Juridisk Publikation
STOCKHOLM - UPPSALA - LUND - GÖTEBORG

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Foreign Nationals as Non-Diplomatic Embassy Staff – Posted or Locally Employed?

Särtryck ur häfte 2/2014

Nummer 2/2014

FOREIGN NATIONALS AS NON-DIPLOMATIC EMBASSY STAFF

— POSTED OR LOCALLY EMPLOYED?

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When the Vienna Convention on Diplomatic Relations[2] came into force in 1964 it was set out to ensure the right to immunities and privileges to non-diplomatic members of staff of foreign missions. However, an exemption was made for nationals of and permanent residents in the receiving State—such employees did not need diplomatic protection. Today, when members of staff move to the receiving State in order to take up a 'local employment' at a foreign mission, they are not always recognised by the receiving State as 'permanently resident' therein. At the same time, the sending State does not consider them part of their official envoy. This creates an 'informal' third group of employees of foreign missions caught in between local immigration laws and diplomatic law. This article examines the State practice in eighteen States in order to find the interpretations of the concepts 'permanently resident in the receiving State' and 'locally employed' in diplomatic law.

1. INTRODUCTION

1.1 MODERN, MULTINATIONAL MISSIONS

Diplomatic missions are to represent the sending State, protect its interests and those of its nationals, promote friendly relations and negotiate with the government of the receiving State.[3] To conduct this undertaking, the personnel of diplomatic missions generally consist of career diplomats (posted by the sending State) and subordinate, non-diplomatic, staff who are either posted by the State or 'locally employed'. The Vienna Convention on Diplomatic Relations protects the personnel of the envoy in their diplomatic mission and ensures them immunities and privileges in that they are only subject to the jurisdiction of the sending State. 'Locally employed' members of staff, on the other hand, are subject to the laws of the receiving State. Hence, they pay taxes and benefit from the social security schemes in that State. In the Vienna Convention, nationals of and permanent residents in the receiving State employed in non-diplomatic roles are considered as 'local employees'. In this regard,

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2 Vienna Convention on Diplomatic Relations, done at 18 April 1961, *United Nations Treaty Series*, Vol. 500, p. 95 (hereafter 'the Vienna Convention' or VCDR).

3 See Article 3 of the Vienna Convention.

problems have arisen since the term 'permanently resident' is not defined in the Vienna Convention. Different interpretations of the concept have emerged in the States' practices, leading to a fragmented view on which employees are to be protected and which are 'locally employed' and therefore subject to the jurisdiction of the receiving State. Two recent court rulings from Sweden will illustrate some of the complications.

1.2 THE NON-RECOGNITION IN SWEDEN

In February 2013 an Administrative Court in Sweden ruled that a Finnish woman employed in the administrative service of the Finnish Embassy in Stockholm was not entitled to registration in the Swedish population register because of her employment.[4] The woman had served as a 'local employee' at the Embassy since August 2009 and would not be positioned elsewhere by the Foreign Office of Finland. Yet the Swedish Court recognised her as part of the diplomatic career service of Finland. In other words, she was not considered 'locally employed'. The case illustrates the general view held by Sweden; EU nationals who move to Sweden to take up an employment at a foreign mission are exclusively held to be part of the diplomatic envoy, unless they lived in Sweden prior to the appointment. As the Finnish woman had not made her registration in the population register prior to signing the employment agreement, she was automatically regarded as a 'posted official' of the sending State.

The same non-recognition was experienced by a French woman who had come to Sweden to serve as an intern at the French Embassy in Stockholm. As she had been employed as part of the diplomatic envoy, the Swedish Foreign Office had issued her a diplomatic ID card (19 September 2010) and a temporary residence permit valid for two years (November 2010 to November 2012). This made Swedish authorities recognise her as a 'posted official'. When the internship came to an end, and she was offered an appointment as a 'local employee' at the Embassy, she considered herself permanently settled in Sweden. However, she too was denied registration in the population register (24 October 2012) due to the fact that she 'belonged to' the French mission.[5]

As shown in the two cases above, the Swedish view on who is 'locally employed' is purely based on nationality and residential status at the time of the first installment. A change in nationality, a permanent residence permit issued by the Swedish immigration authority, or a marriage to a Swedish national

4 *H Andersson v. The Swedish Tax Agency*, Case no. 10705-12, Administrative Court in Stockholm, Sweden, Department 2, the Tax Division (13 February 2013).

5 *C Falquet v. The Swedish Tax Agency*, Case no. 25494-12, Administrative Court in Stockholm, Sweden, Department 3, the Tax Division (22 April 2013).

does not change the fact that someone who entered Sweden as part of a diplomatic envoy is considered a 'posted official'. In countries where only two groups of staff members employed by foreign missions are recognised, such as in Sweden, an informal third group of staff members is created. Members of this third group are left outside the social benefits of the country. The first group of recognised staff members are those assigned to the mission by the government of the sending State, usually labelled 'posted officials'. They normally hold diplomatic or service passports issued by the sending State. Such passports indicate a temporary residence in the receiving State coherent to the diplomatic mission. The health care, pensions, and social benefits of members in this category are covered by the sending State. The second group, consisting of 'locally employed' members, who are also nationals or have permanent residence permits, is covered by the national social security scheme. This category has access to public health care and is entitled to vote in municipal elections on the basis of the nationality or permanent residence status of the members. The third group, the non-recognised local staff, is neither considered to be assigned staff nor local staff. Arguably this is problematic since EU nationals have the right to free movement in EU and should be able to settle down permanently without obstruction. However, before investigating this potential clash between EU law and the Swedish view of diplomatic law further, the categories of mission staff in a diplomatic law perspective will be explained.

