dutch nationality for the appointment as a notary has been adopted in the First Chamber of Parliament in June 2012 after the CJEU judgement of 24 May 2011 on the nationality requirement for notaries (case C-47/08, C-50/08, C-51/08, C-53/08, C-54/08 and C-61/08). However, the government has promised to introduce a new Bill that will re-establish the nationality requirement for third-country nationals, effectively restricting the exemption to nationals of Member States only.

(*Eerste Kamer* 31040, No. S; *Staatsblad* 2012, 272). On 24 May 2011, the CJEU ruled against a nationality requirement (case C-47/08, C-50/08, C-51/08, C-53/08, C-54/08 and C-61/08). Member States may not reserve access to the profession of notary to their own nationals. Even if the activities of notaries pursue objectives in the public interest, they are not connected with the exercise of official authority within the meaning of European law.

On 1 December 2011 the CJEU decided in the infringement procedure against the Netherlands on this issue (Case C-157/09, with annotation by Mok in *NJ* 2012, 41 and Van der Gronden in *NTBR* 2012, p. 21-25) in accordance with the other earlier decided cases. A nationality requirement is not allowed.

See also: A. Van den Brink & H.M.M van Zelen, Nee tegen nationaliteitseisen notarissen, *NtEr* 2011, p. 329335

2.2. Language requirements

Until recently, there were few, if any, explicit statutory requirements as to the knowledge of the Dutch language for appointment in posts in the public sector, although, in practice, proficiency in the Dutch language is required for most public service jobs. The legislation implementing Directive 2005/36/EC provides some examples of that practice. The explanatory memoranda on the ministerial regulations on the recognition of professional qualifications of police officers and fire-brigade officers, explicitly mentions that the officers concerned have to have obtained sufficient knowledge of the Dutch language to perform their job. Language knowledge is not to be tested during the procedure on the recognition of the qualifications acquired in another Member State, but afterwards in the appointment procedure. Moreover, the ministerial regulation on the recognition of professional qualifications of candidate notaries and candidate bailiffs stipulate that the aptitude test is to be conducted in Dutch. The same system applies for child care personnel: (*Staatscourant*, 17 June 2010, No. 9216).

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.

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

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

2.4. Other aspects of access to employment

Nothing to report.

Chapter IV
Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Working conditions in the public sector

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

2. SOCIAL AND TAX ADVANTAGES

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

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

Nothing to report.

2.2. Specific issues: the situation of job-seekers

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

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

Chapter V
Other Obstacles to Free Movement of Workers

Knowledge of Dutch language as a requirement for social assistance and compulsory adult education

A private bill introducing language requirements for the reception of Social Assistance benefits is pending in the Second Chamber since 2010. The government repeatedly has announced its intention to introduce a similar bill. However, in answer to critical questions of the Commission, the government in 2012 assured that this bill will only propose a requirement to prove sufficient knowledge of the Dutch language in cases where language knowledge will improve job opportunities of the applicant. This will apply across the board and hence to EU nationals as well. The government assured that the new requirement will be applied on a proportional and non-discriminatory basis.

The introduction of an obligation for migrant workers, especially those from Poland, to participate in the language and integration course and pass the integration exam, has been discussed in parliament repeatedly since 2004. In recent years this issue is discussed under the heading of introducing compulsory education for adults, or its recent more neutral name 'age-independent compulsory education'. After the ruling of the highest social security court in August 2011 that the obligation to participate in integration courses and pass the integration exam is a new restriction prohibited by the Association Agreement EEC-Turkey and, hence, Turkish nationals had to be exempted from this obligation, both the government and an opposition MP mentioned compulsory adult education as an alternative to oblige Polish and Turkish worker to learn the Dutch language. Currently, a bill is pending before the Senate that will end the government's responsibility for the costs of the language and integration courses. Some categories of third-country nationals may apply for a € 5,000 to € 10,000 loan from the government to pay the course fees. In 2010 approximately 9,000 EU nationals participated in language and integration course offered and funded by municipalities. Those facilities came to an end i n 2012.

Chapter VI
Specific Issues

1. FRONTIER WORKERS

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

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

In 2011 the Social Insurance Bank published a *Vergelijkend Overzicht voor werknemers* (Comparative Overview for Workers) in which a comparison is made between the Dutch and Belgian social security rules See: http://www.svb.nl/Images/9070NO_0111.pdf.

As mentioned in the 2009-2010 report, on 26 June 2009 the Supreme Court ruled in accordance with the decision of the CJEU in the *Renneberg* case (C-527/06) that Mr. Renneberg can deduct from his income generated in the Netherlands for the purpose of paying taxes the difference between the *huurwaardeforfait* (rateable value) for his house in Belgium, to be calculated as if the house was located in the Netherlands, and the mortgage he has paid for the years 1996 and 1997 (Supreme Court, 26 June 2009, No. 39258bis, VN 2009/33.14). The tax authorities, however, demanded under the Income Tax Act 2001, that frontier workers as Mr Renneberg choose to be registered for the Dutch system as internal taxpayer (*binnenlandse belastingplichtige*) and not as external taxpayer (*buitenlands belastingplichtige*). Internal taxpayers pay a higher tax rate than external taxpayers.

