

Global Care Work

Gender and Migration in Nordic Societies

Lise Widding Isaksen (Ed.)

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Cultural exchange or cheap domestic labour?

Constructions of ‘au pair’ in four Nordic countries

Catharina Calleman

This chapter deals with the regulation of au-pair work – a gender-coded, low-wage occupation on the outskirts of the labour market, which is, by definition, performed by foreigners. The regulation of au-pair work is particularly interesting today, as its social context has changed dramatically in the last few decades, most importantly as a result of the deregulation and globalization of the labour market and the development of Internet-based employment agencies.

Whereas earlier au-pair placements took place between countries with similar economic standards of living, the exchange now increasingly takes place between countries where very different material conditions prevail.¹ Today, au pairs often go abroad not primarily to travel, see another country and learn a language, but from economic necessity. Thus the au-pair form of work has become a loophole used to meet the demand for certain types of domestic labour, as general policy concerning labour immigration is very restrictive. Within the EU, citizens of non-EU countries are not granted work permits as long as there is labour available within the EU.

The regulation of au-pair work is strongly influenced by the fundamental limit in law between private and public. Firstly, as the au pair is seen as a family member, the regulation of au-pair placement is affected by the special treatment in law of family matters. Protecting private life and the family from intrusion and intervention on the

part of the state is a crucial objective of the legal order,² which may imply that the family or family members are exempted from certain legislation or that the laws are applied differently in cases concerning the inner life of the family. This in turn implies protection for the stronger party in cases of conflict within the family. Secondly, au-pair regulation is influenced by the special legal treatment of paid domestic work, which builds not only on the low status attached to gender-coded, unpaid domestic work, but also on the protection of private life mentioned above. Thus employment regulation usually either excludes such work or entitles it to considerably weaker protection than other work, simultaneously implying an extension of the prerogative of the employer.³ Thirdly, possibly as a consequence of the private nature accorded the relationship between the parties, the sources of law that determine the status of au-pair work may be said to have a private character, as they do not usually consist of (public) legislation but of internal guidelines drawn up by migration authorities. Fourthly, au-pair work regulation is permeated by the tension between *public* migration legislation – where the main aim is to exclude labour migration – and a loophole in this legislation for ‘cultural exchange’, where the relationship between the individuals is regulated in *private* (employment) law. Thus at least four dimensions of the public–private divide in law may be said to be involved in this study.

The chapter deals with state policies concerning au-pair placements in four Nordic countries: Denmark, Finland, Norway and Sweden. Its aim is to analyse how ‘au pair’ is constructed, and how rights and obligations shaping au pairs as empowered or dependent individuals are distributed according to whether they are constructed as workers or students/family members in these countries. Despite many similarities in legislation between the Nordic countries, there is reason to believe that, because of recent political developments, national policies concerning au-pair work display differences in the various states’ notions of gender and domestic work, the privacy of the home, or labour immigration. The Nordic countries have had a common labour market since 1954, but once Denmark, Finland and Sweden, but not Norway, joined the EU differences began to appear. Furthermore, Denmark has opted out of certain provisions

of the Maastricht Treaty, implying, among other things, that it will not participate in specific aspects of supranational cooperation within the EU.

Method, sources and scope

The starting-point for the present analysis of the status of au pairs will be the regulation in migration law of residence and work permits in the countries studied. With the exception of Norway, these regulations are very brief, consisting merely of a statement that permits may be granted 'for other special reasons' and so on. The application of these regulations relies on guidelines governing the granting of permits for such 'special reasons' (such as, for example, for au pairs) issued by the migration authorities. These guidelines are the only national documents regulating the au pairs' circumstances, and will thus constitute the material used to analyse their rights and obligations in the various countries. The guidelines for each country, as conveyed to potential applicants for au-pair permits, will also be analysed in the light of social constructionism (Burr 1995). Such an analysis aims to reveal the underlying ideas, values and other premises contained in legal documents.⁴ The construction of the au pairs and the families will be analysed in order to convey a concept of the image of au pairs and families created in the various states and of how these images may influence their choice of policies and methods for administration and control.

The regulation of work and residence permits concerns only citizens of countries outside the EU, Iceland, Norway, Lichtenstein and Switzerland, and thus forms part of Fortress Europe.⁵ Similar conditions as regards the relationship between the au pairs and the families may, however, be applied to the thousands of au pairs who are citizens of EU countries, as the regulations in migration law have been inspired by the European Agreement on 'au pair' Placement (Strasbourg, 24 November 1969), which, as will be seen, is the basis for all au-pair regulation and culture in Europe. The analysis in this chapter of concrete rights and obligations will only consider the relationship between the au pair and the family – the employment law dimension. A study of rights and obligations versus the state as

stipulated in social law and tax law would be most interesting but would require a further, extensive, in-depth study.

The main sources of knowledge for the investigation have been the European Agreement and the appended Explanatory Report, national migration law and employment law, and information and standard contracts for au-pair placements adopted by authorities in Denmark, Finland, Norway and Sweden. The information concerning the migration offices' guidelines is constantly changing; the versions used in this chapter date from January 2010. Numerous contacts with the migration authorities in the four countries have also helped in the investigation, while empirical studies of the status of au pairs in Norway and Denmark, and in particular the works of Marte Bertelsen (2007) and Helle Stenum (2008), have been of great value in understanding the context of au-pair regulation.