1.3 THE VIENNA CONVENTION CATEGORIES OF MISSION STAFF

It is sometimes argued that the personnel of foreign missions may, for the purpose of granted immunities and privileges, be categorised in groups of (1) diplomatic agents, (2) home-based non-diplomatic staff, (3) 'locally employed' staff, and (4) private servants. Diplomatic agents enjoy full diplomatic protection (unless they are nationals of the receiving State, which is rarely the case). Both the home-based non-diplomatic staff and the 'locally employed' staff are subordinate staff belonging to either one of the Vienna Convention categories of 'administrative and technical staff' or 'service staff'. These categories of personnel enjoy a more limited diplomatic protection, and only as long as they are not 'nationals of or permanently resident in the resident State'.[6] Thus, the categorisation in the Vienna Convention of who is entitled to immunities and privileges (non-nationals and non-permanent residents) is built on the assumption that home-based members of staff are nationals of the sending State, while 'locally employed' members of staff are nationals of or residents in the receiving State. However, as stated above, this is not always the case.

6 Article 37(2) VCDR reads: 'Members of the administrative and technical staff of the mission […] shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 29 to 35'.

Soon after the Vienna Convention came into force, States began to interpret the concept of 'permanently resident' in order to find out who were in fact entitled to diplomatic protection—and who were to be considered as 'locally employed' staff without immunities and privileges. The concept of 'permanently resident in the receiving State', as it is understood by individual States' interpretations of the Vienna Convention, is most often merged into the State practices of being 'locally employed'. In order to determine which of the mission staff that enjoy immunities and privileges, a division between temporary ('home-based' or 'posted') and permanent residents ('locally employed') staff is seen in diplomatic law.

This article aims to examine the development of interpretations of being 'permanently resident' in relation to the third 'informal' group of foreign missions not recognised as 'locally employed' in some States. The aim is to find a general definition of the concept 'locally employed' in regard to foreign missions. A question asked is whether it is possible for subordinate non-diplomatic personnel to be recognised as 'permanently resident in the receiving State' but not 'locally employed'?

2. INTERPRETATIONS OF BEING 'PERMANENTLY RESIDENT' IN THE RECEIVING STATE

2.1 THE 'WHY' AS A CRUCIAL FACT

Already in 1969, five years after the Vienna Convention came into force, the United Kingdom circulated a guidance note[7] to all diplomatic missions in London on how to determine whether a particular member of staff was 'permanently resident' in the United Kingdom in the meaning of diplomatic law.[8] Four main considerations were suggested to constitute a valid test of who was 'permanently resident' in the UK. Firstly, the intention of the person to stay permanently was emphasised; tax payments, participation in social security schemes and ownership of immovable property were suggested as points relevant to consider. Secondly, a contract designating the employee as 'locally employed' was of importance. Thirdly, the prospect of the individual being posted elsewhere by the sending State was taken into account; an appointment in the United Kingdom likely to continue for more than five years (three to five years is generally considered the 'normal' positioning period, when it comes to European missions) indicated a 'local employment', suggesting the employee

7 A *note* is a formal diplomatic or official communication in writing.

8 Circular Note of 27 January 1969 by the Foreign and Commonwealth Office of the United Kingdom, cited in Roberts, I. (ed.) (2009) *Satow's diplomatic practice*, 6th edn., Oxford: Oxford University Press, pp. 165–166.

was permanently residing in the country.[9] Lastly, the marital status was to be considered since a person married to a national was held more likely to have intentions to stay permanently.

The UK guidance note has formed the basis of customary practice in other common law-countries such as Australia and the United States. In 1989, the UK practice was adopted in a developed shape in Australia. Members of staff of diplomatic missions were considered 'permanently resident' in Australia if the above stated factors of the UK guidance note were fulfilled. In addition, the length of stay in Australia and whether residence was taken up there for personal reasons was to be taken into account. Meanwhile, in the US all members of the administrative, technical and service staffs of foreign missions are considered permanently resident in the US unless the sending State provides appropriate documentation to indicate that the person in question in fact is part of the official envoy. Although the US practice seems more restrictive than the ones applied in the UK and Australia, all of them may be argued to originate from the same fundamental test: is the person in question living in the receiving State solely because it is the requirement of the sending State, or because of personal reasons?

2.2 INTERPRETATIONS BASED ON DOMESTIC IMMIGRATION LAW

Meanwhile, other States attach decisive weight to their immigration laws when determining who is 'permanently resident in the receiving State'. In Canada, only members of staff with a permanent residence permit issued by the local immigration authorities are considered 'permanently resident' for the purposes of the Vienna Convention.[10] In France, the concept of 'permanently resident' is determined solely by reference to the circumstances of the original notification to the Foreign Office.[11] Only the members of staff who, at the moment of employment, have lived in France for more than one year are recognised as 'permanently resident'. A change of residence status during a diplomatic posting is not admitted according to the French perspective. The same goes for most of the Scandinavian countries. In Sweden, Finland and Norway person-

9 In 2004 it was held that the UK guidance in the 1969 guidance note constituted State practice, as displayed in UK case law. See e.g. *Lutgarda Jimenez v. Commissioners of Inland Revenue* [2004] UK SPC 00419 (23 June 2004) where a member of the service staff of a foreign mission in the UK was considered 'permanently resident' in a diplomatic law perspective as the factors of the guidance were met. See also Roberts, I. (ed.) (2009) *supra* note 8, pp. 166–167.

