REPORT
on the Free Movement of Workers in Ireland in 2005

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Introduction

The purpose of this Report is to identify developments in Ireland in relation to the free movement of persons in 2005. Reference is also made to material developments in 2006.

Research for the Report has centred on publicly available sources, largely found on the internet, supplemented where necessary with contacts with relevant administrators.

As with the previous reports, part of the reason for the relative dearth of developments may be the fact that a liberal approach has generally been taken to free movement, so that issues of compliance with EC law have rarely arisen. In contrast to free movement under the EC Treaty, attention has hitherto focused on the immigration and asylum field.

However, there have been some important material developments that show an increased interest in free movement matters.

First, reference must be made to the first significant legislative measure since 1997 in relation to the free movement of Union citizens and family members. Directive 2004/38 has been implemented by the European Communities (Free Movement of Persons) Regulations 2006, made in April 2006. It has not been possible to address this systematically in detail (this will be a task for the 2006 Report): however, an attempt is made to identify a number of areas of interest – including problematic compliance with the Directive – in this Report.

Second, a high number of non-national workers in Ireland – a large proportion of whom come from the 10 new Member States – coupled with allegations that employers are breaching or circumventing the equality principle, has led to suggestions that there is "a race to the bottom", affecting the position of Irish workers. This has led to calls, so far strongly resisted by the Irish Government, that the work permit system should be introduced for nationals of the new Member States. There is a strong belief – reflected in existing legislation and widely endorsed in the context of the recent "Social Partnership" negotiations – that posted workers should be treated equally with national workers in respect of pay and other terms and conditions. The Irish Government appears to endorse the "country of destination" principle as opposed to the "country of destination" principle in the proposed Services Directive. There is every likelihood that the enforcement of equality legislation – by means of a larger independent Labour Inspectorate and increased sanctions for breach – will be strengthened, which will inure to the benefit of nationals from other Member States and third-country nationals alike.

Third, in adopting a "habitual residence" test for access to social welfare benefits in 2004, there was some initial confusion as to how these applied, vis-à-vis beneficiaries of free movement, to social advantages under Regulation 1612/68 and "family benefits". under Regulations 1408/71 and 574/72. It has been accepted, as a matter of administrative practice, that EU law takes precedence over national rules and that relevant "free-movers" will not have to satisfy the habitual residence test when claiming these benefits. The relevant guideline has been published on the Internet, but is not very easy to locate.

Fourth, in relation to access to the public service, it is particularly noteworthy that access to the police force – *An Garda Síochána* – has recently been opened up not only to nationals of other EU Member States but also to resident third-country nationals. That said, the application of the public service exception in Article 39(4) of the EC Treaty to Irish public sector employment generally remains opaque. There is no list – in the legislation or even as a matter of administrative record – of posts reserved to Irish nationals (attempts to obtain a list of posts limited to Irish nationals have up to now proved fruitless and it is not possible to extrapolate such a list from public sources). However, the vast bulk of the public service is open to nationals of other EU Member States. In general terms, the lack of knowledge of Irish is not a significant obstacle for most public sector jobs: though there has been a renewed drive to promote the use of the Irish language for official purposes in the State, it appears that the main effect of the legislation will be the increased use of Irish in documentation and correspondence and this will be the subject of contracting-out arrangements, with no effect on mobility. One area of possible difficulty is that of mutual recognition of qualifications, where there is no published procedure and issues appear to be addressed on a somewhat ad hoc basis.

Chapter I
Entry, residence, departure

The Framework for Beneficiaries of the EU Rules on Free Movement of Persons

Main Legislative Provisions

Main Primary Acts

The principal legislation governing the entry and the residence of non-nationals in the State has been the *Aliens Act 1935* and the *Aliens Order 1946* as amended, together with the regulations implementing the EU Rights of Residence Directives. In addition, the *Immigration Act 1999* sets out the principles and procedures which govern the removal of non-nationals, including those covered by EU free movement provisions, from the *State*.

The 1977 and 1997 Regulations

The *European Communities (Aliens) Regulations 1977*[1] and the *European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997*[2] establish a special regime in relation to the entry and residence of nationals of other EU Member States, and their dependants, under the relevant Community Directives. The regime has been extended to other EEA nationals and their dependants under the European Communities (Amendment) Act 1993.[3] (These Regulations have recently been replaced, in relation to Union citizens and family members by legislation implementing Directive 2004/38, but applied fully during 2005.)

The 1977 Regulations, which have been amended from time to time to cater for new Member States and to make minor amendments, cover EEA nationals qualifying as self-employed persons, service-providers and receivers and workers, those who have been employed or self-employed in the State and have retired or been unable to continue working by reason of incapacity or disease, as well as dependants of such persons. The Regulations do not cover those born in the UK.

The 1997 Regulations cover EEA nationals who are students, retired persons and a residual class of non-economically active persons and dependants of such persons. The Regulations do not generally apply (save for the obligation to apply for a residence document for a third-country national dependent) to those born in the United Kingdom.

