

# MKRG Newsletter

## German Immigration Law News

- February 2007 -

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## **I. Lawyers may work in foreign countries within the EU without having to pass a language test**

According to the Lawyers' establishment Directive, lawyers may be active in any EU member state using their original job title. The admission of lawyers cannot be made conditional on passing a language test by the respective member state (here: Luxembourg).

### Facts of the case:

The European Court of Justice had to make a decision on the conformity of the provisions of the Luxembourg law in two cases with respect to the admission of lawyers from other EU member states. According to the Luxembourg law, foreign lawyers have to pass a language test if they intend to practice law in Luxembourg. They may not practice in the field of domiciliation of enterprises and they are obligated to present a certification of their country of origin each year.

Because of these regulations the Commission did initiate treaty violation proceedings against Luxembourg as they were infringing the provisions of the Lawyers' establishment Directive (Rs.: C-193/05). In the second case, an English lawyer protested against the refusal by a Luxembourg Chamber of Lawyers to register him in the register of lawyers using their original job title for practice due to his refusal to take part in a language test (Rs.: C-506/04).

The European Court of Justice decided that the regulations in dispute are infringing Community law.

### Reasons:

Luxembourg may not make the registration of foreign lawyers conditional on a language test to be passed. This admission requirement violates the provisions of the Lawyers' establishment Directive, which stipulates that lawyers are entitled to take up permanent practice using their original job title. In compliance with the directive this right is solely conditional on the presentation of a certificate on lawyer's registration with the responsible authority of the lawyer's country of origin.

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An examination of the language skills of lawyers from other EU member states indeed is neither in the interest of the persons seeking legal advice nor required for the proper administration of justice. Nevertheless, European lawyers are obligated to observe the professional standards and the ethics of profession established in their native as well as in the host country on pain of disciplinary sanctions. Thereby the lawyer shall not work on a case that requires language skills which cannot be provided by the lawyer. The ban on European lawyers to be active in the field of domiciliation of enterprises in Luxembourg also implies an infringement of Community law. Lawyers from other member states may basically perform the same activities like the lawyers who have been trained in the host country. Indeed, this regulation excludes certain activities from its field of application; however, the issue of domiciliation of enterprises is not subject to such exclusion.

The presentation of an annual certification by the native country, required by the Luxembourg law, is deemed to be unjustified as well. This is due to the fact that an unjustified administrative burden is implicated thereby. The host country's claims shall already be satisfied by means of the provision stipulating that the responsible authority of the native country has to inform the host country if disciplinary proceedings are instituted against the European lawyer.

Source: Press release of the EuGH as of 19.9.2006

## **II. No residence permits for aliens who are not integrated in Germany**

Even aliens who are permanently living in Germany are not entitled to receive a residence permit unless they have become integrated, in particular if they are not able to earn their living. They may not claim that leaving the country would de facto be impossible because of missing passports if such lack of identity papers was caused by them. The Administrative Court Münster decided accordingly for a Romany family with seven family members from the Kosovo. The parents had lived in Germany since 1992, some of their children were born in Germany. From 1992 till 2001, having the status of asylum seekers, they received social security benefits in the amount of € 138.000. All asylum proceedings did fail.

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The court currently decided that there is no requirement for the grant of a residence permit – i.e. the impossibility of leaving the country due to legal or actual reasons. Whether the plaintiffs – as alleged - indeed are not going to have a decent existence as Romanies in the Kosovo would be subject to the asylum proceedings. In the opinion of the judges the refusal of the residence permit particularly does not interfere the private life of the family. They had not become quasi-natives due to their status of integration, of whom a return to their home country cannot be expected anymore. Moreover, the family would not have been able to earn its living for a long time. The remuneration of father of the family amounts to € 1.100 net he is earning during his gainful employment since 2001 as unskilled labour in comparison with € 3.500 which would be the monthly basic income under social law aspects. The mother is not capable of gainful employment for reasons of health, the two oldest sons had also been without training and employment for three respectively one year and would not be in the position to contribute to the living expenses in the foreseeable future.

Nor would this family be integrated otherwise. As the parents themselves were not able to answer simple questions asked by court in German language, the judges assumed that they used their mother tongue within the family in spite of their allegations to the contrary. Therefore, it would not be comprehensible insofar that the children should have insufficient knowledge only. Moreover, it would also be part of responsibility of the parents' under executable duty to leave the country since 1995, that the children should learn their native language.