10 *Circular Note No. XDC-1407* of 30 June 2005. See also the Canadian Immigration and Refugee Protection Act, S.C. 2001, c. 27, Article 2 in which 'permanent resident' is defined as 'a person who has acquired permanent resident status and has not subsequently lost that status under section 46'.

11 Denza, E. (2008) *Diplomatic law: commentary on the Vienna Convention on Diplomatic Relations*, 3rd edn., Oxford: Oxford University Press, p. 425.

nel of foreign missions that did not have permanent residence permits before they took up employment will not be permitted registration in the population register and are thus not recognised as 'permanently resident' in the meaning of diplomatic law.[12] This interpretation of 'permanently resident' implies that all foreign nationals who form part of the subordinate staff of a mission are entitled to diplomatic protection.

However, most European countries do allow a changed residential status during a diplomatic posting. In Germany, Switzerland, and the Netherlands several aspects are used to determine whether the employee is 'permanently resident' in the receiving State in the meaning of diplomatic law. Factors taken into account are a long duration of the posting, a marriage to a national of the receiving State and intentions of the individual to remain permanently in the country.[13] Belgium holds a similar view. A person employed by a foreign mission in Belgium will be considered 'permanently resident' in Belgium once he or she has been granted a residence permit by the local authorities and the stay has exceeded six months (counted from the residence registration or granting of the ordinary permit).[14] In addition, once given status as 'permanently resident' in Belgium, the employee must go abroad for at least one year to once again be granted diplomatic privileges in Belgium under the Vienna Convention.[15] The practice resembles the view held in Denmark where a line sim-

12 Finland: 'In the Population Information System [data is not registered] on foreign nationals employed at foreign diplomatic missions in Finland' (Section 8 of the Finnish Population Data Register and Certificate Services Act (2009/661, *Fin*. 'Laki väestötietojärjestelmästä ja Väestörekisterikeskuksen varmennepalveluista')); Norway: 'Foreign staff at foreign diplomatic missions are not considered resident in Norway if they are seconded to the position by the Foreign office under a diplomatic posting or a temporary employment agreement.' (Chapter 4, Section 6 of the Regulations on the National Registration (FOR-2007-11-09-1268, *Nor.* 'Forskrift om folkeregistrering')); Sweden: 'Anyone who belongs to a foreign mission [...] is registered only if he or she is a Swedish citizen or, without being a Swedish citizen, was living here when he or she became a part of the mission' (Section 5 of the Swedish Population Registration Act (SFS 1991:481, *Sw*. 'Folkbokföringslagen')). See also the statements made by the Swedish Foreign Office in Ministry for Foreign Affairs of Sweden (2014) *Circular note 2/2014* of 8 April 2014 [Online]. Available at: http://www.government.se/content/1/c6/08/72/11/6b-4140fa.pdf [Accessed 16 November 2014].

13 Denza, E. (2008) *supra* note 11, p. 423.

14 See Foreign Affairs of the Kingdom of Belgium (2008) *Circular Note of 16 May 2008*. 'Posted officials' are normally not registered with local authorities, but residence registration in the National Registry of Natural Persons (*Fra*. 'Le Registre National des Personnes Physiques') is usually only performed by 'local employees', and follows after the granting of an ordinary residence permit.

15 Foreign Affairs of the Kingdom of Belgium (2008) *supra* note 14. 'Posted officials are notified to the Foreign Office in Belgium as temporary residents and will not be considered 'permanently resident'.

ply is drawn between members of staff holding diplomatic passports ('posted officials') and those holding regular passports ('locally employed').[16] 'Locally employed' personnel with regular passports are also 'permanently resident' in Denmark according to diplomatic law, i.e. they are not entitled to diplomatic immunities and privileges.

2.3 CONCLUSIONS ON THE INTERPRETATIONS OF 'PERMANENTLY RESIDENT'

Consequently, there are two main ways in diplomatic law to reason about the concept 'permanently resident'. On the one hand there are countries that consider facts such as the purpose with and the duration of stay (Australia, the UK, Germany, Switzerland, and the Netherlands), and on the other hand there are countries determining diplomatic permanent residency on the basis of immigration laws (France, Sweden, and Finland). In addition to recognition as 'permanently resident', foreign nationals employed as part of the subordinate staff of a diplomatic mission, depend on being defined as 'locally employed' to benefit from social security in the country of employment. In countries where someone recognised as 'permanently resident' automatically is identified as 'locally employed' (Germany, Switzerland, and the Netherlands), the connection between the two concepts is clear and the presumption is upheld unless binding assurances are given by the sending State that the employee will be posted elsewhere within a foreseeable future.[17] In this regard it is more likely for subordinate staff of foreign missions to not enjoy diplomatic protection, whereas in countries where the concept of 'permanently resident' is determined by immigration law, the situation is reverse. Employees recognised as 'permanent residents' in a diplomatic law perspective ought also to be recognised as 'locally employed' since the exclusion from diplomatic immunities and privileges that follows from being 'permanently resident' should mean that the employee is not part of the diplomatic envoy. These members of staff of foreign missions, who move to the receiving State in order to take up a local employment, would benefit from recognition as 'local employees' in order to enjoy social security schemes in the country of employment. The receiving States would benefit equally from tax payments made by the employees. However, the concept of 'locally employed' is debated, as will be seen in the next section.