The Agreement of the Council of Europe

The central European policy document on au-pair placement is the European Agreement on 'au pair' Placement, concluded by the Council of Europe in 1969 (hereafter the European Agreement or the Agreement).⁶ The Agreement has been signed by Belgium, Denmark, France, Greece, Italy, Luxemburg, Norway, Switzerland and Germany. This means that out of the countries in this investigation, Denmark and Norway have signed the Agreement, implying that its provisions are applicable to all au pairs in these two countries. However, the Agreement has also inspired the regulation of residence or work permits for au pairs in Finland and Sweden, who are not signatories.⁷ Thus, in these two countries most of its provisions are applicable to au pairs from countries outside the EU applying for au-pair permits. At the same time, au pairs of all nationalities working in Sweden and Finland may be indirectly affected by the Agreement's provisions through the practices of au-pair agencies, the au-pair culture or – not least – competition in the market for au pairs.

The European Agreement was a product of transitional conditions in the 1960s. As described in its Explanatory Report, it was an attempt to settle a problem of 'ever-increasing magnitude', as the number of young people going abroad to improve their knowledge

of languages had risen constantly since the end of the Second World War. Although a form au-pair placement had existed for a long time, its nature had changed. Where once it had been arranged on a friendly basis between families known to each other through mutual acquaintances, the au pair had become a unique social phenomenon because of its frequency and the large number of persons involved. It was obvious that the uncontrolled development of such temporary migration could not be allowed to continue, if only in the interests of the parties concerned (Explanatory Report).

From the beginning the regulation of au-pairing was coloured by ambivalence between a family model based on unpaid labour and a worker model based on paid labour. Au pairs were considered to belong to a special category, one with features of both the student category and the worker category, and were therefore and because of their young age considered to be in need of appropriate arrangements and special protection (Preamble of the Agreement). Thus the European Agreement's aim was merely protective and did not take into consideration the need for domestic work in the various countries concerned. There was, however, a strong interest in making a clear distinction from labour migration, which caused disagreements among the signatories regarding the extent of the au pairs' entitlements. As will be shown, some of the provisions are concrete expressions of this interest.

Au-pair placement protected by the Agreement was defined as

the temporary reception by families, in exchange for certain services, of young foreigners who come to improve their linguistic and possibly professional knowledge as well as their general culture by acquiring a better knowledge of the country where they are received. (Article 2)

It was emphasized in the Explanatory Report that the au-pair placement must be of a 'temporary' nature; its purpose must be cultural; the persons placed must be foreigners; and the placement must be made in families. The Agreement applied to any person placed as an au pair in the territory of any contracting state without discrimination as to that person's nationality (Explanatory Report). In

other words, even if the Agreement focused on European exchange, its provisions were also to be applicable to au pairs who were not European citizens.

The cultural purpose is most apparent in the age limits set for au pairs protected by the Agreement, namely from 17 to 30 years of age. It was felt that to have included those over 30 years of age would be to depart from the purpose of the Agreement – to protect young people going abroad to improve their knowledge of languages. As regards gender, the Agreement mentioned ‘persons’ or ‘young foreigners’, meaning its scope was young women *and* men. According to Annex II, any contracting party may however declare that it reserves the right ‘to consider that the term “person placed au pair” shall apply only to females’.⁸ Thus the Agreement does contain exclusionary criteria according to age, but none according to gender, family status or ethnicity.

An au pair’s rights

As regards the au pair’s rights and obligations in relation to the host family, the similarities to a *work contract* came to the fore in both the content and form of the Agreement’s provisions. Thus its delimitation in respect of labour migration was emphasized, and uncertainty over whether the au pair held worker’s rights or family/student status permeated the discussions. According to Article 6, the rights and obligations of the au pair and the host family were to be the subject of an agreement in writing between the parties concerned. This provision was discussed at length, some wishing it to be considered as an actual contract of employment, others not being able to accept that for a number of reasons, primarily the strict regulation of the immigration of workers (Explanatory Report).

The rights of the au pair were dealt with in Article 8. Some of these rights clearly related to family member/student status. The au pair was to receive board and lodging from the host family and, where possible, should occupy a separate room. The au pair was to be given ‘adequate time to attend language courses as well as for cultural and professional improvement’. This is particularly interesting as the word ‘improvement’ was used to show that there could

be no question of the au pairs pursuing a professional activity or full-length training course. The provision was thus meant to rule out the possibility of clandestine work (Explanatory Report). On the other hand, registering for courses was not made compulsory, with reference to the fact that placements would not necessarily be limited to towns where organized courses were held (Explanatory Report). There was also no mention of the crucial issue of who was to pay for any such courses.

Other rights were more coloured by the notion of the au pair as worker. The au pair was to have at least one full free day per week and was to receive 'a certain sum of money, as pocket money'. The amount of money and the intervals at which it was to be paid were to be determined by agreement between the two parties. The term 'pocket money' was expressly used to prevent the sum paid from being thought a remuneration or wage (Explanatory Report). No guidance was given as to its amount, as it was expected to vary with the customs of the countries and the mutual services rendered.

The obligations of the au pair consisted in rendering the host family services through participation in everyday family life. The time the au pair spent on such services should generally not be more than five hours a day (Article 9). The particular services singled out were housework, cooking and looking after the children, even at night.

The termination of the agreement between the au pair and the family (Article 11) was clearly influenced by the provisions of international employment law.⁹ Where the parties had not set a time limit on their agreement, each was entitled to terminate it by giving two weeks' notice. In the event of 'serious misconduct by the other party or if other serious circumstances made such instant termination necessary', either party could terminate the agreement with immediate effect.