Each of the 1977 and 1997 Regulations contains provisions on leave to land (enter), application for a residence permit, the right to remain and departure, with these provisions intended to implement the relevant EC Directives.

Following the entry into force of the European Communities (Free Movement of Persons) Regulations 2006 (see immediately below), the 1977 and 1997 Regulations apply to citizens of the EEA other than Union citizens. They also operate to confer legal residence for the purposes of the 2006 Regulations.

Directive 2004/38 and the European Communities (Free Movement of Persons) Regulations 2006

In a discussion document issued in April 2005, the Department of Justice considered whether the transposition of Directive 2004/38, due to be implemented by 30 April 2006, should be done by way of the forthcoming Immigration and Residence Bill, or by way of a separate legislative instrument. It was made clear that, between the passage of the Bill and legislation implementing the Directive, no groups should "fall between the cracks" of new legislation.

In the event, implementation of the Directive was done by means of secondary legislation. As from the end of April 2006, the 1977 and 1997 Regulations will cease to apply for EU citizens moving to Ireland and their family members. Directive 2004/38 has been implemented by the *European*

1 SI No 393 of 1977.
2 SI No 57 of 1997.
3 No 25 of 1993.

Communities (Free Movement of Persons) Regulations 2006, made on 28 April 2006.[4] The 1997 and 1997 Regulations will, however, continue to apply to citizens of EEA Member States other than Union citizens (unless, of course, they are family members of EU citizens).

The effects of the 2006 Regulations are addressed in relevant sections throughout the Report. It is not proposed to set out the provisions of the Regulations *in extenso* or to describe systematically how the Regulations implement the Directive. However, the attention of the Commission is drawn to specific areas, including those where the implementation by Ireland raises questions of correct implementation.[5]

The Immigration Act 2004

The *Immigration Act 2004*[6] expresses in primary statute law the main elements of the law governing the State's operation of controls on the entry and presence in the State of non-nationals. Section 2 of the Act expressly provides that nothing in the Act is to derogate from any of the obligations of the State and the treaties governing the European Communities, any act adopted by an institution of those Communities, the European Communities (Aliens) Regulations 1977 or the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997.

Entry

Background

The 1977 and 1997 Regulations

Those covered by the 1977 and 1997 Regulations who produce a valid national identity card or passport as evidence of nationality and identity may not be refused leave to land unless she/she suffers from a specified disease or disability or his/her personal conduct has been such that it would be contrary to public policy or would endanger public security to grant him/her leave to land.

The Common Travel Area and its Implications

The Common Travel Area arrangements enable citizens of the UK and of Ireland to move between their respective jurisdictions without the requirement to carry a passport and to establish themselves and enter the labour market in either jurisdiction as if they were citizens. The passport-free travel arrangements also apply as between these jurisdictions and the Isle of Man and Channel Islands. Under the *Aliens (Amendment) (No. 3) Order 1997*,[7] Immigration Officers are permitted to carry out checks on persons arriving in the State from Great Britain or Northern Ireland, in order to identify non-UK nationals who are not entitled to enter Ireland.

In a Protocol agreed in the Amsterdam Treaty, Ireland (together with the UK) is able to retain internal border controls – notwithstanding Article 14 of the EC Treaty – as long as it retains the Common Travel Area. As least as far as Ireland is concerned, the stated reason for this is the need to protect the integrity of the Common Travel Area. Ireland has "reluctantly" gone this route and, in a Declaration to the Final Act of the Amsterdam Treaty, it has declared its readiness to participate in the EC regime to the maximum extent compatible with the maintenance of the Common Travel Area.

European Communities and Swiss Confederation Act 2001 (Commencement) Order 2002

In May 2002, the Minister for Foreign Affairs signed an Order bringing the European Communities and Swiss Confederation Act 2001 into force. This gives force in law in Ireland to a number of sec-

4 SI No. 226 of 2006. http://www.justice.ie/80256E010039E882/vWeb/flJUSQ6PEJJ7-en/$File/SI226of2006.pdf.

5 Article 40(2) of the Directive requires Member States to communicate to the Commission the texts of the provisions of national law which they adopt, together with a table showing how the provisions of the Directive correspond to the national provisions adopted. I have not seen a copy of this table.

6 No. 1 of 2004.

7 SI No. 277 of 1997.

toral Agreements between the EC and Switzerland signed in 1999, including the Agreement on the Free Movement of Persons.

Under Section 3 of the 2001 Act, the provisions of the European Communities (Aliens) Regulations 1977 and the European Communities (Rights of Residence for Non Economically Active Persons) Regulations 1997 apply to Swiss nationals and their dependants in the same way as they apply to EEA nationals and their dependents.

Immigration Act 2003 (No. 26 of 2003)

Section 2 of the Immigration Act 2003 introduced provisions on the liability of carriers.[8] If a vehicle arrives in the State from a place other than Great Britain, Northern Ireland, the Channel Islands or the Isle of Man, the carrier concerned must assure that all persons on board the vehicle seeking to land in the State do so in accordance with any instructions from an immigration officer. The carrier must also ensure that each non-national on board the vehicle seeking to land has a valid passport or other document that establishes his/her identity and nationality and that anyone required to do so by law has a valid Irish transit visa.