16 Ministry of Foreign Affairs of Denmark (2012) *Circular Note of 6 November 2012*, PRO File No. 4.P.37.a.

17 Denza, E. (2008) *supra* note 11, p. 423.

3. WHO IS 'LOCALLY EMPLOYED'?

3.1 STATE PRACTICES ON THE CONCEPT OF 'LOCALLY EMPLOYED'

3.1.1 TEMPORARY RESIDENTS AS 'LOCALLY EMPLOYED'

There is no codified definition in diplomatic law of the concept 'locally employed'. Traditionally, States have expected 'local staff' to consist of nationals of the receiving State, or at least of permanent residents therein. Today, as there is a growing trend to engage nationals of third countries as 'locally employed' members of staff, and on account of the freedom of movement within the EU, the phenomenon of hiring foreign nationals as 'locally employed' subordinate members of staff has caused the residential status to become a crucial factor in defining an employment as 'local'. Depending on the emphasis put on residential status, two main groups of State practices can be identified as alternative definitions of 'locally employed'.

A smaller group of the States studied (e.g. Slovenia,[18] Israel,[19] and Canada) allow their Foreign Offices to provide temporary permits to *all* members of staff of foreign missions—both the 'posted officials' and the ones that are 'locally employed'. However, in Canada only nationals of the *sending State* are recognised as being 'locally employed' when having temporary resident permits. Also, the permit must have been issued by local immigration authorities for another purpose than the employment at the mission.[20] Moreover, Canada holds the firm practice not to allow any Canadian nationals or permanent residents to enjoy immunities or privileges. As such, employees with permanent residence permits in Canada hired as subordinate members of staff are—independent of their nationality—by definition 'locally employed'.[21]

18 Ministry of Foreign Affairs of the Republic of Slovenia (2013) *Protocol Guide*, 2nd edn. [Online]. Available at: http://www.mzz.gov.si/fileadmin/pageuploads/Diplomatski_protokol/Protocol_Guide_EN.pdf [Accessed 16 November 2014], pp. 21–22.

19 Israeli citizens and permanent residents may be hired locally, but never as part of the diplomatic, administrative or technical staff. Foreign nationals can be designated as 'local recruits', but no 'locally employed' members of staff are entitled to diplomatic immunities or privileges. Also, Israeli labour law requires a limitation of the employment to not exceed the maximum of five years duration that is stated for foreign nationals in Israel in general. See Ministry of Foreign Affairs of Israel (2008) *Being a Diplomat in Israel*, Jerusalem: Protocol Division [Online]. Available at: http://www.mfa.gov.il/MFA/AboutTheMinistry/Departments/Pages/Being_a_Diplomat_in_Israel.aspx [Accessed 16 November 2014], p. 31 ff.

20 See Foreign Affairs, Trade and Development of Canada (2012) *Circular Note No. XDC-0081* of 27 January 2012; (2005) *Circular Note No. XDC-1407* of 30 June 2005. However, Canada does not allow missions to employ temporary visitors from third countries as 'locally engaged' staff, see Foreign Affairs, Trade and Development of Canada (2013) *Circular Note No. XDC-605* of 11 September 2013.

21 Foreign Affairs, Trade and Development of Canada (2012) *Circular Note No. XDC-0081* of 27 January 2012; (2005) *Circular Note NO. XDC-1407* of 30 June 2005.

Apart from the small group of States allowing temporary residents to become 'locally employed', the majority of States studied agree that there is a firm connection between the status as a permanent resident and being 'locally employed'. [22] These States usually argue that the entry into and continued stay in the country must fall completely under the jurisdiction of local immigration authorities. Although this characteristic is shared by several States, three subgroups may also be identified within this group: (1) States that consider the employment agreement to be a crucial factor, (2) States that look solely to the residential status of the employee on the day of employment, and (3) States that allow several indicators to weigh up to a definition of a 'local' employment.

3.1.2 THE EMPLOYMENT AGREEMENT AS DETERMINATIVE

Among the States that share an accommodating understanding of the concept 'locally employed' and as such allow a change of diplomatic status to take place during a diplomatic posting, it is commonly argued that a designation as 'local staff' (or equivalent) in the employment agreement is a factor of importance in determining the employment as being 'local' (e.g. Austria, Canada, Germany, Israel, Italy, Malta, Switzerland, Slovenia, and the Netherlands). Moreover, the employment agreement is also used to look at who the issuing authority—the formal employer—is, as a distinction usually is made between members of staff *seconded by* the sending State ('posted officials') and staff *employed directly by the mission* ('local recruits'). In other words, a 'local employment' is one where the agreement is made directly between the employee and the Embassy. Usually, there is also an underlying requirement that the employee is already a permanent resident in the receiving State when the agreement is signed (e.g. Austria,[23] Denmark,[24] Italy,[25] Spain,[26] and the Netherlands[27]). In Slovenia,

22 This practice is upheld in Australia, Austria, Germany, Finland, France, the Netherlands, Norway, Italy, Slovakia, Slovenia, Spain, Sweden, the UK and the US.