Even if a quasi-integration was assumed, the lack of identity papers which was caused the plaintiffs excludes the grant of a residence permit. They had failed to strive for passports or passport replacement after the completion of the asylum proceedings in 1995. However, the alien would be obligated to do everything in his/her power and which can reasonably be expected in order to overcome any deportation obstacles (like e.g. the lack of identity papers).

Source: Press release of the Administrative Court Münster File No.: 5 K 2132/04

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### III. Germany plans to introduce identity cards for expatriates

Federal authorities said they planned to introduce German identity cards for resident aliens, similar to those already carried by all German citizens. At present, non-Germans use their passports stamped with German visas as identity documents.

*August Hanning*, a state secretary at the federal interior ministry, told a Hamburg conference on digital commerce late Thursday that the planned computer-readable cards for Germans and non-Germans would contain photos and fingerprints. *Hanning* said the European Union would issue a directive late this year or in early 2007 on electronic identity cards.

"We'll be among the first in Europe to put it into effect," he said. Current German ID cards only contain photos.

Germans generally take a relaxed view of their ID cards and do not always bother to carry them. Children under the age of 16 have none. In a related development, teachers in the German port city of Hamburg say they are quietly educating in public schools hundreds of children whose families have entered the country illegally and live in fear of discovery.

Like other industrialized countries, Germany has significant numbers of immigrants who have no visas, pay no taxes and receive no welfare benefits. It has not adopted the French practice of netting hundreds of people in stations and demanding they show identity.

The newspaper *Hamburger Abendblatt* said Hamburg education authorities had begun collecting the names and nationalities of all children in city schools. The police would be able to use the lists to track down families without residence permit.

Teacher and parent groups appealed for the information to be sealed. They warned that the state-wide roll would deter illegal migrants from educating their children, who might remain illiterate and create mischief.

Teachers and principals said they were knowingly "bending" the law to school hundreds of children who had no right to be in Germany.

Source: Press release DPA

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## IV. Case Study

An Australian national shall be assigned by his employer, an Australian company having a subsidiary in Germany, to the German operation for a period of 1 year; he would like to be accompanied by his wife and their children; if possible his wife would like to work too. The assignment shall start as soon as possible. Please find set out hereafter in a very briefly manner what has to be done:

### 1. The husband

As a matter of visa law nationals of certain countries (e.g. Argentina; Israel; Japan; Canada; Korea, USA) are exempted from the general obligation to apply for a visa before crossing the external borders of the European Union, cp. [www.auswaertiges-amt.de](http://www.auswaertiges-amt.de) for details. However, therefore the required residence permit has to be requested within three months after having entered; in case of violation penal prosecution due to illegal residence in the Federal Republic of Germany.

Regarding the work permit, basically, the approval of foreign labour is guided by the requirements of the German economic location, taking into consideration the circumstances of the labour market as well as the need to efficiently fight unemployment; however, the international contracts stay here untouched. Basically, an alien can be granted a residence permit in order to practice an employment, if the Federal Employment Office has approved or through a legal regulation, or if an international agreement is certain that the practicing of employment without the approval of the Federal Employment Office is acceptable. Another general condition is to present a definite offer for work.

Further, under certain circumstances there is no need to get an approval at all, e.g. for managerial positions and certain activities of a commercial character. In particular, as mentioned in the attached memo, no approval will be needed, should the applicant turn out to be a specialist resp. executive with a special job experience who earns a salary of at least double the income limit for the assessment of contributions of the social health insurance (therefore at present appr.: 7.050,- €). Furthermore, executives/managers also do not need an approval under certain circumstances.

If one is not able to prove that these preconditions are met, the following would apply: Summarizing, without going into too much details, the authority of foreign affairs resp. the labour office would have to check whether or not the position could be filled in by another job-seeker of German or EU nationality or a job-seeking national of one of the EU accession states. It would therefore be very important to express in the application respectively the cover letter, that only the applicant will be able to fill in the position and to execute the tasks assigned to him.