Text(s) in force

Directive 2004/38 and the European Communities (Free Movement of Persons) Regulations 2006

Article 5 of Directive 2005/58 has been implemented, as regards the right of entry for Union citizens and family members defined in Article 2(2),[9] by Regulation 4 of the 2006 Regulations,[10] and, as regards other family members and partners defined in Article 3(2),[11] by Regulation 5.

- In addressing the need for an entry visa for family members who are not nationals of a Member State, as defined in Article 2(2), Regulation 5 does not in terms state (as provided in Article 5(2) of the Directive) that possession of the valid residence card shall exempt such family members from the visa requirement.
- Article 5(3) is not specifically addressed.
- In relation to Article 5(4) of the Directive, the implementing provisions in Regulation 4(5) do not exactly match the wording of the Directive: the person concerned is to be given every reasonable opportunity to "present the necessary documents to the immigration officer within a reasonable period of time" (not provided for in Article 5(4)) but does not have the express right (provided for in Article 5(4)) to have the necessary documents "brought to them within a reasonable period of time".
- Ireland appears to have chosen not to avail of the possibility of imposing a reporting requirement under Article 5(5) of the Directive.

In relation to "permitted family members" covered by Article 3(2) of the Directive, Regulation 5 is designed to implement the specific requirements of Article 3(2) as regards the facilitation of entry.

Regulations 19 to 23 implement the provisions of the Directive relating to restrictions on the right of entry and the right to residence on grounds of public policy, public security or public health. In general, these appear to comply with the requirements of the Directive.

In relation to public health, Regulation 22(3) provides for non-routine medical examinations as foreseen in Article 29(3) of the Directive. There is, however, no specific reference to such a requirement being imposed within three months of the date of arrival.

Immigration Act 2004 (Visas) Order 2006 (SI No. 227 of 2006)

Section 17 of the Immigration Act 2004 (see above) provided a new statutory basis for the making of visa orders. The Immigration Act 2004 (Visas) Order 2006[12] – which replaces a 2005 Order[13] - speci-

8 The 2003 Act also contained provisions on asylum, covering the safe country of origin concept and streamlining procedures.
9 Defined in the Regulations as "qualifying family members".
10 See note 4.
11 Defined in the Regulations as "permitted family members".
12 http://www.justice.ie/80256E010039E882/vWeb/flJUSQ6PFHQM-en/$File/SI227of2006.pdf.
13 Immigration Act 2004 (Visas) Order 2005 (SI No. 363 of 2005).

fies the classes of non-nationals who are not required to have a valid Irish visa when landing in the State and classes non-nationals required to have a valid Irish transit visa when landing in the State. The States whose citizens do not require a visa include all 25 EU Member States, the remaining EEA Member States and Switzerland. The order came into operation on 2 May 2006.

Residence

Background

The 1977 and 1997 Regulations contain provisions on applications for residence permits, the issue of a first residence permit and the validity of residence permits. Residents permit are optional and only a very small proportion of persons eligible to do so have in fact applied for a permit.[14]

The possession of a residence permit is not mandatory, reflecting the fact that the permit is only evidence of the right to remain.

However, in the context of calculating the period of residence in the State for the purposes of an application for a certificate of naturalisation, Section 16A(1) of the Irish Nationality and Citizenship Act 2001 (which came into force on 1 December 2002) has provided that no period will be counted in which the non-national was not the holder of a permit under the 1977 or 1997 Regulations. To this extent, it qualifies the permissive nature of the permit.

Text(s) in force

Directive 2004/38 and the European Communities (Free Movement of Persons) Regulations 2006
Regulations 6 to 11 of the 2006 Regulations[15] implement the Directive's provisions on the right of residence (Articles 6 to 15), and Regulations 12 to 16 implement the provisions on the right of permanent residence (Articles 16 to 21).

In relation to the right of residence:

- Regulation 6, implementing Article 6 on the right of residence for up to three months, imposes the additional condition, not foreseen in the Directive, that the person concerned "does not become an unreasonable burden on the social welfare system of the State".
- Regulation 6(2)(c) covers cases of cessation of activity addressed in Article 7(3) of the Directive which will lead to the retention of the status of worker or self-employed person. In relation to Article 7(3)(d) (vocational training), Regulation 6 provides that the status is to be retained "except where he or she is involuntarily employed, he or she takes up vocational training relating to the previous employment": this is somewhat ambiguous wording, but it can be read to conform to the requirements of the Directive.