23 Information conducted from Mr W. Spadinger, Director of Privileges and Immunities at the Ministry for Europe, Integration and Foreign Affairs in Austria (telephone 8 April 2014) [pers. comm.].

24 In Denmark the definition of 'locally employed' is based on whether the appointment is notified by the sending State to the Danish Foreign Office; members of the subordinate staff who are not notified to the Danish Foreign Office are recognised as any other immigrant and thus subject to Danish law. Please see Ministry of Foreign Affairs of Denmark (2012) *Circular Note of 6 November 2012*, PRO File No. 4.P.37.a. See also Section 18 of the Danish Central Persons Register Act (LBK nr 5 af 09/01/2013 Gældende, 'CPR-loven').

25 Information conducted from Ms Y. Gabrielsson, Counsellor at the Embassy of Sweden in Rome, Italy (e-mail 6 April 2014) [pers. comm.].

26 Ministerio de Asuntos Exteriores y de Cooperacion (2010) *Practical guide for the diplomatic corps accredited in Spain*, 5th edn., Madrid: Secretaría General Técnica. Available at: http://www.exteriores.gob.es/Portal/es/ServiciosAlCiudadano/SiViajasAlExtranjero/Documents/guia_practica_ingles_2010.pdf [Accessed 16 November 2014].

27 Ministry of Foreign Affairs of the Netherlands (2013) *Protocol Guide for Diplomatic Missions en*

however, though the employment agreement indeed is emphasised, a 'local employee' must have obtained his or her residence and work permits *before* the employment.[28] In Malta too, the concept of 'locally employed' is only partly defined by the fact that the employee was appointed directly by the Embassy, but most importantly the local employee must reside in Malta by his or her personal choice.[29] Meanwhile, Germany, Switzerland and, the Netherlands have gone as far as to presume that non-diplomatic employees with permanent resident permits always are 'local hires', unless the sending State gives binding assurance that the employee will be posted elsewhere within a foreseeable future.[30] However, as the Embassy is the official employer, the employment must have taken place without involvement of the Foreign Office of the sending State. In other words, an eligibility to work in the country *in combination with* the Embassy as the official employer is emphasised as separating 'local staff' from those appointed by the State and sent to the receiving State to serve as 'posted officials'. This is suggested by Austria to be derived by analogy from Article 1(h) of the Vienna Convention.[31]

3.1.3 PERMANENT RESIDENT PRIOR TO BEING EMPLOYED

Some States argue that exclusively the conditions on the day of employment are of importance to define the employee as 'locally employed'. In France, there are three conditions recognised to constitute a 'local employment': (1) French nationality, (2) the holding of dual nationalities (French and foreign), and (3) having permanent residency in France prior to the employment.[32] As

Consular Posts, The Hague: Protocol Department [Online]. Available at: http://www.government.nl/issues/staff-of-foreign-missions-and-international-organisations/documents-and-publications/leaflets/2013/01/21/protocol-guide-for-diplomatic-missions-en-consular-posts-january-2013.html [Accessed 16 November 2014].

28 However, according to Slovenian law residence permits (for non-EU nationals) are normally issued for a period of no more than one year. 'Locally employed' foreign (non-EU) nationals must therefore apply for a renewal each year with the competent local authorities. EU nationals are only required residence registration before they are permitted to work in the country as they are subject to the free movement provisions within the Union (the basis for the free movement is set out in Article 45 of the Treaty on the Functioning of the European Union; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States).

29 Information conducted from Ms J. Pisani, Director of the Protocol and Consular Services at the Ministry for Foreign Affairs of Malta, (e-mail 22 May 2014) [pers. comm.].

30 Denza, E. (2008) *supra* note 11, p. 425.

31 Article 1(h) specifies that the agreement with private servants is not made with the sending State but between a diplomat and his servant.

32 Ministère des Affaires étrangères et du Développement international (2012) *Le personnel local* [Online]. Available at: http://www.diplomatie.gouv.fr/fr/le-ministere-et-son-reseau/protocole-3445/social/article/le-personnel-local [Accessed 16 November 2014].

such, all members of the 'local staff' at foreign missions in France are subject to French labour law and thus not granted any immunities or privileges (unless there is a bilateral agreement stating otherwise). The same practice is seen in most of the Scandinavian countries; eligible residents of Sweden, Finland, and Norway, that were living in the countries respectively prior to the employment, are the only ones recognised as being 'locally employed'. A foreign national who moves to any of these countries in order to take up an employment as a subordinate staff member of a foreign mission, will be recognised as belonging to the official envoy of the sending State. Consequently, a firm distinction is upheld between those residing in the country *prior* to the employment and those moving in order to take up the employment. This results in the fact that no employee can change from being posted to become 'locally employed'. Meanwhile, in States that put emphasis on the employment agreement, and those that let several factors add up in defining a 'local employment', a change of diplomatic residential status is possible.