Opinions varied among signatories regarding how appropriate benefits should be provided to the au pair in the case of 'sickness, maternity or accident'. Difficulties had arisen because, in the absence of wages, affiliation to a national social security scheme was impossible in the majority of countries. Thus measures taken to distinguish au-pair work from labour migration had an effect on the au pair's social entitlements. Article 10 was a compromise, which aimed to

cover *both* situations in countries where the au pairs were eligible for the social security benefits *and* situations where no such scheme was applicable to them. Each contracting party was to list the benefits to which the au pair was entitled in the event of sickness, maternity or accident. If such benefits were not covered by 'national social security legislation or other official schemes' in the receiving country, the host family was to take out private insurance at their own expense.

Denmark

Denmark has signed the European Agreement, and the Agreement's contents are therefore to be applied to all au pairs in Denmark. The national regulation of conditions of au-pair work falls to the Danish Immigration Service. Au pairs from countries outside the EU must have a temporary residence permit according to the Danish Aliens Act s 9c(1), which refers to special grounds for the granting of a residence permit and makes applicants subject to the special eligibility criteria and procedures of the migration authorities. Denmark has seen an increase in applications for residence permits for au pairs since 2000. Before 2006 the number did not reach 2,000 persons, but in 2007 2,207 persons and in 2008 2,939 persons were granted residence permits as au pairs.¹⁰ This phenomenon parallels a general tightening of migration regulations concerning citizens of non-EU countries (Stenum 2008). The au-pair scheme has been much debated. Abusive situations concerning au pairs have been revealed and a special penalty has been introduced under 'indsatsen mod misbrug av au pair-ordningen'.¹¹

The official policies of the migration authorities on residence permits for au pairs are presented on the website 'New in Danmark/ Ny i Danmark'.¹² This information is clearly influenced by the rationalities of migration law and has a strong emphasis on exclusion, discipline and repression. The first paragraph explains the aim of au-pair placements, simultaneously defining working more than the stipulated 30 hours as 'working illegally in Denmark'. One does not need to look far before encountering the section entitled 'Consequences of abusing the au-pair scheme', which spells out that all adult members of the host family must declare that they have not

been convicted of violence against an au pair in the last ten years, or of illegal employment of an au pair in the last five years, or been registered in a special au-pair register as a result of other abuse of the au-pair scheme (that is, disregarding the limitations regarding an au pair's tasks and duties, maximum work hours, accommodation, minimum allowance, etc.).

A large part of the information from the Immigration Service consists of detailed eligibility criteria for the au-pair permit, relating both to the au pair and to the family. Thus, it is a precondition that the au pair already has 'the necessary linguistic and cultural foundation to receive the full benefit' of her stay in Denmark. The au pair must have completed the equivalent of nine years schooling and have a working knowledge of Danish, Swedish, Norwegian, English or German. She must not be married and must not bring with her children under the age of 18. For receiving families, detailed criteria are defined to the effect that child-care is a condition for granting an au-pair permit – in other words, the host family must comprise at least one parent and one child under the age of 18. In families with shared custody, both parents must meet the conditions for being a host family, as the au pair will follow the children. Some exclusionary criteria relate to citizenship/ethnicity, with the stated aim of introducing the au pair to the Danish language and culture. Normally, at least one parent must be a Danish citizen. However, parents who are EU citizens residing in Denmark under the EU regulations on free movement, or foreign nationals who have lived in Denmark for a long time and have a strong attachment to Denmark, are also accepted as host families.

The special application form for au pairs contains questions on family status, previous stays in Denmark, education and knowledge of languages, number of children in the host family, and a requirement for a weekly work schedule. The applicant has to vouch for the correctness of the information, and consent to information being passed on to local authorities, the host family, intelligence agencies and prosecuting authorities. The applicant is reminded several times that she may be subject to penalties if the information provided is false or incomplete or if she violates the conditions of the residence permit.

The au-pair applicant may be given a permit for a maximum of 18 months, which is longer than the period stated in the European Agreement. In exceptional cases the permit may be extended to a maximum of 24 months. One informative example given of such an exception is if a child in the family has an illness or condition that demands care or has a special connection to the au pair. This exception falls far outside the purposes of the European Agreement and is obviously a criterion based on the need for domestic services. Parental ill-health or disability, however, is said not normally to be a special reason.

The rights and obligations of the au pair and the family are stated in the Immigration Service's Standard Au Pair Contract, which must be attached to the application for a residence permit. As a student the au pair has the right to sufficient time off to take language courses, pursue her cultural and professional interests, and participate in religious events,¹³ but there is no requirement for registration for courses or that the au pair actually attends language courses. There are also no provisions regarding who is responsible for paying for courses. It is explicitly stated that the au pair's daily chores are not considered work. The money paid to the au pair is called 'pocket money', set at a minimum of DKK 2,900 per month.

It is also stated, however, that the relationship between the au pair and the host family is regarded as an employer/employee relationship and as such subject to Danish law on holidays and taxation. The information about holidays is not readily accessible, however: according to the application form, the host is obliged to ascertain whether the applicant is covered by the provisions of the Holiday Act (2000) or the Act on Certain Working Conditions in Agriculture (1994) and to inform the applicant in writing whether or not she is entitled to paid holidays. Other stipulations on work concern neither rights nor obligations, but prohibitions. The au pair is not allowed to carry out chores for the host family outside the time limits defined, carry out tasks other than household chores, carry out chores, or work outside the host family's home or take on paid or unpaid work. This message is repeated three times in the Immigration Service's information.

As regards employment protection, both parties have a right to

terminate the contract with two weeks' notice or with immediate effect in the case of a serious breach. However, the au pair's right to stay in the country is conditioned by the fact that she is allowed to find a new family who meet the requirements of the Immigration Service, which, of course, might limit her possibilities of terminating the contract.