In relation to the right of permanent residence:

- Regulation 13 provides for the entitlement to permanent residence in the State of Union citizens no longer working in the State and their family members (Article 17 of the Directive). The right is stated to be enjoyed by a qualifying person "whether or not he or she has been resident in the State for a continuous period of 5 years". this is somewhat broader than the derogation provided for in Article 17(1).
- In relation to workers or self-employed persons who work in another Member State whilst retaining their residence in the host Member State (Article 17(1)(c) of the Directive), Regulation 13(4) envisages return to the State "at least once a week": however, no reference is made to such a return "as a rule", which could lead to inflexibility.

Regulations 19 to 23 implement the provisions of the Directive relating to restrictions on the right of entry and the right to residence on grounds of public policy, public security or public health. In general, these appear to comply with the requirements of the Directive.

14 In practice, non-national residents will register for the PPSN number, giving entitlement to social welfare allowances.

15 See note 4.

Departure

Background

There have been no reported cases of departure of persons covered by the free movement rules in recent years. Indeed, there appears to have been only one case in the past few years known to the Department of Justice, and this did not involve formal deportation proceedings.

Persons failing to qualify as free-movers will cease to be covered by the 1977 and 1997 Regulations. Those Regulations also provide for departure, and deportation, on grounds of public policy or public security (or, before the grant of a first permit, public health grounds). The Regulation appear generally to conform to Community law requirements.

Text(s) in force

Directive 2004/38 and the European Communities (Free Movement of Persons) Regulations 2006
Regulations 19 to 23 of the 2006 Regulations[16] implement the provisions of the Directive relating to restrictions on the right of entry and the right to residence on grounds of public policy, public security or public health. In general, these appear to comply with the requirements of the Directive. A number of specific points may be made:

- There are very detailed provisions on removal from the State and on the making of exclusion orders.
- In implementing Article 28(1), Regulation 20(3)(a) limits the considerations to be taken into account before taking an expulsion decision to those examples listed in the Article 28(1).
- In relation to the expulsion of minors, Regulation 20(6)(c) implements Article 28(3)(b) in referring to expulsion as being necessary in the best interests of the child. However, no express reference is made to the 1989 UN Convention on the Rights of the Child.

Miscellaneous

In light of the requirement of habitual residence, in effect since 1 May 2004, a person – whether a Community or third-country national – who is not eligible for benefit will not be left destitute, but will, if he or she is otherwise not entitled to stay in Ireland, be able to avail of voluntary return. The requirement of habitual residence is discussed further in Chapter X.

16 See note 4.

Chapter II
Access to employment

Text(s) in force

University College Galway (Amendment) Bill 2005
Section 3 of the University College Galway Act 1929 currently imposes a duty on the body:

> "making an appointment to any office or situation in the College, to appoint to such office or situation a person who is competent to discharge the duties thereof through the medium of the Irish language: provided a person so competent and also suitable in all other respects is to be found amongst the persons who are candidates or otherwise available for such appointment".

In practice, it appears that the College offers candidates for new posts an Irish test – composed of an essay and oral examination – on a voluntary basis. Successful performance in it can result in a candidate being favoured for appointment.

In December 2004, and again in March 2005, there were reports that disappointed applicants to academic positions were taking legal proceedings in relation to the legislation. No judgment has yet appeared.

The College has made moves to have the test dropped and a request for amending the legislation has been made to the Department of Education and Science which has confirmed that it is reviewing the position.

In December 2005, the University College Galway (Amendment) Bill was introduced. It is proposed to remove the current requirement to appoint candidates competent in the Irish language and replaces it with an obligation to ensure that strategic development plans of the University contain a provision for the delivery of education through the medium of Irish. The President and governing authority of the University are obliged to ensure that this aim is implemented.

On 22 February 2006, the University College Galway (Amendment) Act 2006 was enacted along the lines proposed in the Bill.[17]

Miscellaneous

The large number of migrants from Poland and elsewhere, and widespread reports of low wages and exploitation, has led to calls for the work permit system for nationals of the new Member States to be reintroduced. These calls have been resisted by the Irish Government. See, generally, Chapters VII and VIII.

17 No. 1 of 2006. http://www.oireachtas.ie/documents/bills28/acts/2006/A106.pdf.

Chapter III
Equality of treatment on the basis of nationality

Background

Equality Legislation

The statutory framework to combat discrimination in Ireland largely consists of three Equality Acts – the Employment Equality Act 1998, the Equal Status Act 2000 and the Equality Act 2004.

The Equality Act 2004,[18] enacted on 18 July 2004, contains a serious of amendments to the Employment Equality Act 1998, the Pension Act 1990 and the Equal Status Act 2000, seeking to give effect to the 2000 Employment and Race Equality Directives. In line with these Directives, amendments to the 1998 Act will allow positive measures to be taken to prevent or compensate for disadvantages linked to grounds such as race (including nationality), supplementing the existing grounds of gender, disability, age and membership of the Travelling community.

