

9 June 1999- Royal Decree implementing the Foreign Workers (Employment) Act of 30 April 1999

REPORT TO THE KING

Sire,

The purpose of the royal decree submitted for your signature is to implement the Foreign Workers (Employment) Act of 30 April 1999. It also fixes the date on which the Act shall come into force, namely 1 July 1999.

The royal decree is intended primarily to co-ordinate existing rules on the employment of foreign workers, a matter currently covered by a number of royal and ministerial decrees and a series of ministerial circulars.

The provisions on the employment of foreign workers contained in these various texts are neither clearly structured nor logical. This creates legal uncertainty for all those who have to refer to them.

The decree also seeks to update the current provisions. The existing texts date from the late 1960s and, until now, have undergone little or no adaptation to reflect various developments in the labour market with regard to the employment of foreign workers.

Article by article commentary:

Article 1

Paragraphs 3,4 and 5 are definitions taken from the Act referred to in paragraph 2. Paragraph 6 provides a definition of legal residence (replacing the notion of lawful residence ("sejour regulier"), which was not defined in the previous provisions). See the Act of 15 December 1980.

The definitions contained in paragraphs 7 (labour market) and 8 (performing artists) did not exist in the previous provisions; nor did that of "professional sportsperson" (see paragraph 11).

The definitions in paragraphs 9 and 10 (cabaret and cabaret employees) have, on the other hand, featured in the existing provisions since 1993.

Article 2

The first paragraph of this article lists the exceptions, under Section 7 of the Act, to the requirement to obtain a work permit.

Paragraph 3 is already included in the existing provisions.

At the end of paragraph 4, the words "for the performance of duties that confer entitlement to these documents" have been added. A similar wording has been inserted under paragraph 6 (ministers of religion) and the word "recognised" has also been added (with reference to religions).

Paragraph 5 introduces a new category of exemption for refugees.

Paragraph 7 is a provision that already exists -likewise paragraphs 8, 9, 10, 11, 13, 14 and 15.

Under paragraph 12, a reference to Article 9 of Royal Decree No.118 of 23 December 1982, on the establishment of employment zones, has been added. This makes good an omission.

Paragraph 16 is virtually identical to the existing provision, with the sole addition of the words "and/or recognised".

Under paragraph 17 the exemption already granted to performing artists of international standing is extended to their accompanying personnel, and, in the interests of consistency, the wording of the residence condition now mirrors that used in paragraphs 15 and 16 -"provided they do not stay in the country for longer than three consecutive months".

Under paragraph 18, the word "higher", used in connection with "educational establishment", has been deleted. The aim is to avoid penalizing young people of foreign origin legally resident in Belgium and enrolled in secondary education -all the more so because persons in this category are frequently disadvantaged.

Under paragraph 19 the words "legally resident" have been added.

Paragraphs 20 and 21 concern certain categories of trainee and constitute new provisions.

Under paragraph 22 (apprentices) the words "legally resident in Belgium" are replaced by "authorised or permitted to reside in Belgium for longer than three months".

The final paragraph of Article 2 leaves the definition of the concept of "international standing" as used in paragraph 17 to the Minister's discretion.

Article 3

This article stipulates the categories of work permit. By contrast with the existing legislation, the type-C permit, which had fallen into disuse, has been dropped.

In addition, the definition of the type-B permit has been somewhat amended: its maximum period of validity is fixed at 12 months and its scope restricted to occupations with a single employer (and no longer in a single sector).

Article 4

Paragraphs 1(1) and 1(2) are based on existing provisions. However, at the end of 1(2) the words "unless such an absence has not led to the loss of the right of residence or residence authorisation under Article 39(3) or 39(5) of the Royal Decree of 8 October 1981 on the Entry, Residence, Establishment and Deportation of Foreigners". The aim is to avoid contradictions between the right to work and the right to residence.

Paragraphs 2(1) and 2(2) correspond to Article 1 of the Royal Decree of 6 November 1967. Paragraph 2(3) is a new provision included with a view to avoiding any inconsistency between the rules on foreigners' residence in Belgium and those on their access to employment.

Article 5

This article sets out the exemptions to Section 4, paragraph 2(1) of the Act. It concerns those persons in respect of whom the labour market is not taken into account for the issue of a work permit.

Given that Section 4 paragraph 2(1) of the Act relates solely to authorisations of employment and not to temporary authorisations of employment (see Section 4 paragraph 4 of the Act and Article 4 paragraph 3 of this decree), no exemptions to Article 5 can be made.

Article 6

This article corresponds to Article 9 of the Royal Decree of 6 November 1967.

In order to facilitate monitoring, however, it shall no longer be possible to indicate special circumstances in a registered letter.

The words "if possible" are used because it is anticipated that work permits may in future be formatted differently (ie like identity cards).

Article 7

This article corresponds to Article 13 bis (l) of the Royal Decree of 6 November 1967. For practical reasons it was decided not to provide for sanctions.

Article 8

This fundamentally important provision is virtually identical to Article 5 of the Royal Decree of 6 November 1967. It should be noted, however, that there is now a reference to the "labour market" (see Article 1(7)) rather than the "national labour market".