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

The State Secretary of Financial Affairs announced in February 2012 that those EU citizens, who earn more than 90 % of their income in the Netherlands can deduct the mortgage interest they pay for the house they own in another Member State. (http://www.rijksoverheid.nl/ministeries/fin/nieuws/2012/02/23/maatregel-keuzeregeling-buitenlandse-belastingplichtigen.html)

In 2010 a new journal was launched dealing with the (mainly social security and tax) problems of frontier workers: *Over de grens, vakblad over grensoverschrijdend werken.* See www.futd.nl.

Literature

H. Verschueren (ed.), *Werken over de grens België-Nederland; Sociaal-en fiscaalrechtelijke grensconflicten*, Antwerpen: Intersentia 2011, ISBN 978-94-000-0219-7 (xiv + 246 blz.)

2. SPORTSMEN/SPORTSWOMEN

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. There is no quota.

Basketball: For the season 2011/2012 a basketball team in the highest division must include at least six Dutch players. The Dutch Basketball League announced that for the 2012/2013 season only a maximum of 4 foreign players (including EU citizens) will be allowed. (http://www.basketballleague.nl/nieuws/1255)

Base-ball: For the 2011/2012 season base-ball teams in the highest league can consist of a maximum of 3 players without a Dutch passport. A foreign player who has played for five years in the Dutch league is counted as a Dutch player**.**

3. THE MARITIME SECTOR

Nothing to report. See the 2012 report of Barnard on seafarers.

4. RESEARCHERS AND ARTISTS

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

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

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

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

5. ACCESS TO STUDY GRANTS

Since September 2007, the Dutch Study Finance Act (*Wet studiefinanciering, WSF*) allows students resident in the Netherlands to take their study grant with them when they study abroad. This is subject to the condition that the student must have resided legally in the Netherlands for at least three out of the six years preceding the beginning of the course abroad (Article 2.14 (2)(c) WSF). When applied to migrant workers, including frontier workers and their family members, this residence clause appears at odds with Article 7(2) Regulation (EEC) No. 1612/68. In 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). The CJEU decided on 14 June 2012: 'Declares that, by requiring that migrant workers and dependent family members comply with a residence requirement – namely, the 'three out of six years' rule – in order to be eligible to receive funding for higher educational studies pursued outside the Netherlands, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992'.

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).

As this is a politically sensitive issue at the moment, the amount of hours will be increased to 56 hours a month as of 1 January 2013. It is questionable whether this increase will stand firm in court.

In 2011 4823 students from EEA countries (+ Swiss) received a Dutch study grant on the basis of the fact they were classified as migrant workers. (Aanhangsel Handelingen TK 2011-2012, nr. 901)

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

Judicial Practice

X v. Ministry for Education, Culture and Science, Rechtbank (Rb.) Groningen, 10 June 2010, No. 09/738 WSFBSF.

Applicant is a Belgian national, following a course of study in communication management at [X] in [X] (Belgium). Applicant received Dutch study finance from September 2007 onwards on the grounds that applicant's mother worked in Maastricht and had the status of Community (now: Union) worker. From the 1st of April 2009 onwards applicant's mother was, however, unemployed as a result of being made redundant. She currently receives Belgian unemployment benefits. As a result IB-Groep (now DUO/Minister for Education) decided that applicant no longer fulfilled the requirements necessary to be entitled to (export) study finance. The issue considered in this case evolves around the question whether the mother can continue to claim study finance for her child on the basis of Article 7(2) of Regulation (EEC) No. 1612/68 as a right being linked to her status as Union worker, even though she is no longer employed. The Rechtbank confirms that the migrant worker has a right to equal treatment as regards study finance as it is a social advantage within the meaning of Article 7(2) Regulation (EEC) No. 1612/68, and that this right of non-discrimination must be

accorded to the children of the worker as well on the basis of the case law of the Court of Justice (cited are: Case C-3/90, *Bernini* and Case C-337/97, *Meeusen*). The Rechtbank then turns to the question whether this right to study finance continues to exist after the employment relationship has ended. Relying on *Fahmi* (case C-33/99), the Rechtbank holds that the loss of worker status entails the loss of an entitlement to study finance for the children of the worker, because the social advantage cannot be seen as inextricably linked to the (previous) employment relationship. In this context, furthermore, it is of no consequence whether the worker became unemployed voluntarily or involuntarily. Finally, the Rechtbank rejects the application of *Lair* (Case 38/86) to the case, as the facts were of a different nature. The case is now pending before the Central Appeal Tribunal. In a preliminary judgement the Central Appeal Tribunal (CRvB 08 July 2011, *LJN* BR1101) considers, in contrast to the lower court, that several additional factors should be taken into account in order to determine whether a person retains his or her worker status: in particular the Minister is asked to investigate whether the applicant's mother genuinely sought new/further employment after she became unemployed.