3.1.4 SEVERAL FACTORS ADDED TOGETHER

Among the States that let several factors weigh up to a definition, individual reasons to stay in the country are usually emphasised. It is commonly argued that employees holding the relevant permits from local immigration authorities cannot have been positioned in the country by the sending State as part of the diplomatic envoy. Rather, they must have moved to the receiving State of personal choice. The same argument is used for members of staff applying for a permanent residence permit during a diplomatic posting. In doing that, the employee has made a personal choice to stay permanently, and is less likely to be positioned elsewhere by the sending State. Thus, it is not a requirement in most States that 'locally employed' members of staff are permanently resident *prior to* the employment. On the contrary, in States where several factors add up to a definition of what it means to be 'locally employed', a changed diplomatic residence status during a diplomatic posting is allowed (e.g. Austria, Belgium, the UK, and the Netherlands). In other words, an employee that used to belong to the 'posted officials' might change his employment contract with the sending State to become 'locally employed' as he or she wishes to stay in the country for personal reasons. In this regard, aspects such as a long duration of the posting, marriage to a national of the receiving State or individual intentions to remain permanently in the country are weighed together. However, an example from the UK will illustrate the complexity in this. A Philippine woman had entered the UK on a tourist visa. When she became a member of the service staff of a foreign mission in London she thereby prolonged her temporary stay. The employment agreement designated her as 'local staff'. When the Court was to decide whether she was in fact 'locally employed', it was

argued that the designation in the contract in combination with the fact that her employment had lasted more than ten years and that she was not likely to be posted elsewhere by the sending State, added up to constitute a 'local employment'.[33]

As the varied State practices described above indicate, there is no uniform definition of what constitutes a 'local employment' in diplomatic law. However, groups of States sharing the same practice have been found. Adding to this is the fact that the European Court of Justice (ECJ) shares the view held by a majority of States, as the following example will illustrate.

3.2 PRACTICE OF THE EUROPEAN COURT OF JUSTICE

Regardless of the criteria used to determine who may belong to the 'local staff' of a mission, most States agree that national labour law is fully applicable on those recognised as locally engaged members of staff.[34] This is, however, also a question of State immunity. In a court ruling the ECJ concluded that an Embassy of a third State situated in an EU Member State is an 'establishment' within the meaning of EU law provisions of jurisdiction, when it comes to a dispute of the employment agreement. The statement concerns functions carried out by those employees of Embassies that do not fall within the category of 'exercising public powers', in other words those of the subordinate staff that are 'locally employed'. The case concerned a citizen of both Germany and Algeria, employed as a chauffeur ('service staff') at the Embassy of the People's Democratic Republic of Algeria in Germany. The Court came to the conclusion that if he was recognised as 'locally employed' the German court would have jurisdiction in any employment dispute between the Embassy and the employee, since such an employment contract is a matter between an individual and the Embassy as an 'establishment' or entity.[35] This suggests that the Court considers it possible for the Embassy to conclude employment agreements with local staff without it being directly seen as an official act of

33 *Lutgarda Jimenez v Commissioners of Inland Revenue* (*supra* note 9).

34 E.g. Canada, see *Circular Note No. XDC-605* of 11 September 2013 (*supra* note 20); Sweden, see *Circular note 2/2014* (*supra* note 12); Turkey, see *Circular Note No. 429252* of 12 October 2006; in France: 'Locally engaged staff' at the website of the Ministry of Foreign Affairs of France [Online]. Available at: http://www.diplomatie.gouv.fr/en/the-ministry-of-foreign-affairs-158/protocol/social-matters/article/locally-engaged-staff [Accessed 16 November 2014].

35 The case has been widely debated as it emphasises a concept of limited State immunity often accepted in Europe but not fully appreciated as part of the general international law. See e.g. Nagan, W.P. (2013) 'The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory', *North Carolina Journal Of International Law & Commercial Regulation*, Vol. 38, p. 375, LexisNexis Academic: Law Reviews, EBSCOhost.

the State. Thus it is possible, according to the ECJ, to be recognised as 'locally employed' without reference to nationality or prior permanent residence, but through a designation in the employment agreement.

3.3 SUMMARY ON THE CONCEPT OF 'LOCALLY EMPLOYED'

To summarise, there are two main groupings found in State practice on the interpretations of the concept of 'locally employed' staff of foreign missions. On the one hand, there are several States emphasising the designation made in the employment agreement between the mission and the employee. On the other hand, some States look solely at nationality and residential status to conclude whether the employee was 'sent' to the receiving State or already lived there. Most of these States do not recognise the fact that an employee may consider him-/herself as a local employee even though he or she was not a resident in the receiving State before appointed by the foreign mission.

4. IS THERE A CUSTOMARY DEFINITION OF 'LOCALLY EMPLOYED'?

Diplomatic law requires all States to permit entry of persons employed by a diplomatic mission.[36] A common distinguishing factor between posted and locally employed members of staff is whether the employee had to apply for residence and work permits him-/herself before being allowed into the country. Meanwhile, with respect to the free movement within the EU, it is suggested that it is no longer possible to look solely at the residential status at the time of appointment in order to find out whether the person belongs to the posted officials or came on their own as a local employee, at least not in EU Member States.

The State practices presented above emanate from statements on the concept of 'locally employed' staff in eighteen States. Definitions of who is 'permanently resident' for the purposes of the Vienna Convention generally do not correspond to the national immigration law definition of 'permanent residents', although some States use these concepts as synonyms (e.g. Canada). A summary of the most common considerations of the States in their interpretations of 'permanently resident' for the purposes of the Vienna Convention is displayed in Table 1.