Article 9

This article corresponds to Article 1 of the Ministerial Decree of 15 July 1969, although it contains several changes.

It specifies the categories of foreign worker in respect of whom, under a derogation to Article 8, the labour market is not taken into account for the issue of an employment authorisation.

Note, in particular, that it was decided to drop housemaids and domestic servants from the list, and that, in the case of students, the limit of 20 hours' work per week (already applied, though on the basis of circulars) has been confirmed. This is a logical restriction inasmuch as the main justification for the persons in question residing in Belgium is to attend courses of study.

This article has the further merit of covering all the cases in respect of which the labour market is not taken into account previously some of these exemptions (for trainees, au pairs and specialist technicians, for example) were to be found scattered throughout the relevant provisions.

For clarity, the term "specialist technicians" has been used (in paragraph 9) in preference to "installation specialists" because in practice the work concerned is no longer confined to the installation of industrial plant.

Paragraphs 11, 12 and 13 (in respect of professional sportspeople and persons with managerial-type functions in an airline or tourist office of their country of origin) also confirm exemptions already covered by circulars.

The definitions of "researcher" and "guest teacher" in paragraphs 2 and 4 were drawn up following consultation with the Communities.

Article 10

This article corresponds to Article 6 of the Royal Decree of 6 November 1967.

Article 11

This article corresponds to Article 2 of the Ministerial Order of 15 July 1969. As it refers to Article 9, the comments on that article also apply here.

Article 12

The first paragraph of this article corresponds to Article 2 bis of the Royal Decree of 6 November 1967. Paragraphs 2-5 introduce the requirement that certain categories of people

(artists, trainees, au pairs and persons with temporary employment authorisations) must have a specific contract.

Article 13

This article corresponds to Article 3 bis of the Ministerial Decree of 15 July 1969. The comment under Article 11 is also relevant here.

In the case of trainees and au pairs there is a requirement that they have a specific contract.

Article 14

Part of this article corresponds to Article 2 of the Royal Decree of 6 November 1967. A provision has been added (in paragraph 3) stipulating the period of validity of a medical certificate, in order to prevent the submission of certificates that are out of date.

In the light of experience, paragraph 4 has also been added, requiring that, if necessary, medical certificates be translated into one of the languages of the Region responsible.

Article 15

In conjunction with Article 14 this article corresponds to Article 2 of the Royal Decree of 6 November 1967 (in respect of paragraph 1) and to Article 21 of the same decree (in respect of paragraph 2).

Article 16

This article stipulates the categories of foreigner entitled to type-A work permits and corresponds to Article 13 of the Royal Decree of 6 November 1967.

Paragraph 1 covers entitlement to a type-A permit on the basis of a number of years' work under a type-B permit. The number of years has been reduced from five to four, although in practice this merely confirms the system already being applied under Article 10(2) of the Ministerial Decree of 15 July 1969.

The use of the term "legal residence" as defined in Article 1 (in place of "lawful residence") should also be noted.

Paragraph 2 concerns the right to obtain a type-A permit on the basis of a period of "unbroken legal residence" (as opposed to "lawful" residence).

Paragraph 3 provides that the spouses of persons entitled to obtain a type-A permit under paragraphs 1 or 2 are entitled to the same type of permit. In the interests of consistency with the rules on residence, the additional requirement has been introduced that the spouse must be covered by a residence permit under the provisions of Article 10, paragraphs 1 (1) or 1(4) of the Act of 15 December 1980.

The aim is to avoid the situation in which a person might obtain a type-A permit immediately, while in possession of a residence permit that was merely temporary and only due to be confirmed after a year of cohabitation.

Under paragraph 4, note should be taken not only of the introduction of the notion of residence, in accordance with Article 10 paragraphs 1(1) or 1(4) of the Act of 15 December 1980, but also of the fact that the term "children" is now used without any distinction between legitimate, illegitimate and adopted children.

The remaining provisions, apart from paragraphs 6 and 8, are not new. Paragraph 8 is also intended to harmonise the right to residence and the right to work. Pursuant to Section 19 paragraph 3 of the Act of 15 December 1980, the Royal Decree of 7 August 1995, stipulating the circumstances and conditions under which a foreigner may be authorised to return to Belgium after an absence of more than a year, is published in the *Moniteur beige* of 2 September 1995.

Article 17

The first paragraph of this article stipulates the cases in which the period of four years provided for in Article 16(1) may be reduced. It corresponds to Article 10(1) of the Ministerial Decree of 15 July 1969 and to the second paragraph of Article 13(1) of the Royal Decree of 6 November 1967.

Paragraph 2 corresponds to the last paragraph of Article 13 of the Royal Decree of 6 November 1967.

Article 18

Paragraph 1 of this article stipulates what may be deemed a period of work for the purposes of applying Articles 16(1) and 17(1). This provision corresponds to Article 13(1)(4) of the Royal Decree of 6 November 1967.

Article 18(2) describes the cases in which a period of residence may be deemed unbroken, and corresponds to Articles 13(1)(3) and 13(2)(2) of the Royal Decree of 6 November 1967. At the same time the scope of Article 18(2)a has been extended to cover Article 16(2).