In the Danish information concerning the au-pair scheme, restrictive migration legislation has encroached on the protection of au pairs. Through detailed eligibility criteria and provisions on punishment, the au pair is largely constructed as an alien trying to sneak into the country, either for economic reasons or in order to join relatives. She is also constructed as a person who may be subject to abuse. The family is likewise largely constructed as either wanting lots of cheap labour or wanting to bring in relatives to Denmark – and as potential criminals.

Some of the eligibility criteria make au-pair placements an institution for (qualified) child-care. The idea of professional and cultural improvement has been allowed to shape the eligibility criteria but not to safeguard the rights of the au pair as a student. There are no rights – except the right to free time in accordance with the Agreement – for the au pair as student. As a worker she has the right to a monthly allowance, limited working hours in accordance with the European Agreement, and the right to holidays, but the existence and the extent of this right is unclear in the information. Finally, either party may terminate the relationship with two weeks' notice, but the au pair is only allowed to stay in the country if, within a short period of time, she can find a new family offering conditions that accord with the requirements of the migration authorities. Thus, if for some reason she needs to stay in the country, she is made strongly dependent on the host family.

Finland

Finland signed the European Agreement in July 1997, but did not ratify it, as the legislation of the country did not comply with the Agreement's requirements.¹⁴ However, the basic content of the European Agreement has inspired Finland's policy regarding residence

permits for au pairs, which citizens of countries outside the EU are required to have and which are the subject of this investigation. This permit, a permit 'for other special reasons', according to the Finnish Aliens Act 45 s 1(4), is a 'B permit', meaning that it is considered temporary and may be issued for a period of one year. Whereas other B permits can be extended, the au-pair permit cannot.

Au-pairing in Finland is not publicly supported, but is permitted.¹⁵ No statistics are available on the number of au-pair permits issued in Finland, but the websites of au-pair agencies give the impression that quite a few people in Finland are looking for au pairs.¹⁶ The information published by the Finnish Immigration Service on residence permits for au pairs is based on a definition of au pairs as 'foreign citizens of 17–30 years of age who come to Finland to study or to become acquainted with the Finnish or Swedish language and culture, who live with families, and compensate for their upkeep by means of light housework'.¹⁷ A statement that au pairs are not full-time child minders or home-helps distinguishes them from regular domestic workers.

There is a requirement that, upon arriving in the country, an au pair must possess Finnish or Swedish language skills or have studied Finnish culture, for example, history and politics, and have proof of such (for example school or university certificates). The applicant must also state why he or she wants to enter Finland to learn the language or become acquainted with the culture. Other eligibility criteria relate to the au pair's family status and family relations: it is stated that the au pair must not be a relative of the host family. In addition, au pairs cannot bring children who are minors to Finland. This is a deviation from the provisions for other temporary residence permits.¹⁸

There is, however, no definition of a host family. Instead it is left to the discretionary power of the Migration Office to decide whether 'other special reasons' prevail; that is, whether it is question of an au-pair contract or a contract for domestic work. In this decision, the emphasis is on the total situation and especially on the nature and amount of work.¹⁹ In its decision, the Migration Office has at its disposal the application form containing detailed information concerning education, family (spouses or cohabitants, small and

adult children and parents) and criminal history. The information emphasizes the role of the au pair as a family member. Thus other family members' circumstances serve as a yardstick for the rights and obligations of the au pair. For example, it is set down that the au pair's housing conditions must be equivalent to those of the rest of the family. Likewise, the au pair's work must not exceed the amount of housework or childminding carried out by family members. The information thus conveys an idyllic image of au-pair placements. The au pair is constructed as a student wishing to study the Finnish culture; the family as an egalitarian place, where the members have the same rights and obligations. Thus an au-pair placement is constructed as one that does not require state intervention.

The rights and obligations of the au pair and the family are to be stated in a contract and attached to the application for a residence permit, but there is no standard contract. The status of the au pair as a student is supported by a requirement for clarification of the Finnish or Swedish language courses the au pair will be registered for, the course timetable, and who will be paying for the courses. Their student status is also supported by a requirement for a written clarification of how the day care for the host family's children has been arranged during the au pair's stay in Finland. Au pairs are not considered as workers; their payment is called 'monthly net remuneration' (€ 252), and they do not have any rights or obligations as workers. An au pair does not need a permit for employed persons and labour law is not applicable. There is no state intervention in such issues as the termination of the relationship or rights to paid holidays. This means the required au-pair contract as constructed by the two parties is the only legal basis for the relationship. Being a mutual agreement, the contract can be cancelled by either party. However, the au-pair permit is not tied to one family but rather is issued as a general au-pair permit, meaning the au pair is free to change families without notifying the migration authorities.

To conclude, in Finland au-pair regulation is strongly influenced by the boundaries between private and public, implying an exception from the regulation of the home and the inner life of the family. There is very little state intervention in the relationship between the au pair and the family. In the migration authority's information,

the family is constructed as an egalitarian place, where the members have the same rights and obligations. Thus an au-pair placement is constructed as being in no need of state intervention.

The status of the au pair as student is, however, supported by a requirement for registration in language courses and information on who will be paying for the courses. The family also has to show how the day care for the children has been arranged during the au pair's stay. In other words, certain concrete measures have been taken to ensure that the au pair is a student and not a nanny. There is no standard contract for the mutual rights and obligations of the parties – Finland has chosen to have a minimum level of intervention in this relationship.