The Explanatory Memorandum to the Equality Bill 2004 made it clear that it was intended to preserve the comprehensive and multi-ground approach to equality found in the 1998 and 2000 Acts "by transposing the Directives in a way which, where possible and appropriate, applies their provisions to each of the nine grounds and to both employment and service provision areas". The structure of the older Acts has thus been retained with amendments made on an Section by Section basis: it is regrettable that the opportunity was not taken to produce new consolidated legislation. Detailed commentary on shortcomings in implementing the Directives is to be found in the Ireland Country Report on Measures to Combat Discrimination.[19]

The Social Welfare (Miscellaneous Provisions) Act 2004 has amended the Pensions Act 1990 to give effect to the 2000 Directives in so far as they relate to occupational pensions.

Conditions of Employment

Irish law endorses the principle of non-discrimination in relation to the treatment of workers, whether they come from Ireland, the old 15 EU Member States, the new 10 Member States, the other EEA Member States or from third countries.

As might be expected, differential treatment exists in relation to entry for the purposes of employment, where a broad distinction may be drawn between privileged EU/EEA nationals, privileged third-country nationals (including Turkish workers) and a residual class of third-country nationals. Such differences will continue once the proposed "green card" system proposed in the Employment Permits Bill 2005 comes to pass (see Chapter VII, below). Such differential treatment in relation to access is not in itself antithetical to the idea that, once employed, there should be equality in treatment as regards pay and other conditions of employment.

A key provision on equality, introduced "for the avoidance of doubt", is contained in Section 20 of the Protection of Employees (Part-Time Work) Act 2001 which provides that a series of enactments conferring rights on an employee applies, and shall be deemed always to have applied to, a posted worker (within the meaning of Directive 96/71) and

> "a person, irrespective of his nationality or his place of residence, who
> i. has entered into a contract of employment that provides for his or her being employed in the State;
> ii. works in the State under a contract of employment; or
> iii. where the contract has ceased, entered into the contract of employment or worked in the State under a contract of employment,
> *in the same manner, and subject to the like exceptions not inconsistent with this subsection, as it applies and applied to any other type of employee*" (emphasis supplied).

18 No. 24 of 2004

19 Authored by Shivaun Quinlivan. Published on the European Commission's website. Given the complexity of the legislation and the Directives, it has not been possible for the present reporter to form a critical view of the Irish measures.

The full range of employee protection legislation thus formally applies to foreign workers, posted or otherwise, and irrespective of origin.

During 2005, and continuing into 2006, there were widespread concerns that, as a matter of practice, the equality principle was not being applied to third-country national workers and to workers from the new Member States (in particular, Poland and the Baltic States). These cases are considered in Chapters VII and VIII, below.

Social Advantages

The application of the equality principle has also arisen in relation to the application of the "habitual residence" test introduced in 2004 for access to social welfare payments. This is discussed in Chapter X, below.

Text(s) in force

Directive 2004/38 and the European Communities (Free Movement of Persons) Regulations 2006

Regulation 18 of the European Communities (Free Movement of Persons) Regulations 2006[20] contains provisions on entitlements implementing the equal treatment provisions in Article 24 of the Directive:

- Equal treatment with Irish citizens is assured in relation to rights of travel in or to or from the State, access to employment and other economic activity, access to education and training, the receipt of medical care and services and "other entitlements" (a "catch-all" category).
- Reflecting Article 24(2) of the Directive, entitlement to social welfare benefits is not available for three months after entry (or a longer period in the case of a job-seeker). However, this limitation does not apply to workers, self-employed persons, or persons who retain such a status and their family members.
- Regulation 18 also implements Article 24(2) of the Directive in relation to maintenance grants for students.
- Regulation 18(3) makes it clear that persons covered may be asked to provide the relevant residence document or evidence of application in order to exercise an entitlement, but that failure to do so may not of itself be used as a reason to refuse an entitlement to a person. This appears to comply with Article 25(1) of the Directive, but unfortunately does not state in terms that "entitlement to rights may be attested by other means of proof".

Garda Siochána

Section 52 of the Garda Siochána Act 2005[21] provides for the appointment of members of the Police Service of Northern Ireland (PSNI) to ranks in the Garda Siochána not below the rank of superintendent. Candidates are to compete in a merit-based selection procedure with other applicants for appointment to the rank concerned. It is provided that, in determining the eligibility of a member of the PSNI to apply for appointment, appropriate recognition shall be given to the rank, experience and qualifications that would be required for appointment to an equivalent rank in the PSNI.

20 See n. 4.

21 No. 20 of 2005. (http://www.oireachtas.ie/documents/bills28/acts/2005/2005.pdf .

Chapter IV
Employment in the public sector

Background: Irish Nationality and Language Requirements

This section provides an overview of the current situation in relation to the nationality condition for access to public employment. In doing so, I have provided information in relation to specific Irish nationality requirements and Irish language requirements, which could be tantamount to a nationality requirement. What follows is an updated version of material appearing in the 2002-2003 and 2004 Reports.

The Civil Service

Nationality. There is no specific legal provision requiring the possession of Irish nationality for access to posts in the Civil Service.