As to the prerequisites for the grant of such work permit there are of course ways to get smoothly through the application process; however it would first of all have to be checked what the employee would be doing in Germany. Basically, it would be possible to get a work permit if nobody else from the German and the European market would be in position to fit the job description. As a national from a third-country he will not necessarily be taken into account on a privileged basis compared to non-EU nationals, but can be admitted for any kind of occupation, unless privileged employees from the European Union, the European Economic Area and Switzerland are available. It would, therefore, be necessary to make a job advertisement for a certain period of time before receiving the work permit. The whole application procedure will probably take between 4 and 8 weeks once the application package is completely filed. Usually, the following information would be required:

- curriculum vitae (both in English and German if possible)
- photographs
- copy of the identification card / passport
- document of apprenticeship
- copies of university diploma(s) (if any)
- information on the announced employment, especially description of the job
- information on the spouse and children (if any)
- offer of employment / employment contract
- health insurance coverage

As he neither is EU-national nor national of one of the EU accession states he will not be entitled to obtain a Non-EU residence permit which is granted only to dependents of EU-nationals or nationals of the EU accession states. He will therefore only be entitled to stay in Germany as long as he has got a valid work permit.

## 2. The wife

As a matter of visa & immigration law, the situation of the wife, first of all, is dependent on the prospects of success of his application of course. She will only be able to receive a visa if he does, unless she tends to work and files her own application. It goes without saying that the employee's wife should also make sure to have her passport with her all the time. If she would like to work as well, here again it should be checked what kind of job she would be doing. Like her husband, she will not be privileged in comparison to other non-EU nationals.

## V. Immigration law abroad – Canada: Relocating global talent

### 1. International employee transfers in mergers and acquisitions

The mobility of the labour force is a key element for the success of an international enterprise, especially in the context of mergers and acquisitions. In order to facilitate the transfer of senior management and technical personnel into Canada, several valuable tools are at the disposal of immigration lawyers and human resources managers. The most important are the, North American Free Trade Agreement (NAFTA), the General Agreement of Trade and Services (GATS) and the Regulations set out under the Immigration and Refugee Protection Act (IRPA) concerning Canadian interests and significant benefit to Canada. Taking advantage of these tools in the appropriate manner can save time and costs during the transfer of key personnel, and having the appropriate knowledgeable legal representation can expedite visa processing.

### 2. Canadian interests: significant benefit

Senior managerial, executive and specialized knowledge employees whose applications for Work Permits can be made under the Canadian interests policy, showing that their presence in Canada may result in a significant benefit for Canadians, are exempt from obtaining a Human Resources and Skills Development (HRSDC) Labour Market Opinion or “Confirmation” before having their Work Permits issued.

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### 3. **International agreements facilitating transfers**

Canada is a signatory to a number of international agreements that involve the movement of foreign personnel. The admission of foreign workers under these agreements benefits the Canadian economy and serves to meet other foreign policy objectives, including culture, trade and commerce.

### 4. **NAFTA**

NAFTA contains special provisions concerning immigration between the three signatory countries, the United States, Mexico and Canada. The following categories of persons are covered by NAFTA:

- Business Visitors
- Professionals
- Intra-Company Transferees
- Traders and Investors

### 5. **GATS**

The GATS provides expedited and simplified entry procedures for admission to signatory countries for business purposes and employment for individuals from 122 countries. The business persons who qualify for admission under GATS are:

- Business Visitors
- Professionals
- Intra-Company Transferees

When considering transferring senior management, executive or technical personnel in the context of a merger or acquisition, human resources managers should be mindful of both the advantages and limitations of Work Permits and consult with an experienced immigration lawyer prior to making any commitments related to the transfer of key personnel.

By: Sergio R. Karas, B.A., LL.B., [karas@karas.ca](mailto:karas@karas.ca)

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Sergio R. Karas, is a Certified Specialist in Canadian Citizenship and Immigration Law by the Law Society of Upper Canada. He is current Vice Chair of the Ontario Bar Association Citizenship and Immigration Section, and incoming co-Chair of the International Bar Association Immigration and Nationality Committee.

Any more questions with regard to German immigration & labour law ? Do not hesitate to contact us:

## Contact details

**RA Dr. Gunther Mävers,**  
Maître en Droit (Aix-en-Provence)

Mütze Korsch Rechtsanwaltschaftsgesellschaft mbH  
Erfstr. 19 a (Am MediaPark), 50672 Cologne, Germany  
Tel. : +49-221-50003-603  
Fax : +49-221-50003-636  
E-mail : [maevers@mkrg.com](mailto:maevers@mkrg.com)  
Internet: [www.mkrg.com](http://www.mkrg.com) - [www.visalawint.com](http://www.visalawint.com)



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