See also the article by Alexander Hoogenboom, Mobility of our best and brightest from a free movement of workers perspective, in FMW-on-line Journal on Free Movement of Workers, issue 4.

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

6. YOUNG WORKERS

Nothing to report.

Chapter VII
Application of Transitional Measures [2011-2012]

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

In the coalition agreement of October 2010 of the centre-right government, that depended on the votes of the PVV party of Geert Wilders, it was agreed that the transitional measures for workers from Bulgaria and Romania would continue until 1 January 2014. At the end of 2011 the Netherlands notified the Commission that, considering the threat of serious disturbances of the Dutch labour market it would continue to apply the transitional measures under the Accession Treaties for workers from Bulgaria and Romania. Considering the relatively small number of work permits issued to workers from those two Member States (a total of 1510 permits in January-August 2011), the low level of immigration from those states and the limited number of EU-2 nationals resident in the Netherlands, this statement appears to be based more on political than on economic grounds.

In March 2011 the Second Chamber of the Dutch Parliament decided to start an inquiry in order to establish which lessons could be drawn from the recent labor migration from EU-12 Member States and which recommendation could be made for the future policies with regard to this issue, TK 32680, nos. 1-2. Labor migration from Bulgaria and Romania and the treatment of the workers from those countries were a recurrent issue during the public hearings held by the parliamentary commission. In September 2011 the commission published its report. There is a special chapter in the report on the access of EU-2 worker to the Dutch labor market, TK 32680, no. 4, chapter 8. The commission concluded that the use of free movement by workers from accession states had been underestimated by experts before accession. It estimates that in January 2011 around 200,000 citizens from CEEC countries were employed or living in the Netherlands, although 60% of the migrants who came from Poland in 2003-2009 had returned by2011. The report observed the exploitation, underpayment and bad housing conditions of many CEEC workers and made recommendations to improve registration of EU-8 and EU-2 workers, better exchange of information on those workers between tax, social security and population registration agencies and compliance of employers with the law and collective labor agreements (Tweede Kamer 2011-2012, 32 680, No. 4).

Early 2012 the party of Geert Wilders (PVV) announced to open a special website where members of the public could voice their complaints about migrants from CEE countries. This initiative caused a wide public reaction. In February 2012 the ambassadors of all EU-10 states in The Hague voiced their concerns in a public declaration and during a visit with the Dutch Minister of Foreign Affairs, TK 29704, no. 137. The center-right government refused to take a clear position on this issue, stating that they did not comment on the activities of individual political parties, TK 29704, nos. 140 and 142.

7.1. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

7.1.1 General information

On 1 January 2011 more than 25.000 nationals of Bulgaria or Romania were living in the Netherlands. Almost half of those EU-2 nationals had between 1 and 5 years of residence and 30% had residence for more than 5 years in the Netherlands (CBS Webmagazine). The total number of persons born in Bulgaria with registered residence in the Netherlands increased from 4,582 at the beginning of 2007 to 16,961 in 2011; for persons born in Romania the increase is less sharp: from 9,374 in 2007 to 15,785 in 2011. According to the population registration in 2011 2,721 migrants born in Romania migrated to the Netherlands, considerably less than in 2010 (4,212) and in 2009(4,300). In 2011 5,213 immigrants born in Bulgaria were registered, that is considerably more than in 2010 (2,697) and in 2009 (2,227).

The total number of work permits issued for Bulgarian and Romanian workers during the first eight months of 2011 was 1510 (1,161 for Romanian and 349 for Bulgarian workers) down from 3,589 worker permits for the whole of the year 2010.

7.1.2 Texts in force

There was no amendment to the relevant legislation between January 2010 and August 2011. The Aliens Act 2000 (Article 17) and the Aliens Circular 2000, Chapter B10/1.2 both stipulate that EU-2 nationals are exempted from visa obligations. The Aliens Regulation provides that 'reliance on public assistance could result in loss of the residence right' should be included in the text on the residence permit issued to nationals from those two countries (Article 3.1(4) Aliens Regulation) and that employment is subject to a work permit (Article 3.2a Aliens Regulation). Article 8.26, under j, of Aliens Decree provides that the Minister of Justice adopt rules implementing the Association Agreements with Bulgaria and Romania. From the explanatory memorandum it appears that the amendment intends to indicate that the transitional measures are still in force for the EU-2. However, the reference is not correct. The clause in Article 8.26 of the Aliens Decree should refer to the Accession Treaties with the two Member States and not to the two now defunct Association Agreements. In October 2011 Article 3.2a Aliens Regulation was amended to make it more clear that employers are only allowed to employ an EU-2 worker without a work permit, if the worker has had uninterrupted access to the Dutch labour market for 12 months and that employers need a work permit to employ a self-employed EU-2 nationals who has not had access to the Dutch labour market for 12 months (Decision of the Minister for Immigration and Asylum of 28 September 2011, *Staatscourant* 2011, no. 17763)

The rights and obligations of workers from Bulgaria and Romania 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*) stipulate that workers from Bulgaria and Romania are exempted from the work permit requirement after they have lawfully worked for 12 months in the Netherlands. For non-exempted EU-2 workers a work permit is required. Such permits are issued following a labour market test.