Section 17 of the Civil Service Regulation Act 1956 provides that the Minister for Finance shall be responsible for the regulation and control of the Civil Service as well as the fixing of the terms and conditions of service of civil servants and the conditions governing their promotion. The Minister may, for this purpose, make such arrangements as he thinks fit and may cancel or vary such arrangements.

In relation to the holding of competitions, Section 16 of the Civil Service Commissioners Act 1956 provided that, subject to the consent of the Minister, the Commissioners might, in making regulations in respect of competitions, provide, amongst other matters, for "the confining of the competition to citizens of Ireland". It does not appear that any such regulations have been made. This Act has been repealed by the Public Service Management (Recruitment and Appointments) Act 2004, which confers responsibility for running competitions on the Public Appointments Service. Section 58 makes it plain that the Minister for Finance is responsible for all matters relating to recruitment in the Civil Service, including "eligibility criteria".

Recruitment to *professional* posts (for example, engineers, accountants and lawyers) is fully open to nationals of the other EU Member States.

Recruitment to *administrative* posts is in principle open to nationals of the other EU Member States. However, there are certain posts in areas considered to be essential to the national interest (such as the diplomatic service and security posts) which are restricted to Irish nationals. There is no published list of such posts. However, when these jobs are advertised, it is specified that they are only open to Irish nationals. These include posts in the Department of the Taioseach (Prime Minister), the Office of the Revenue Commissioners, the Department of Defence, the Department of Justice, Equality and Law Reform and the Department of Foreign Affairs.

Language. Section 58 of the Public Service Management (Recruitment and Appointments) Act 2004 makes it clear that the Minister is responsible for all matters relating to recruitment in the Civil Service, including "the use or knowledge of the Irish language in the Civil Service or any part of it". Since all citizens have the right to conduct their business with Government through Irish or English, there have to be sufficient staff available in the Civil Service to provide a service to Irish speakers. In most open competitions, applicants invited to interview may, take an optional language test. Candidates who satisfy the Public Appointments Service that they are proficient in both Irish and English will be awarded extra marks which could result in a higher ranking for a competition.

Certain posts – such as posts in the Department of Rural, Community and Gaeltacht Affairs – will require candidates to be fluent in both Irish and English.

The Health Service

*Nationality***.** There are no nationality requirements for access to employment in the Health Service.

Irish Language. There is no general requirement that applicants for jobs in the Health Services speak Irish. However, all citizens have the right to conduct their business with Health Boards through Irish and, in order to ensure that there are sufficient staff available to provide a service to Irish-

speakers, applicants invited to a competitive interview may have an assessment made of their ability to communicate in English and in Irish.

Defence Forces

Nationality. Irish citizenship, or specific approval of the Minister for Defence, is required for recruitment to commissioned officer ranks in the Irish Defence Forces.[22] It is necessary to be ordinarily resident in Ireland in order to enter below this level.

Irish Language. There is no statutory requirement for those seeking access to commissioned officer or other ranks to have Irish language qualifications. All members of the Defence Forces are to be instructed in giving and receiving, in the Irish language, such commands and directions as are necessitated by the routine tasks of their ranks and appointments.

Education Sector

Nationality. There are no nationality requirements for recruitment.

Language. Teachers trained in Ireland will possess Irish language qualifications. In relation to teachers trained in another EU Member State, a distinction is drawn between those seeking appointment as teacher in mainstream national schools and those seeking appointment in second level schools. Mention should also be made of the position in the universities, especially University College Galway.

Mainstream national schools.[23] Teachers trained in another EU Member State, whose qualifications have been assessed and accepted by the Department of Education and Science, but who do not possess an appropriate Irish language qualification will be granted a five-year period of *provisional recognition* to teach in national schools. During this period these teachers will be required to work towards meeting the Department's Irish language requirements and must, where necessary attend training courses to prepare for the Irish language examination, *Scrúdú Cáilíochta sa Ghaeilge* ("S.C.G"). To satisfy the Irish language requirements, applicants must pass the S.C.G and provide certification that they have resided in the *Gaeltacht* (an Irish-speaking area) while attending an approved three-week course or its aggregated equivalent. Although teachers with provisional recognition may be appointed as permanent, temporary or substitute teachers, the period of employment may not exceed the period granted for provisional recognition. The basis for the requirement is that teachers in national schools should be qualified to teach the range of primary school subject through Irish. Where a teacher with provisional recognition is employed, the school must show that appropriate arrangements have been made to teach the Irish curriculum to the teacher's class: the Department has made in clear that "under no circumstances should such a class be deprived of competent Irish language tuition".

Since September 2004, all current and past candidates for the S.G.C. have been granted a two-year extension to the normal five-year period and new applicants may request such an extension where they have failed to pass all the S.G.C. modules within the five-year period.

Full recognition is granted to those teachers who have already satisfied the language and all other requirements. This currently applies to teachers who have successfully completed certain courses with an Irish-language content in St. Mary's College, Belfast.

The above rules apply to "mainstream" national schools. A scheme of "restricted recognition" – designed to ensure that the teacher qualified under another jurisdiction cannot teach in a mainstream class – applies to certain categories of special schools and classes.