Paragraphs 3 and 4 of Article 18 correspond respectively to Articles 13(1)(5) and 13(2)(3) of the Royal Decree of 6 November 1967.

Article 19

This article concerns quotas and corresponds to Article 13 of the Ministerial Decree of 15 July 1969.

The introduction of the requirement to consult the relevant joint committee should be noted.

Articles 20-23

These articles correspond to Article 17 paragraphs 1-4 of the Royal Decree of 6 November 1967 (as amended on 16 February 1998).

Paragraph 5 of that article, providing for possible exceptions with regard to the age of trainees and the duration of traineeships, has now been included in Article 38 paragraph 2.

Articles 24-29

These articles concern au pairs. They correspond to Article 18 of the Royal Decree of 6 November 1967 and significantly amend its provisions. However, they incorporate in their entirety the proposals contained in Opinion 97/1 of the Conseil consultatif de la main- d'oeuvre étrangère [Foreign Workers Consultative Council], which had not yet been adopted.

It should be noted that the specific purpose of Article 26(2) is to prevent au pairs being placed with families whose usual language is not one of the three national languages (Swedish or Japanese speaking families for example). Such a situation would not provide the desired language training for the au pair because the host family's language would not be the language studied.

Article 30

This article covers cabaret employees. The definitions of "cabaret" and "cabaret employee" are set out in Articles 1(9) and 1(10). Article 30 corresponds to Article 4 of the Ministerial Decree of 15 July 1969 (version of 19 March 1993).

Article 31

The first paragraph of this article provides a definition of "renewal" not contained in the existing provisions. In particular it stipulates that renewal refers to the continued employment of a particular worker in a particular occupation (although not necessarily with the same employer).

Articles 31-33 correspond to Articles 5-9 of the Ministerial Decree of 15 July 1969.

The second paragraph of Article 31 introduces a minimum period within which the application for renewal must be made before the expiry of the current employment authorisation and work permit.

Article 32

This article stipulates that Articles 8-11 and the first paragraph of Article 12 shall apply to applications for renewal.

On the other hand, this implies that the condition concerning a medical certificate need no longer be met.

Article 33

This article provides -for social reasons -for a number of exemptions to Article 31 (1), which already apply. However, the involuntarily unemployed are no longer included as an exempted category .In fact, it is illogical to authorise the renewal of permits for such persons in respect of a different occupation because, in principle, the only reason for issuing the initial permit was a shortage of labour in the occupation in respect of which it was issued.

Article 34

This article corresponds to Articles 7 and 8 of the Royal Decree of 6 November 1967. It opens, however, with a clearer wording: "the authorisation and work permit shall be refused", in place of "... shall not be granted" or "may be refused".

Paragraph 1 constitutes a new provision, under which an employment authorisation or work permit may be refused on the grounds that the application contained incomplete or inaccurate information.

Under paragraph 2 it will be possible to refuse authorisations and permits in cases where, for example, the conditions applying to regulated occupations have not been met.

Under paragraph 6, employment authorisations and work permits may no longer be refused because they relate to jobs that are not full-time; henceforth the only criterion for refusal shall be the fact that a job will not provide a sufficient income.

Article 35

This article provides for the withdrawal of employment authorisations and work permits (see paragraphs 1 and 2 respectively). It corresponds to Article 11 of the Royal Decree of 6 November 1967.

This paragraph, too, now opens with a clearer wording: "the employment authorisation (or work permit) shall be withdrawn", in place of "... may be withdrawn".

Article 36

This article corresponds to Article 29 of the Royal Decree of 6 November 1967. Article 37

This article provides that victims of trafficking in human beings may be given a temporary employment authorisation. It thus creates a legal basis for the procedure previously provided for in ministerial circulars published in the *Moniteur beige* on 7 July 1994 and 21 February 1997.

Article 38

Under paragraph 1 the Minister, when making general rules in application of this decree, is required to consult the Foreign Workers Consultative Council set up under Section 19 of the Act.

If for reasons of urgency the opinion of the Council is not sought, the grounds for failing to consult it will be stated in accordance with the normal rules.

Paragraph 2 lists possible exceptions. The grounds for deciding to avail of such an exception must be stated. The term "authority responsible" denotes the regional Minister in charge of employment.

Article 39

This article lists the provisions that have been revoked.

Article 40

The current rules of procedure shall continue to apply until 31 December at the latest. This should allow a new procedure for issuing secure work permits to be developed.

Following the Council of State's comments it was decided at this stage not to include paragraph 2 of the proposal concerning a circular on refugee applicants because this temporary provision had been added after the Council of Ministers had approved the proposal, and concerned matters that, under Articles 4(4) and 8(1) of the Act of 30 April 1999, had to be considered by the Council of Ministers.

Under Article 8(2) of the Act, the same does not apply in relation to Article 40(1).

In response to the Council of State's opinion, a royal decree will be drawn up following discussion in the Council of Ministers in order to add the content of the above-mentioned circular to the provisions of the present decree.

Article 41

The Act and this decree shall enter into force on 1 July 1999.