7.1.3. More restrictive application and future amendments of work permit legislation in 2011

In April 2011 the Minister of Social Affairs announced his intention to restrict the granting of work permits for seasonal jobs after 1 July 2011 to the absolute minimum. The Minister in its letter did not mention the standstill clauses in the Accession Treaties with Bulgaria and Romania (TK 32144, no. 5). The Second Chamber in a motion adopted in December 2010

had asked for the introduction of further restrictions in the work permit legislation, TK 32500 XV, no. 37. In reply to questions in parliament the minister stated that the current rules, obliging employers to look for alternative solutions, such as the employment of Polish workers through private employment agencies, would be applied more strictly (TK 29407, no. 119 and 126). On 28 April 2011, after an extensive debate in the Second Chamber on the government's intention to make the practice of issuing work permits more restrictive, a motion asking the government to abstain from its intention to make the practice of issuing work permits for workers from Bulgaria and Romania more restrictive, considering the prospect of free movement with the EU-2 in January 2014, was rejected by the Second Chamber with an overwhelming majority, TK 29407, no. 127 and *Handelingen* p. 80-5-127. During the debate the minister stated that in the years 2008-2010 approximately 3.000 work permits had been issued each year to workers from Bulgaria and Romania and that he wanted to avoid a repetition of that practice in 2011, TK 29407, no, 127, p. 18. The new rules ('*toetsingskader*') to be applied when deciding on the application for work permits after 1 July 2011 are published in a letter of the Minister of Social Affairs of 8 July 2011, TK 29407, no. 128. The national federation of employer organisations VNO-NCW voiced strong opposition against the introduction of the more restrictive rules and several employers filed appeals against the refusal to issue work permits for Romanian or Bulgarian workers. A first request for an interim injunction was denied. However, in July 2011 the District Court of The Hague in four cases issued an interim injunction allowing the employer to employ the EU-2 workers pending the administrative review of the refusal (see par. 7.1.5 below). The result was that 16 employers were allowed to employ 180 EU-2 workers pending the administrative review of the refusal. This court decision gave rise to parliamentary questions. In his answer the minister denied that there were new stricter conditions, only the existing requirements were applied more strictly, *Aanh. Handelingen* TK 2010-2011, no. 3364. The issue of the compatibility of these measures with the standstill clause also was raised during a debate in the Second Chamber in October 2011, TK 29407, no. 131, p. 6 en 19.

Since the large majority of work permits issued for EU-2 workers in 2007-2010 were issued for seasonal jobs, the new rules are in fact a major change of the Dutch policy on admission of EU-2 workers. The number of work permits issued for employment of EU-2 workers in the horticulture already during the first eight months of 2011 was clearly lower than in 2010: only 765 work permits were issued for Romanian workers (2175 for the whole of 2010) and 118 for Bulgarian workers (491 in 2010). Apparently, the restrictive policy regarding EU-2 workers has its effect. In 2010 a mere 0.05% of the applications for a work permit to employ EU-2 workers had been refused; in 2011 almost half (44%) of those applications were refused, TK 29407, no. 129. On the other hand the number of EU-2 worker employed by service providers who notified the labor authorities of their activities rose considerably: from 6,525 in 2010, to 8,809 in 2011, four fifth of the workers covered by those notifications were Romanian workers.

7.1.4 Illegal employment and disputed self-employment

In 2010 the inspectorate detected 600 Bulgarian workers employed without the required work permit and 141 Romanian workers without a work permit, accounting for 25% and 6% of the total number of detected undocumented workers (Annual Report 2010, p. 45). In 2011 workers from Bulgaria and Romania accounted for 40% of those working without the required work permit detected by the labour inspectorate (Annual Report 2011 of the Inspectorate SZW, p. 21).

The Labour Inspectorate often deems that EU-2 nationals who are claiming to work as self-established of service providers are in fact workers. In 2010 in 255 cases the inspectorate held that the 'pseudo-self-employment' was a cover for employment. In both years 85% of those cases concerned Bulgarian nationals. In 2011 around 250 cases of EU nationals pretending to work as self-employed persons but according to the inspectors actually working as employees were detected, again the large majority were Bulgarian nationals, TK 29407, no. 132, p. 10/11. In those cases heavy administrative fines are imposed on the individuals or companies that are qualified as the employers of those workers. As in previous years, many of the cases concerning Bulgarian nationals dealt with by the Dutch courts concern persons who deny the qualification of employer or dispute the level of the administrative fine that they consider unreasonably high, see par. 7.1.5 below.