Second Level Schools. The requirement that all second level teachers should have passed the oral component of the *Ceard Teastas Gaeilge* – with teachers coming from other Member States allowed a period of three years after appointment to achieve this – was removed for the generality of second level teachers in June 1999.[24] Teachers of Irish and those employed in schools in the Gaeltacht and where Irish is the medium of instruction continue to be required to be fully proficient in Irish. This

22 Section 41 of the Defence Act 1954.

23 See Department of Education and Science, Circular letter 25/00.

24 See Minister's Press Release of 24 June 1999, reprinted in Department of Education and Science "Registration Council: Application for Recognition of Qualifications for the Purposes of registration as a Secondary Teacher".

change was seen as facilitating the mobility of teachers between the Republic and Northern Ireland, to the benefit of teachers and pupils and to the education systems in both jurisdictions.

The Marine Sector

There is no Irish nationality condition for access to the posts of captain and first officer of an Irish-flagged ship.

Recognition of Diplomas for Access to the Public Sector

The Public Appointments Service (formerly the Office of the Civil Service and Local Appointments Commissioners) operates a non-published procedure for the recognition of diplomas. It is sufficient for a copy of the diploma itself to be provided. Contact will be made with appropriate professional bodies and colleges and a decision will be taken after taking all factors into account. It appears that some attempt is made to ensure uniformity of treatment. In case of rejection, there is the possibility of an ex gratia administrative appeal. There does not appear to have been any recourse to the courts in relation to a refusal to grant recognition.

It is very difficult to judge whether this raises difficulties under free movement rules. However, the lack of transparency and predictability does cause concerns.

Text(s) in force

Police (An Garda Síochánà)
There has been no formal nationality or residence requirement for entry to An Garda Síochánà, the Irish police service. However, the current requirement to hold a qualification in both Irish and English at Leaving Certificate level, or equivalent, has effectively limited entry to Irish citizens.

The position has changed radically as a result of the Garda Síochánà (Admissions and Appointments) (Amendment) Regulations 2005[25] made in September 2005. The language requirement has been replaced with a requirement to hold a qualification to hold a qualification in two languages, at least one of which is to be Irish or English.

A new nationality and residence condition has also been introduced. Entry will now be open to:

i. nationals of an EU Member State, other EEA State or the Swiss Confederation; and
ii. nationals of any other state who are lawfully present in Ireland and have five years lawful residence there.

In order to ensure that An Garda Síochána can deliver on its very strong commitment to delivering a service in Irish, all Garda recruits will be required to achieve an appropriate standard in Irish before becoming full members of the force and recruits who do not have an Irish-language qualification will undergo basic training in that language.

According to the Minister for Justice, Equality and Law Reform, the new changes will "open up entry to An Garda Síochána to persons in Ireland from all parts of the community and from all ethnic backgrounds. This is a hugely significant step which will help ensure that future intakes of recruits to An Garda Síochána reflect the composition of Irish society, to the benefit of the Force and the people it serves".

25 S.I No. 560 of 2005.

Chapter V
Members of the family

Text(s) in force

Directive 2004/38 and the European Communities (Free Movement of Persons) Regulations 2006

Council Directive 2004/38 has been implemented by the European Communities (Free Movement of Persons) Regulations 2006, made in April 2006. In general, the provisions of the Directive in relation to family members appear to have been correctly implemented. However, a number of specific points may be made here. It should be noted that the Regulations refer to family members defined in Article 2(2) of the Directive as "qualifying family members" and to those covered in Article 3(2) of the Directive as "permitted family members".

- Regulation 7(1), which implements Article 9 of the Directive (administrative formalities for family members who are not nationals of a Member State), provides that such a family member "who has been resident in the State for not less than 3 months shall apply to the Minister for a residence card". This provision satisfies the requirements of Article 9(2). However, it also gives the impression that a residence card cannot be applied for earlier: Article 9(1) of the Directive, in referring to a "planned period" of residence of more than three months, seems to imply that an application may be made earlier.
- Under Regulation 7(2), the issue of the residence card is subject to the Minister being "satisfied that it is appropriate to do so". This suggests an element of subjective appraisal in the process which is not foreseen in the Directive.

Deportation of Third-Country National Spouses of Irish Citizens
F(P) and F(C) v Minister for Justice (High Court, 23 January 2004). An Irish citizen was married to a Romanian national in November 2002. The Romanian national, who had arrived in Ireland under a false identity and had worked illegally, was the subject of a deportation order in May 2002 and she was deported in March 2003. The applicants sought injunctive relief and an order quashing the Minister's decision to refuse to revoke a deportation order. Relief was refused. The Court held, amongst other matters:

1. The right to reside in a particular place in the individual's choosing was not a fundamental or constitutional right of a citizen, whether married or not.
2. The husband was aware of his wife's precarious status in the jurisdiction and, following the UK *Mahmood* case (2001), Article 8 ECHR was not violated by the wife's deportation.
3. Aliens who were otherwise liable to deportation could not acquire an immunity by marrying an Irish citizen. There was no authority to support the proposition that an Irish citizen had a constitutional right under Article 41 of the Constitution to reside with his or her spouse in the jurisdiction.