36 Article 26 of the Vienna Convention.

	Australia	Belgium	Canada	Denmark	Germany	France	Netherlands	Sweden	UK	US
Has a perm. residence permit from local authorities		X	X	X		X		X		
Designated as 'locally employed' in contract	X				X		X		X	X
A long duration of stay in the receiving State	X	X			X				X	
Settled down in receiving State due to personal reasons	X	X		X						
Individual intentions to stay permanently	X				X				X	
Married to a national/perm. resident in receiving State	X				X				X	

Table 1. Selection of States and their main criteria considered when determining who is 'permanently resident' in the receiving State for the purposes of the Vienna Convention.[37]

As shown in the table above, the elements most often relied on when determining permanent residence status in the perspective of diplomatic law are whether the residence permit was issued by local immigration authorities and whether the employee is recognised as 'locally employed'. Employment agreements designating the employee as 'local staff' (or equivalent) are in fact often considered the best element of indication to determine permanent resident status.[38]

In fact, the custom of defining the employment as a local hiring to determine that the person has a non-privileged status (i.e. is 'permanently resident' in the receiving State) is not surprising; 'locally employed' members of staff have usually applied for a position because of personal reasons and are not sent to the receiving State on the demand of the sending State. In this regard, they are in less need of immunities and privileges since they are not employed to conduct a diplomatic mission of the State. Although some States (e.g. Israel, Canada) accept that the Foreign Office of the sending States may be involved in the appointment of foreign nationals as part of the 'local staff', the general definition of 'locally employed' is members of staff employed in non-diplomatic duties—'local employees' do not form part of the career service of the sending State. Consequently, the employment agreement is the most important feature

37 The table is merely a summary of the State practices presented in this article.

38 See e.g. *Lutgarda Jimenez v Commissioners of Inland Revenue* (*supra* note 9).

in determining whether an employee belongs to the 'local staff' or the career service ('posted officials').

A summary of the States' practices on the concept of 'locally employed' is presented in Table 2 below. The different views and interpretations of the concept of being 'locally employed' found in the State practices reviewed are grouped into four main considerations. The general rule is that 'local' members of staff are typically nationals of and permanent residents in the receiving State employed at a mission (column 1). However, this is not the only criterion considered when defining an employment at a foreign mission as a 'local' one. The three other main considerations are (2) whether the employee is recognised as 'permanently resident' in the receiving State and, as such, does not enjoy any immunities and privileges, (3) whether the employee is designated as 'local staff' and will not be posted elsewhere by the sending State according to the agreement, and (4) whether the employee was resident in the receiving State prior to the employment.

(1) 'Local staff' must be eligible to work in the country without permits issued by the Foreign Office.		(2) 'Local staff' are, by defintion, permanently resident in the receiving State, i.e. no immunities.		(3) 'Local staff' are to be designated as such in the contract, and will not be posted elsewhere.		(4) 'Local staff' are, by definition, already resident in receiving State *prior to* the employment.	
Yes	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*
Australia	Canada	(Australia)*	Austria	Austria	Australia	Finland	Australia
Austria	Israel	Canada	Denmark	Canada	Israel	France	Austria
Denmark	Slovenia	Finland	Germany	Denmark	Italy	Norway	Canada
Germany		France	Netherlands	Germany	Norway	Slovakia	Denmark
Finland		Norway	Israel	Malta	Slovakia	Sweden	Germany
France		Slovakia	Slovenia	Netherlands	Sweden	Turkey	Israel
Netherlands		Spain	UK	Slovenia	Turkey		Italy
Norway		Sweden		Spain	US		Malta
Italy		Turkey		UK			Netherlands
Slovakia		(UK)*					Slovenia
Spain		(US)*					Spain
Sweden							UK
UK							US
US							

Table 2. Criteria upheld by the States studied, stipulating who is 'locally employed'. A 'No' simply means that the consideration is not used when determining the status of an employee of a mission as posted or locally employed.[39] The (*) in column 2 means that the criterion is not used alone, but it is commonly used along with other factors.

39 The table is merely a summary of the State practices presented in this article. In the case where no conclusions on the use of the criterion could be drawn the State is simply left out from that column, which is the case for e.g. Italy and Malta in column 3.

The criterion that most States do not take into consideration is the one in column 4; a 'local employment' is generally not characterised by the residence status held by the employee before the employment at the mission took place. On the contrary, several States recognise the possibility to attain a permanent residence status during a diplomatic posting and thus change the employment into a 'local' one. Only a minority of the studied countries (e.g. Finland, Slovakia, and France) share the restrictive view held by Sweden. Employees who move to these States in order to take up employments as subordinate members of staff will be considered as posted officials, independent of a contract designating them as 'local appointments'.

An important consideration for the States that admit a change of residence status during a diplomatic posting is the duration of stay in the country. As a general rule, 'locally employed' subordinate members of staff have no requirement in their employment agreement to accept a new posting in another State. The fact that an employee has not been, and will not be, positioned elsewhere by the sending State is a consideration of high importance in several States (e.g. the UK, Australia, Germany, the Netherlands, and Austria). The employees will not be positioned elsewhere by the sending State in a foreseeable future (or at all) since the very nature of a 'local' employment agreement is that it is local. This suggests that 'local staff', in principle, are not granted immunities or privileges in the receiving State since permanent residents are excluded from immunities and privileges by Article 38 of the Vienna Convention. Nevertheless, in respect of the difficulties in interpreting the term 'permanently resident in the receiving State' in the diplomatic law perspective, some States (e.g. Canada, Israel, and the US) have defined 'locally employed staff' as automatically equaling 'non-privileged' or rather 'permanently resident' in diplomatic law.