7.1.5 Judicial practice

* In the case of a Bulgarian national who had lived for more than five years lawfully in the Netherlands and, hence, had acquired a permanent resident right under Article 16 of Directive 2004/38, but who had never been lawfully employed in the Netherlands, it was held that the transitional measures only allow free access to the labor market after one year of employment on the basis of a work permit, that the relevant Annex to the Accession Treaty does not make an exception for Bulgarian nationals with a permanent residence right and that the Accession Treaty, being primary Union law, prevails over Directive 2004/38, being secondary Union law, District Court The Hague, session in Amsterdam 8 June 2012, no. AWB 12/13086.
* A Bulgarian spouse of a Dutch national entered the Netherlands in 2007 and received a EU residence card with the mention 'employment allowed but during the first 12 months a work permit is required'. The refusal of her registration as unemployed and looking for work by the official labor agency was held to be justified, since under the transitional measures Article 1 of Regulation 1612/68 does not apply to her and she is only allowed to work after her employer has received a work permit to employ her, Centrale Raad van Beroep 16 March 2012, www.rechtspraak.nl, LJN: BV9903.
* In July 2011 upon a request for an interim-injunction the judge held it to be evident that the criteria for deciding applications for a work permit have been amended by the competent authorities and this could possibly be a violation of the standstill clause in the Annex to Article 14 of the Accession Treaty with Bulgaria and with Romania. This question cannot properly be decided in a procedure for an interim injunction. It has not been made clear what other activities the employer should have performed in order to prove that there is no alternative way of fulfilling his vacancies for seasonal work in the horticulture. The list of private employment agencies provided by the government does not prove there are sufficient workers available and some of those agencies demand high fees. The employer should be treated as having the required work permit pending the administrative review of the refusal. District Court of The Hague 27 July 2011, AWB 11/20541, LJN: BR2785. Similar judgments were pronounced by the same court on the same day: see www.rechtspraak.nl, LJN: BR2788, BR2778 and BR2786 and *Jurisprudentie Vreemdelingenrecht* 2011/401 with note by P.J. Krop.
* The Minister of Social Affairs imposed an administrative fine of € 32,000,- on a firm for employing four Romanian nationals as trainees in order to learn how to work with products sold by the Dutch employer. With reference to the judgment of the Court of Justice in the *Vicoplus* case it was held that since the employer had received a permit to employ

the persons as trainees and they were not occupying regular work places, no fine could be levied. The decision of the District Court was partially annulled, Judicial Division of the State Council 2 May 2012, www.rechtspraak.nl, LJN: BW4553.

* The Minister of Social Affairs imposed an administrative fine on a one man firm because a Bulgarian national was found cleaning with a vacuum cleaner a car registered in the name of that firm. It was held that, although the legislator intended to give a wide definition of the term employer, this did not imply that every person that is providing a service could be qualified as a worker and the person who commissioned the service as his employer. The decision imposing the fine was annulled, Judicial Division of the State Council 22 September 2011, *Jurisprudentie Vreemdelingenrecht* 2011/436 with note by T. de Lange, www.rechtspraak.nl, LJN: BT2154.

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7.1.6 Literature

Arbeidsinspectie, *Naleving Wet arbeid vreemdelingen en Wet Minimumloon en minimumvakantietoeslag door intermediairs*, Den Haag, 2011

Centraal Planbureau, *Notitie Arbeidsmigratie uit Oost-Europa*, Den Haag, TK 32680, nr. 8.

G. Enbersen a.o, *Bulgaren en Roemenen vergeleken met Polen*, Rotterdam 2011 (Erasmus Universiteit)

R.P.J. Jennissens, *De Nederlandse Migratiekaart: Achtergronden en ontwikkelingen van verschillende internationale migratietypen*, Den Haag 2012, CBS/WODC.

T. de Lange, Kroniek Arbeidsmigratie, *Asiel- en Migrantenrecht* 2011, p. 426-433

C. Pool, *Migratie van Polen naar Nederland in een tijd van versoepeling van migratieregels*, Den Haag 2011 (Boom).

E. Snel a.o., *Arbeidsmigranten uit Bulgarije, Polen en Roemenië in Den Haag, Leefsituatie, arbeidspositie en toekomstperspectief*, Den Haag 2011 (Nicis)

E. Wobma & R. van der Vliet, Aantal Midden- en Oost-Europeanen in vijf jaar tijd verdubbeld, *CBS Webmagazine* 25 July 2011

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 of the Court of Justice's judgment in the *Hendrix* case.

In the Salemink case (C-347/10) the CJEU ruled on 17 January 2012:

> 'Article 13(2)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 1606/98 of 29 June 1998, and Article 39 EC must be interpreted as precluding an employee, working on a fixed installation on the continental shelf adjacent to a Member State, from being in a position in which he is not compulsorily insured under national statutory employee insurance in that Member State solely on the ground that he is not resident there but in another Member State'.