The rights of the au pair as worker – except for a monthly allowance and limited working hours as in the European Agreement – are entirely the business of the two parties involved. This in turn implies that the au pair does not have a right to any social or employment benefits from the state, and consequently is totally dependent on the family in that respect. On the other hand, the au pair is free to change families without the input of the migration authorities.

Norway

Norway has signed the European Agreement and has legal regulations stating the conditions for granting au-pair permits. The relevant provisions are Section 26 of the Norwegian Aliens Act (Lov 2008-05-15 nr 35) according to which residence permits may be granted for studies and for scientific, religious or cultural purposes etc. and the Aliens Ordinance (FOR 2009-10-15 nr 1286), of which sections 6–25 apply to residence permits for au pairs. Accordingly, a permit may be granted for a total of two years if the contract meets the requirements decided by the Directorate of Immigration. This is elaborated in detail in the circular on residence permits for au pairs issued by the Directorate (RS 2010–102).

Since 2000 Norway has seen an increase in the number of au pairs from countries outside the EU; their number had reached 1,760 by 2007 and 1,980 in 2008.²⁰ There has been an intense debate concerning au-pair placements.²¹ The au-pair rules were amended

in October 2007, after the Ministry of Labour initiated a process of regulation. This resulted in improvements to the au pairs' economic circumstances and an updating of the standard au-pair contract, which was also made mandatory. Further, the au pair, the host family and – where applicable – the mediating agency were obliged to sign an information sheet on rights and obligations when signing the contract.²² A further amendment to the regulations on au pairs came into force on 1 January 2010. The requirement for a work permit was then abolished and a residence permit only was required.

The ambivalence between work and cultural exchange is obvious in the information on residence permits for au pairs from the Norwegian Directorate of Immigration. It is emphasized that the purpose of the stay is cultural exchange, but on the other hand the family is supposed to provide an 'offer of employment' and the au pair is not allowed to work for 'other employers' or to perform 'other work'. The payment was referred to earlier as a wage but is now called 'pocket money' or 'pay' and is NOK 4,000 gross per month. There is no mention of cultural exchange in the information concerning the application procedure. Instead there are references to 'when you start working' and the fact that the au pair 'must not start to work for the family'. There are also restrictions as to the workload allowed. For example, the au pair is prohibited from working for anyone other than her host family, and may not combine her work as an au pair with other work, regardless of whether this is paid or unpaid. She must not work for more than 30 hours a week even in return for extra pay. Thus the au pair is constructed not primarily as a student but as someone intent on working as much as possible or making as much money as possible.

The eligibility criteria set out by the Directorate are detailed, relating to the au pair and the family, and to the relationship between the two. Host families may be married couples, partners or cohabiting couples (regardless of gender) with or without children, or single parents with children. Thus, the definition of family does not make childminding a condition for an au-pair permit. In the case of single parents, the children must live with the host family at least half the time; a measure designed to exclude single persons without children from constituting a host family.²³ Other criteria,

relating more to the relationship between the parties, are based on a mixture of ethnicity, language and family ties, and are obviously intended to prevent family reunion and other forms of immigration. Further, a general condition for granting a permit is the probability that the au pair will return to her home country at the end of her stay and that circumstances in her home country indicate that she will be able to do so.

The rights and obligations of the au pair and the family are stated in a standard contract, which has to be attached to the application. The au pair's status as a student and family member is defined by obligations and rights. The au pair is explicitly obliged to live with the host family for the entire period of the contract. The host family on their part must treat the au pair as a member of the family. Concerning the rights, the au pair must be given the opportunity to take part in Norwegian language tuition and leisure activities, and the host family is obliged to pay up to NOK 6,000 a year for language tuition. The school to be attended and the amount paid by the family have to be stated in the standard contract.

As has already been mentioned, the relationship between the au pair and the family is often labelled employment in the information supplied by Norway's immigration authorities. Au pairs' conditions have also been adapted to employment law in several ways and strengthened in relation to the European Agreement. Thus the au pair is 'entitled to a minimum of 48 hours off per week, a free period which should be continuous if possible and never shorter than 24 hours'.²⁴ Further, an au pair is entitled to a total of 25 days holiday per calendar year.²⁵ When it comes to employment protection, either party may terminate the contract in writing with at least one month's notice. The au pair is not required to provide grounds for termination, but the host family must have reasonable grounds for dismissing the au pair. If the au pair so requests, the host family has to state the grounds for termination in writing.²⁶ The right of an au pair to stay in the country after the termination of a contract is dependent on whether she can find another family which meets the requirements of the Directorate, however.²⁷

To conclude, the Norwegian regulation of the relationship between the au pair and the family is relatively 'public'. It takes the form of

legislation, and the au pair has clear rights, both as a worker and as a student. Simultaneously, the ambivalence between student/family and worker is obvious. In the guidelines of the migration authorities the au pair is constructed not primarily as a student but as somebody striving to work as much as possible. On the other hand, au-pair placements are not constructed as childminding, as they are not limited to families with children. The au pair's position as student is fairly strong, as the family is obliged to pay for courses. As a worker, an au pair has clearly stipulated rights to rest and vacations, stated in numbers of hours and days, and also a fairly high degree of employment protection.