The Central European and Danish statements on who is 'locally employed' may be derived by analogy from Article 1(h) of the Vienna Convention.[40] As the Convention states that private servants are not employees of the State, it may give capacity to an interpretation that Embassies are free to employ members of staff without the involvement of the Foreign Office of the sending State. In other words, all members of the mission do not have to be regarded as officials who serve the State. However, this interpretation suggests that 'local staff' always and by definition have their employment agreements signed by the Head of Mission[41]

40 Article 1(h) reads as follows: "a 'private servant' is a person who is in the domestic service of a member of the mission and who is *not an employee of the sending State*" (emphasis added).

41 'Head of Mission' is the term used in the Vienna Convention (see Article 1) for the person in charge and with the duty to act in the capacity of the sending State. The Head of Mission is

and ignores the possibility of local agreements drawn up in the Capital by the Foreign Office of the sending State.

There is not yet one unilateral definition of 'locally employed' staff of foreign missions in international law. The concept of 'locally employed' staff is rather a product of several factors weighed together. A number of indicators are taken into account in determining who is 'locally employed'. None of them may alone define 'locally employed' in a desirable way. They may, however, combined and thoroughly weighed against one another in every individual case, give an accurate indicator of when someone is 'locally employed' in the view held by most Anglo-American and European States. In summary, a member of staff of a foreign mission is 'locally employed' when:

(1) employed as part of the subordinate staff of the mission;
(2) legally residing in the receiving State on his/her own, without involvement from the Foreign Office of neither of the States;
(3) having a personal intention to reside permanently or indefinitely in the receiving State;
(4) regarded as 'permanent resident' in the meaning of diplomatic law and therefore does not (typically) enjoy diplomatic immunities and privileges; and
(5) employed directly by the foreign mission or with an employment agreement designating him or her as 'locally employed'.

Though it is not yet possible to draw any definite conclusions in order to establish a uniform definition, this article has identified important indicators of a common usage of similar elements in determining whom of the mission staff that are 'permanently resident' and 'locally employed' in a receiving State. Moreover, the line between posted and 'locally employed' staff will be of even greater importance onwards as there is a growing trend, especially in Europe, of limiting State immunity on behalf of individuals who would otherwise fall through the cracks in e.g. employment disputes.[42] The definition of 'locally employed' staff of foreign missions is merely a product of an ongoing development in a direction towards uniformity. The State practices of today, presented above, can be described in terms of five main indicators that together serve to determine who is 'locally employed'. These factors are not (yet) used by all of the States studied. They are, however, shared by the majority and are suggested to be the beginning of a uniform practice that eventually may turn into customary law. In short, 'locally employed' members of staff of foreign missions

always a diplomatic agent positioned in the receiving State by the sending State.
42 See e.g. the ruling in C-154/11 and debate following that ruling, *supra* note 35.

are, according to the most commonly held view of the States studied, subordinate personnel living in the receiving State for reasons other than a direct demand of the sending State, and they typically do not enjoy any diplomatic immunities or privileges as they are also recognised as 'permanently resident' in the receiving State in a Vienna Convention perspective.

5. THE SWEDISH NON-RECOGNITION VIS-À-VIS THE PRESENTED DEFINITION OF 'LOCALLY EMPLOYED'

Since no uniform definitions of the concepts 'permanently resident' and 'locally employed' in the meaning of diplomatic law are yet established in international law, the Swedish non-recognition does not breach any international obligations in this regard. Nonetheless, the vast majority of the State views presented in this article tend to be more open-minded towards the fact that people at the present day change their country of residence for various personal reasons. In other words, 'locally employed' is most commonly not equal to 'already living in the country when employed' (as in Sweden).

As indicated above, the Vienna Convention determines a person's privileged status based on the category of staff he or she falls into, combined with his or her nationality or permanent residence status. The general approach to determine who is part of the 'local staff' has therefore been, besides placing the employee into either the category of 'administrative and technical staff' or 'service staff', to consider the nationality or determine the residential status from a diplomatic point of view. While such an approach may well result in the same conclusion, it would be advisable to approach the query from the other direction; 'locally employed' members of staff should typically not enjoy immunities or privileges as they are residing in the country by free will and on more than a temporary basis. The typical 'local' employment agreement would not involve obligations to accept a new posting as part of the employment agreement. 'Locally employed' members of staff have instead, characteristically, chosen to settle down in the receiving State for other reasons than the requirements of the sending State. Such an employee should not be considered as belonging to the career service of the sending State, and thus submitted to the good will of that State to provide for social security, health care, social services and pensions, as is the case for the Finnish and French women mentioned in the beginning of this article.

In conclusion, most European countries have recognised the problems created by a narrow definition of 'locally employed' and thus accept EU migrant workers as 'locally employed' even when they were not resident in the receiving State prior to the appointment at the mission. If Sweden would adopt the

most commonly held definitions of who is 'permanently resident' and 'locally employed' in the receiving State, it would bring the State practice one step closer to a common usage, and closer towards new customary law. Not only would the difficulties faced by individual employees in Sweden be avoided, but there would also be more unity in regard to which members of staff of foreign missions are to be granted immunities and privileges. On the other hand, an amendment to the Vienna Convention, adding a definition of who is 'locally employed' in contrast to being a 'posted official' would possibly provide a faster development of a uniform custom on the matter. However, with regard to the different views on the subject among States, the discussions preceding such a decision may take even longer than the development of customs with the help of judicial decisions and international publicists putting emphasis on the problem.