Judicial practice

On 14 October 2010 the CJEU answered the preliminary questions put to it by the Central Appeal Tribunal regarding the compulsory contributions as set out in the Dutch Health Care Act to be made by Dutch citizens living abroad in case C-345/09 (*Van Delft*):

> 1. Articles 28, 28a and 33 of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, in conjunction with Article 29 of Council Regulation (EEC) No. 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Commission Regulation (EC) No. 311/2007 of 19 March 2007, must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which recipients of pensions payable under the legislation of that State who reside in another Member State in which they are entitled under Articles 28 and 28a of Regulation No. 1408/71 to the sickness benefits in kind provided by the competent institution of the latter Member State must pay, in the form of a deduction from their pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence.
> 2. Article 21 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which recipients of pensions payable under the legislation of that State who reside in another Member State in which they are entitled under Articles 28 and 28a of Regulation No 1408/71, as amended by Regulation No 1992/2006, to the sickness benefits in kind provided by the competent institution of the latter Member State must pay, in the form of a deduction from their pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence. On the other hand, Article 21 TFEU must be interpreted as precluding such national legislation in so far as it induces or provides for — this being for the national court to ascertain — an unjustified difference of treatment between residents and non- resi-

dents as regards ensuring the continuity of the overall protection against the risk of sickness enjoyed by them under insurance contracts concluded before the entry into force of that legislation.

A case note on this judgment was written by Marjan Ydema-Gutjahr, published in: *Rechtspraak Vreemdelingenrecht* 2010, No. 88, and by W. Sauter, Sociale zekerheid, vrij verkeer en Unieburgerschap: de rafelranden van het nieuwe zorgstelsel?, *Nederlands Tijdschrift voor Europees Recht* (2011) p. 62-70.

A reference to this judgment has been made for instance by the District Court Amsterdam, obliging Dutch citizens living abroad to pay the compulsory contributions as required by the Dutch Health Care Act (Rechtbank Amsterdam, 23 December 2010, LJN BP 6229).

The issue still leads to court decisions. On 14 December 2011 the Central Appeal Tribunal (LJN BU 7612) confirmed the obligation for a Dutch person, who lived in Spain already before the entering into force of Regulation 1408/71.

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 (Tweede Kamer 21501-31, No. 182).

There is no information on tension between Directive 2004/38/EC and Regulation (EEC) No. 1612/68.

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

EU-citizens and their family members are still exempted from the obligation to integrate within the meaning of the *Wet Inburgering*. This remains unchanged in the reform proposals which were sent to the *Tweede Kamer* in November 2011. A proposed amendment that will affect EU-citizens and their family members is the deletion of assistance to those who choose for voluntary integration.[50] The recognition that Dutch language skills are of eminent importance on the work floor and the decreasing number of participants who voluntary choose to follow an integration programme has not changed the government's position on this issue. It is argued that as migration from EU-Member States, in particular the CEE-Member States, as a rule involves those with a higher education, they should be capable of acquiring Dutch language skills on their own steam. A self-study course for this group is being developed and should be available at a low price in the first halve of 2012. Investigations into a Social Loan System to fund participation in Integration Programmes and the test are still underway.[51]

50 Tweede Kamer 2011-2012, 33 086, No. 3 p. 6.

51 Tweede Kamer 2011-2012, 29 407, No. 132, Brief van de Minister van sociale zaken en werkgelegenheid aan de Voorzitter van de Tweede Kamer der Staten-Generaal [Letter from the Minister for Social Affairs and Labour to the Chair of the Second Chamber], 18 November 2011, p. 19-21.

The discussion on the proposal to include a Dutch language requirement in the *Wet werk en bijstand* [Law on Labour and Social Benefits], as reported in the 2010-2011 Dutch report, are still ongoing.

Publications

K. Groenendijk, Kroniek inburgering 2010-2011: van integratiebeleid naar immigratiebeleid, 3 *Asiel & Migrantenrecht* (2012-1) p. 36-48

K.M. de Vries, *Integration at the Border. The Dutch Act on Integration Abroad in Relation to International Immigration Law*, Migration Law Series No. 8, Diss. VU Amsterdam 2012

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

The discussion on family migration, which covers a reconsideration of impediments to marriage, polygamous marriages, age limits and the recognition of marriages convened abroad, as was reported in the 2009-2010 and 2010-2011 Dutch reports, has been put on a halt following the fall of the Rutte Cabinet on 23 April 2012.[52] In the same month the Council of State (Legislation Division) was requested to advice on the proposed legislative act that would realise these amendments.[53]

The labelling of the debate on family migration has not, however, stopped the entry into force of a number of amendments to the *Vreemdelingenbesluit* that will restrict the number of family members who will qualify for family reunion to the nuclear family, by limiting the right to family reunion to partners in a marital relationship and registered partners.[54] Though it is explicitly recognized that the amendment will only affect third-country nationals (qualifying for family reunion under Directive 2003/86/EC) and Dutch nationals who have not exercised free movement rights, as Directive 2004/38/EC includes a mandatory definition of family member, no waiting periods or flexibility in the period required to qualify for permanent residence,[55] it can be expected that the restriction to nuclear family members will make the so-called 'Europe-route' more attractive for so-called static Dutch nationals.

A new development that should not go unmentioned in this context concerns the measures designed to reduce irregular migration and unwanted, criminal non-nationals. This was one of the principle concerns of the Rutte Cabinet that was translated into a priority of the Aliens- and Border (KMar) Police for the period 2011-2014. Though geared against third-country nationals, the measures, as presented by the Minister for Immigration and Asylum

52 Algemene Commissie voor Immigratie, Integratie en Asiel, Besluitenlijst van de procedurevergadering van woensdag 30 mei 2012 [General Committee for Immigration, Integration and Asylum, Decisions of the Procedure Meeting, Wednesday 30 May 2012] p. 6, retrieved from: http://www.tweedekamer.nl/images/20120530%20IA_tcm118-228332.pdf.