Sweden

Sweden has not signed the European Agreement, one rationale given being that, according to Swedish law, an au pair is considered an employee and subject to protective employment legislation.²⁸ Although Sweden has not signed the Agreement, it has strongly inspired its policy regarding work permits for au pairs, applicable to citizens of countries outside the EU. The legislation concerned is the Aliens Act (2005:716) chapter 6 s 2:3, stating that a work permit may be granted 'to an alien who is participating in an international exchange'. Au-pair placements have been characterized as international exchange, as they have not been considered open to the labour market.²⁹ The number of work permits lately granted for au pairs is not large, fluctuating around 200 a year.³⁰ This might be explained by the fact that domestic workers – au pairs and regular domestic workers – are increasingly available within the EU and they are not required to have permits.³¹

In Sweden, au pairs' conditions of have received attention in the media, and bills have been introduced in parliament concerning the risks of exploitation and the absence of control over au-pair working conditions.³² These discussions have usually concerned au pairs from the Baltic countries and Poland. There is sometimes confusion about the role and the status of au pairs. Recently it was revealed in the media that an au-pair agency offered jobs on au-pair conditions in Sweden to jobseekers in Sweden. This caused the public employment

agency to remove the agency's advertisement from its publications, concluding that the agency was not acting appropriately.³³

The information from the Swedish Migration Board on work permits for au pairs from countries outside the EU is short and to the point.³⁴ It consists of a definition and the stated aims of the au-pair visit: an au pair lives with a family and receives payment for light household duties/taking care of children. The aim of the visit is to acquire international experience and to have the opportunity to learn Swedish and become acquainted with Swedish culture. There is also a short list of requirements concerning the au pair and the family, the supporting documents needed, and information about the application procedure. The monthly pay for au-pair work is called a 'salary' (SEK 3,500 gross), which is consistent with the fact that an au pair is considered a worker. However, there is also an element of uncertainty as to the notion of what au pairs are. Recently, in 2009, the information contained a sentence emphasizing that an au pair is something between a student and an employee, but that has now been removed.³⁵

Many important issues such as entitlements under employment law and social benefits are not covered, but left to the applicant to investigate. Thus there is no information about the right to terminate the contract or to change conditions or employer. In the Swedish version, but not the English version of the information, reference is made to the Domestic Work Act (1973), which is applicable to the employment relationship. Further, the applicant is informed that, as she will be staying in Sweden for a limited period of time, she will not be entitled to the same social benefits as permanent residents in the country. Therefore she must find out what insurance cover she needs. Expressions such as 'appeal', 'attorney', 'important that you find out' are used, and thus the au pair is constructed as a legally competent, resourceful and well-informed person.

There are not many explicit eligibility criteria on the information page. Apart from the requirements of the European Agreement regarding age and foreign citizenship, the au pair must demonstrate that he or she has a clear interest in or use for Swedish language studies. Recently a new criterion has been added, aimed at excluding labour migration: 'A previous period spent as an au pair in another country

immediately prior to the planned stay in Sweden could reduce the chances of being granted a permit.⁷ Even if there are few explicit eligibility criteria, the application form asks detailed and exhaustive questions about the applicant's family members; for example, the number of her children, relatives in Sweden, earlier stays in Sweden, and so on. Based on the information in this application, the Migration Board decides at their discretion whether the person may be expected to meet the criteria of an au-pair placement.³⁶ The upshot is that there are eligibility criteria, although neither explicit nor exact, as to education and criteria aimed at excluding family ties and labour migration.

A written offer of employment from the host family must be attached to the application for a permit. There is no standard contract, but the requirements for the permit intervene in the parties' freedom of contract. Thus it is a requirement for the work permit that the au pair engages in studies of the Swedish language for 'a large part of a normal 40 hour working week remaining after a maximum of 25 hours of housework'. The applicant needs to enclose a certificate from the relevant school stating how many hours per week she will be studying.³⁷

As has already been mentioned, an au pair is subject to employment legislation. The legislation applicable to au-pair work is the Domestic Work Act (1970:943); a special act concerning all kinds of housework performed in the employer's home, for example, child-care, cooking, cleaning and washing. The act contains rules regarding the concluding and termination of the employment agreement, working hours, and working environment that deviate from general employment legislation. However, the au pair's status as a worker and the employment legislation make little difference to their status compared to the entitlements inspired by the European Agreement, as it is a question of legislation applying to employment in private homes. A provision of the Domestic Work Act for continuous rest for 36 hours each week, preferably at weekends, however gives rights that go further than the Agreement.³⁸ Regarding employment protection, like the European Agreement the Domestic Work Act contains no requirement for reasonable grounds for dismissal to be given, but longer notice is required than that stated in the Agreement – one

month for each party – when the duration of the relationship is a maximum of one year.

The actual possibilities for an au pair to terminate the relationship seem dependent on her right to change family. The work permit for au pairs is limited to au-pair work, but the au pair may change employer without permission from the Migration Board and there is no requirement for a renewed application in such cases. This possibility to change employer represents a deviation from general work permits, which are tied to one employer.³⁹ No information about these crucial possibilities is issued by the Migration Office or appears in the application form, however.

The au pair's worker status also means that regulations on leave, such as the Paid Vacation Act (1977:480), the Parental Leave Act (1995:584), and the Work Environment Act (1977:1160) are in principle applicable. That said, an au pair has no right to a paid holiday, as that right is based on work in the previous year and an au pair only has the right to stay in the country for one year. Inspection of working hours and working environment in private homes, however, does not take place unless there is special reason,⁴⁰ which also makes the value of the application of the Work Environment Act questionable.

The Swedish information on the rights and obligations of au pairs is meagre. Expressions such as 'appeal', 'attorney', 'important that you find out' are used and the onus is on the au pair, who is constructed as a legally competent, resourceful and well-informed person. This is perhaps related to the fact that in Sweden au pairs are considered workers. However, despite being considered workers, au pairs' rights as workers are limited, as the applicable employment regulations concern work in private households and is affected by the traditionally low value attached to such work. This implies a right to weekly rest and a month's notice for termination of the relationship but no other employment protection, while for all else the conditions of the Agreement are applicable. The au pairs' rights as students are limited and consist of defined leisure time and some checks to ensure that studies are initiated.