53 Tweede Kamer 2011–2012, 32 175, No. 30, Brief van de Ministers van veiligheid en justitie en immigratie, integratie en asiel aan de Voorzitter van de Tweede Kamer aan de Voorzitter van de Tweede Kamer der Staten-Generaal Den Haag, 25 mei 2012 [Letter from the Ministers for Security and Justice, and Immigration, Integration and Asylum to the Chair of the Second Chamber], 25 May 2012, p. 7.

54 Besluit van 27 maart 2012 tot wijziging van het Vreemdelingenbesluit 2000, het Besluit modern migratiebeleid en het Besluit inburgering (aanscherping eisen gezinsmigratie) [Decision of 27 March 2012 amending Vreemdelingenbesluit 2012, the Decision Modern Migration Policy and the Decision Integration (more restrictive conditions family migration)], *Staatsblad*, 2012, 148.

55 *Idem*, p. 8.

on 8 July 2011, will affect EU-citizens and their family members in two ways.[56] First of all, an amendment of Directive 2004/38/EC that would allow Member States to refuse an application for residence as a family member if the application is preceded by prior irregular residence is envisaged.[57] Secondly, more frequent use of an entry ban and termination of the right of residence of EU-citizens and their family members, who qualify as habitual offenders of criminal offences[58] but cannot be expelled under Directive 2004/38/EC, is also envisaged. A general measure to tackle the problem of irregular residence and criminality is to give every non-national a unique immigration number which will be used for both migration and criminal law purposes. Though not spelled out, it is to be expected that this will include EU-citizens and their family members exercising free movement rights. The idea premising this measure is that it will facilitate the identification of individuals and the exchange of information between the two authorities. To realise a more frequent use of entry bans and termination of residence rights of habitual offenders of criminal offences who are EU-citizens, the Immigration and Nationality Services (IND) and the Border Police (KMar) were instructed to develop a proposal that takes the parameters set by Directive 2004/38/EC into consideration in February 2011. Efforts to persuade the European Commission and other Member States to tackle this problem are ongoing and interventions in proceedings before the Court of Justice, advocating a broader reading of the notion of public policy, are envisaged.[59]

A further measure of a general nature that will also affect EU-citizens is the redesign of the Population Administration (*Gemeentelijke Basisadministratie*) that will allow the Dutch authorities to register newcomers in a separate database, *Registratie Niet-Ingezetenen* [Registration non-residents] (RNI), that is on the books for 2012 and will be governed by the *Basis Registratie Personen* Act that will replace the current legislation on the *Gemeentelijke Basisadministratie*. The RNI will include data on the first home-address of EU-citizens, to be collected upon registration after three months. It will operate alongside the *Gemeentelijke Basisadministratie*, that includes data on all residents in the Netherlands, and include information on the residence status. An aim of this operation is to streamline data registration. An administrative fine of 325 Euros will be introduced, but will not replace the current criminal penalty, for a refusal to register in the population administration. A further development is to make deregistration from the *Gemeentelijke Basisadministratie* by local authorities easier, as the complicated procedures for deregistration are the reason not to register residents.[60]

3.3. Return of nationals to new EU Member States

On 18 November 2011 the Minister for Social Affairs and Labour informed the *Tweede Kamer* of the developments concerning labour migration from the CEE-Member States. The letter is a follow-up to and builds on the information in the letter that was sent to the *Tweede*

56 Tweede Kamer 2010-2012, 19 637, No. 1435, Brief van de Minister voor immigratie en asiel aan de Voorzitter van de Tweede Kamer der Staten-Generaal [Letter from the Minister for Immigration and Asylum to the Chair of the Second Chamber], 8 July 2011.

57 *Idem*, p. 5.

58 Dutch nationals are classed as habitual offenders if they commit three offences in five years (Tweede Kamer, vergaderjaar 2011–2012, 19 637, No. 1470 Verslag Algemeen Overleg 6 October 2011, vastgesteld 2 November 2011, Minutes, approved 2 November 2011) p. 12).

59 *Idem*, p. 2, 6-8

60 Tweede Kamer 2011-2012, 29 407, No. 132, Brief van de Minister van sociale zaken en werkgelegenheid aan de Voorzitter van de Tweede Kamer der Staten-Generaal [Letter from the Minister for Social Affairs and Labour to the Chair of the Second Chamber], 18 November 2011, p. 6-8.

Kamer on 14 April 2011 (see 2010-2011 Dutch report).[61] Regarding 'unwanted CEE Member State nationals' the letter provides information on access to benefits, criminality and the encouragement of (voluntary) returns measures.[62] The report also builds on and refers to the report of the *Committee Lura* that was set up to draw lessons from the labour migration by CEE-Member State nationals over the past years.[63]

The number of nationals from CEE-Member States who rely on social benefits has witnessed a steady increase in the period 2006-2010 (from 2200-3190).[64] Chapter 7 of *The Monitor Midden- en Oost European,*[65] published on 30 May 2011, reveals the same trend for the Rotterdam municipality. This development has attracted the attention of the authorities who have set to work to ensure stricter compliance with the residence condition in the *Wet Werk en Bijstand* (see section 3.1 of this Chapter). It has also lead to a more rigid application of the policy rules on the termination of residence rights of those whose reliance on benefits can be qualified as 'unreasonable' by the Immigration and Nationality Services – a test that is now performed by the Immigration and nationality Services upon request of the Municipality prior to the granting of a benefit, which previously to take place in the opposite order.[66]

The efforts to increase the number of voluntary returns have been continued. Amongst the measures designed to increase the number of returns of EU-citizens who are not entitled to reside in the Netherlands under EU law are the tightening of the rules on residence as a work seeker (introduced in July 2011); after three months residence is subject to evidence of a real chance of being employed,[67] and the development of return programmes for CEE-Member State nationals who regularly use the day and night care. June 2011 witnessed a pilot in the four Largest Cities (Amsterdam, Rotterdam, The Hague and Utrecht) designed to reduce the use of day and night care facilities through strict application of the rules on access to these facilities by the local authorities followed by a request to the Immigration and Nationality Department to assess whether, in an individual case, the use of such facilities can be labelled 'unreasonable'. The latter measure has found its way into *Vreemdelingencirculaire* 2000, B11/4.3, *Beroep op publieke middelen* [Reliance on Public Funding] in December 2011. Whether or not successful, that is hard to assess at this moment. The numbers of voluntary returns mentioned in the letter are: 23 for The Hague, 20 for Utrecht and 14 for Rotterdam. On 4 April 2012 the Municipality of The Hague launched a return project for homeless nationals of Poland, Bulgaria, Romania, Hungary, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia and Lithuania. Those eligible for day and night shelter provided for by the Salvation Army are not only homeless, but also unemployed, not eligible to social security benefits and must also suffer from an addiction and/or psychological prob-

61 Tweede Kamer 2010-2011, 29 407 No. 118, Brief van de Minister van Sociale Zaken en Werkgelegenheid [Letter from the Minister of Social Affairs and Labour to the Chair of the Second Chamber], 14 April 2011.

62 Tweede Kamer 2011-2012, 29 407, No. 132, Brief van de Minister van Sociale Zaken en Werkgelegenheid aan de Voorzitter van de Tweede Kamer der Staten-Generaal [Letter from the Minister of Social Affairs and Labour to the Chair of the Second Chamber], 18 November 2011.

63 Tweede Kamer 2011-2012, 32 680, No. 4, Parlementair onderzoek Lessen uit recente arbeidsmigratie, eindrapport arbeidsmigratie in goede banen, [Parliamentary investigation; Lessons from recent labour migration, Final Report: Labour Migration].

64 Tweede Kamer 2011-2012, 29 407, No. 132, 18 November 2011, p. 14.

65 Retrieved from: www.bds.rotterdam.nl/dsresource?objectid=209856&type=PDF.

66 Tweede Kamer 2011-2012, 29 407, No. 132, p. 14-15.

67 Besluit van de Minister voor Immigratie en Asiel van 10 juni 2011, nummer WBV 2011/8, houdende wijziging van de Vreemdelingencirculaire 2000 [Decision of the Minister for Immigration and Asylum of 10 June 2011, number WBC 2011/8, amending the Aliens Circular 2000], *Staatscourant* 17 June 2011, No. 10662, p. 29.

lems. The programme is coordinated by the *The Central Coordinating Centre* that determines who is eligible for assistance and what assistance is needed. The programme is designed to facilitate return to the Member State of nationality. The Central Coordinating Centre is assisted by the Polish *Barka Foundation for Mutual Help*.[68]

The data on entry bans reveal that in the first nine months of 2011 150 entry bans were adopted compared to 150 for the full year 2010. It is not entirely clear if this can be attributed to the new policy tool that allows the Immigration and Nationality Department to read into the EU-public policy concept the habitual offender of criminal offences which, as such do not justify an expulsion measure. In the period 2010 – the first half of 2011 175 EU-citizens who were subject of an entry ban are reported to have left the Netherlands.[69]

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

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

5. SEMINARS, REPORTS AND ARTICLES

On 3-4 November 2011, the Centre for Migration Law of Radboud University Nijmegen organized the Network's annual conference in Bucharest. The presentations have been published on the website of the CMR: http://www.ru.nl/law/cmr/projects/fmow-2/annual-conference/.

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

68 Information provided in the leaflet: *New day and night shelter scheme in The Hague; Information for homeless Central and Eastern Europeans.* Retrieved from: http://www.denhaag.nl/home/bewoners/to/Regels-toegang-nachtopvang-en-dagopvang.htm and also available in Polish.

69 Tweede Kamer 2011-2012, 29 407, No. 132, p. 23-24.