Overview of rights and obligations of au pairs in relation to families

Table 1 gives a rough picture of the rights and obligations of au pairs in relation to their families according to the European Agreement and the regulations of the countries compared. More precise and detailed information has been given under each country.

Table 1: Rights and obligations of au pairs and families in the Nordic countries

	European Agreement	Denmark	Finland	Norway	Sweden
Age of au pair	17–30	17–29	17–30	18–30	18–30
Time limit of stay/permit	12 months, max. 24 months	18 months	12 months	24 months	12 months
Hours worked per week	–	18–30	30	30	25
Hours worked per day	5	3–5 (6 days a week)	5	5	–
Free time per week	One day	One day	One day	48 hours	36 hours
Contract	Written agreement	Standard contract	Own contract	Standard contract	Own contract
Pay	'Pocket money'	DKK 2,900 gross	€ 252 net	NOK 4,000 gross	SEK 3,500 gross
Language course required	Yes	No	Yes	Yes	Yes
Pay for language courses	–	–	–	Family NOK 6,000	–
Right to terminate the relationship	Both parties	Both parties	As per contract	Both, family on reasonable grounds	Both parties
Notice	Two weeks	Two weeks	As per contract	One month	One month

Conclusions

In all four countries compared here, the states have decided to implement the provisions of the European Agreement on 'au pair' Placement only within the regulatory framework of work permits or residence permits. This means there is no other regulation specifically concerning the conditions of au pairs, although the Agreement's aim was primarily protective. Thus, in this sense, the public dimension, and especially the interest in excluding labour migration, may be said to have encroached on private law with its admittedly limited protection for au pairs.

With the exception of Norway, the conditions for au-pair permits are dependent on policy documents on the outskirts of legislation. Thus they rely on the application of guidelines issued by migration authorities themselves, although the European Agreement (signed by Denmark and Norway and inspiring the policies of Finland and Sweden) compels the contracting states to take all possible measures in the form not only of regulations but also of legislation.

The regulation by migration authorities of the conditions for au pairs are often rewritten and reconstituted, primarily with the aim on the part of the authorities of preventing labour immigration and family reunion – the versions used in this chapter are from January 2010, and are already changing. The student concept is then mostly used as an exclusionary criterion, while simultaneously the reality of applications for *work* affects the use of language and the sometimes repressive tone. Thus au-pair placements are constantly localized with new meanings. Concepts such as student and worker and the duration of permits sometimes seem to be changed without regard to the consequences for rights and obligations in areas such as employment and social law.

In my opinion, the guidelines of the migration authorities are an expression of the rationalities of migration law, but not necessarily of the employment and social rights of au pairs as a court dealing with such matters would assess them. For example, such a court would probably often consider an au pair to be a worker because of her subordination in relation to the family and her workload, regardless of how the relationship was labelled earlier. This view would have

consequences for her employment and social rights (and possibly also for her right to stay in the country). However, au-pair matters very rarely end up in courts and everyone knows that. This supports the conclusion of Bertelsen (2007) that the host families in their superior position in relation to the au pairs have the power to decide which laws and regulations are applicable in 'their' specific au-pair relationship.

The most obvious differences between the four countries are not in the rights and obligations of au pairs as summarized in Table 1, but in the construction of au pairs in the information concerning permits provided by authorities to applicants and families. There is a huge difference between the four countries in how authorities have chosen to construct information about their au-pair schemes. It ranges from almost repressive to rather friendly and welcoming, and from very detailed to vague and general.

Eligibility criteria for au-pair placements are treated very differently: two countries choosing to list them openly in detail (Denmark and Norway); and two preferring to gather information from application forms on all issues and then using their discretionary powers to decide who is eligible and who is not (Finland and Sweden). The outcome might be quite similar. Some of the criteria mentioned far transcend the criteria put forward by the European Agreement, but may be interpreted as implementing its aims by excluding labour migration and family reunion.

The host family is defined differently in the various countries. Denmark allows only those with children to have au pairs, thus constructing au-pair placements as childminding; Norway allows persons with or without children; Finland and Sweden have no rules regarding the issue. Meanwhile all four countries have some eligibility criteria concerning education. In one country (Denmark) this seems to serve mostly to obtain qualified personnel, while others seem to take the cultural exchange and study purpose more seriously, demanding registration for courses or that the family pays for courses. Norway is the only one of the four that explicitly obliges the family to pay for language courses.

All countries except Finland show ambivalence towards a family model based on unpaid labour and a worker model based on paid

labour. Finland constructs the au pair entirely as a family member; Sweden goes furthest in constructing the au pair as a worker. However, the au pair's status as worker and the applicability of employment law does not matter much in relation to the family/employer. This is because it is a question of special regulations for employment in households, which are generally less protective of the employee than other legislation. They are in fact similar in outcome to the provisions of the European Agreement. Norway, however, has introduced a requirement for reasonable grounds for dismissal in their au-pair rules, which means a strengthening of the position of the au pair in relation to the European Agreement and the regulations of the other countries.

When it comes to social rights, the status of worker regularly affords au pairs a better position than that of student/family member, as the social security system is largely based on waged labour. Information about the extent of social benefits is obscure in all countries, however, and the migration authorities do not have such information. A list of rights drawn up by authorities, presupposed in the European Agreement, is non-existent. None of the countries seems to have appointed such public or private bodies as were foreseen in the Agreement, which were to supervise the placement conditions, provide consultation, and settle differences between au pairs and receiving families.

Notes

- 1 A Norwegian local court has described this development as follows: 'Today most au pairs come from non-Western countries. In these countries many people wish to create a better future in the West. Therefore immigration issues manifest themselves. The au pair scheme is distinct from labour immigration, which is otherwise strictly limited' (Oslo Tingrett, dom 18 February 2008. Saksnr 07-130127TVI-OTIR/08).
- 2 This protection may be traced in the legislation and case law in many legal areas, and is explicitly stated in a number of international conventions, including Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).
- 3 See ILO report *Decent Work for Domestic Workers*.
- 4 Social constructionism permeates, for example, the dissertations on law by Monica Burman 2007; and Eva Nilsson 2007.

- 5 A term sometimes used to describe the very restrictive immigration regulations of the European Union.
- 6 Council of Europe; European Treaty Series No. 68.
- 7 This is obvious from its contents, and has also been confirmed by the migration offices.
- 8 Annex II, article 18.1. This provision seems to conflict with today's bans on discrimination. None of the four Nordic countries has limited the scope of its provisions for women.
- 9 See, for example, the recommendation of ILO 1963 no 119. The convention was not established until 1982.
- 10 *Tal og fakta på udlaendningsområdet 2007*, 21. Ministeriet for Flygtninge, <www.nyidanmark.dk>.
- 11 Folketingets enstimmige vedtagelse av lagforslag L 198, a parliamentary decision of 28 March 2007 (styrkelse av indsatsen mod misbrug af au pair-ordningen).
- 12 <http://www.nyidanmark.dk/da-dk/Ophold/au_pair/>, accessed in January 2010. It has subsequently been changed.
- 13 The right to participate in religious events (supposedly Christian, as they were expected to take place on Sundays) is derived from the Agreement.
- 14 According to an answer from the Ministry of Internal Affairs, Finland, conveyed by Mirkka Mykkänen, Senior Adviser.
- 15 See article by Zechner in this volume.
- 16 See for example <www.findaupair.com> or <www.aupair-world.net>.
- 17 'Entry into Finland as an au pair', a fact sheet from the Finnish Immigration Service.
- 18 The Aliens Act 45 § states that when an alien has been granted a temporary residence permit, his or her family members will be granted a temporary residence permit for the same period of time.
- 19 According to an answer from the Ministry of Internal Affairs, Finland, conveyed by Mirkka Mykkänen, Senior Adviser.
- 20 *Tall og fakta 2008*, UDI, 12.
- 21 A number of very interesting articles can be found at <<http://www.aupair-norway.org/>>. See also Cecilie Öyen, *On equal terms – an evaluation of the Norwegian au pair scheme*, Fafo-rapport 2009, 29.
- 22 See <<http://www.udi.no/Norwegian-Directorate-of-Immigration/News/2007/Changes-in-the-au-pair-regulations/>>
- 23 Beate Holter, UDI.
- 24 Marte Bertelsen (2008) has pointed out that this regulation is unclear. A person who has 48 hours off, for example at the weekend, and works 5 hours a day Monday to Friday, will in fact work 25 hours and not 30 hours, which is the maximum allowed.
- 25 The wording 'per calendar year' seems to mean that the right to paid holidays for au pairs differs from general regulations on holidays, implying that a person will have to work one whole year before they have the right to a holiday.
- 26 The meaning of reasonable grounds in au pair work has been discussed

- at length in a local court (Oslo Tingrett, dom 18 February 2008. Saksnr 07-130127TVI-OTIR/08).
- 27 A change of host family is crucial, as this may be the only measure the au pair can take to improve her situation. The interviews in Bertelsen (2008, 80) show that au pairs who changed families were in a better situation after concluding their second contract.
 - 28 Utrikesutskottets betänkande AU2005/06: UU15. According to Susanne Lind of the Migration Office, nobody now employed in the Migration Office knows the reason Sweden has not signed the Agreement; neither is there any legal document that explains why.
 - 29 SOU 1982:49, 105. Today this is far from the case. Au-pair positions are openly advertised by employment agencies on the Internet. The Swedish rules concerning au-pair permits have had clearly ambivalent features since the 1970s (see Calleman 2007, 40–46).
 - 30 More specifically, 196 in 2006, 202 in 2007, 189 in 2008, and 130 in the first eight months of 2009 (information received from Rita Ylikivela, Migration Office).
 - 31 Several thousand au pairs may be working in Sweden. According to the owner of the agency mentioned below, it places 2,000–3,000 au pairs a year in Sweden (mostly foreign women).
 - 32 See for example the Motion to Parliament 2002/03: A270.
 - 33 *Helsingborgs dagblad*, 7 August 2009.
 - 34 <www.migrationsverket.se/info/159.html>.
 - 35 <www.migrationsverket.se/info>, august 2009.
 - 36 As for the family, it may consist of two parents, or a single parent with children, or adults only. It is most unusual that the applicant asks to bring a child, but such an application has once been accepted (Gunilla Wickström, Migration Office).
 - 37 Applicants are regularly registered for language courses, but as these are usually short, for example one month long, there are no checks that au pairs continue the classes after that (Gunilla Wickström, Migration Office).
 - 38 These provisions derogate from the Swedish Working Time Act, as employment in households is exempt from the Directive 2003/88/EG, which has been implemented in the Working Time Act.
 - 39 This exception has been made in order not to force an au pair to remain with a family where the relationship has not worked out well (Gunilla Wickström, Migration Office).
 - 40 Article 15,3 of the Work Environment Ordinance.

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