Philip Fitpatrick and Claudia Fitzpatrick v Minister for Justice (High Court, 26 January 2005). This case followed on from the *F(P) and F(C)* case and involved the same parties. After deportation to Romania, Mrs. Fitzpatrick sought revocation of the deportation order and, upon the Minister's refusal, sought to quash the decision refusing revocation on the basis that he had failed specifically to address the impact of a refusal on the husband's marital circumstances and that the decision was disproportionate and irrational. The Court quashed the decision of the Minister on the basis of his failure to take into account the period during which the applicants lived together as a married couple in the State.

Miscellaneous

Guidelines on Documentation Required for Applying for a Visa to Ireland
In November 2005, the Department of Justice, Equality and Law Reform issued lengthy guidelines on documentation required for applying for a visa.[26] These guidelines set out the minimum documenta-

26 http://www.justice.ie/80256E01003A21A5/vWeb/flJUSQ678E4G-en/$File/VisaAppDocs.pdf.

tion required with all visa applications and specify additional requirements for particular categories of visas.

In relation to visa applications generally, it is provided, amongst other matters, that:

- the fully completed form must be signed by the applicant, save where he/she is under 18 where the parent's may sign on the applicant's behalf;
- all documents submitted must be in English, or where in another language, a notarised translation must accompany the original document;
- at the time of the application, the passport must be valid for 6 months after the date on which it is proposed to leave Ireland. For long-term stays, it is advised that the passport be valid for at least 12 months;
- all visa applicants must be able to show evidence that they can support themselves during their stay in Ireland without recourse to public funds or resources. A detailed bank statement showing sufficient funds – and covering the immediate 6-month period prior to submitting the application should be submitted. Lump-sum lodgements made in the run-up to the application are not taken into account;
- details should be included of any other family members presently in Ireland, or any other EU State;

In relation to the "Spouse of Irish/EU Visa", which covers spouses of Irish nationals and nationals of other EU Member States, the additional requirements are as follows:

- a fully completed and signed application form;
- a passport valid for at least 12 months;
- a clear copy of the other spouse's passport;
- a marriage certificate;
- for recent marriages, and marriages where the couple have not yet resided together, the applicant is asked to give a full account of the relationship history – when and where the couple met and evidence of this such a visas, entry/exit stamps on passport of Irish/EU national;
- evidence of Irish/EU national's employment in Ireland (P60 form, payslips);
- if other spouse is not in employment, details of how the applicant intends to support himself herself; and
- accommodation details.

The guidelines also contain further information relating to visa decisions, rights of appeal and arrival in the State.

Chapter VI
Relevance, influence, follow-up of recent Court of Justice judgments

The Chen Case (Case C-200/02) – Free Movement Rights

In the *Chen* case, the European Court of Justice addressed the question of the free movement rights of a child born of Chinese parents in Northern Ireland (and hence entitled to ius soli Irish citizenship) and her Chinese-national mother and made it clear that Irish citizen children born in the North and their carer parents could, where self-sufficient, enjoy rights of free movement in the UK.

In May 2004, Advocate General Tizzano had delivered his Opinion in the *Chen* case, concluding that a child of non-national parents born in Northern Ireland and hence entitled to Irish citizenship and enjoying, through her parents, sufficient resources to ensure that she would not become a burden on the finances of the host State, was entitled as a matter of Community law to reside in Northern Ireland. The need to give that right useful effect, as well as the prohibition of discrimination on grounds of nationality in Article 12 of the EC Treaty, entitled the non-national mother to a long-term residence permit. It was, to say the least, potentially embarrassing to the Irish Government to retain a citizenship regime, with such Community law consequences in another Member State. Indeed, as the Advocate General pointed out: "[i]n order to avoid such situations, the criterion [used by the Irish legislation for granting nationality] could have been moderated by the addition of a condition of settled residence of the parent within the territory of Ireland".

Such concerns, which many thought exaggerated or misplaced, resulted in an amendment to the Constitution in 2004 removing the *constitutional* entitlement to citizenship of those born in the island of Ireland where neither parent is an Irish citizen or entitled to be so. In June 2004, a Bill to amend Article 9 of the Constitution was passed by the people in a referendum. The resulting Twenty-Seventh Amendment of the Constitution Act[27] was designed to remove the *constitutional* right to entitlement to Irish citizenship of persons born in the island of Ireland born after the date of enactment of the enactment of the Act who do not have, at the time of birth, at least one parent who is an Irish citizen or entitled to be an Irish citizen. Such persons are to be entitled to Irish citizenship only as provided by law.

The Irish Nationality and Citizenship Act 2004,[28] coming into effect on 1 January 2005, has introduced a residence requirement to be satisfied by certain non-national parents before children born in the island of Ireland can benefit from ius soli citizenship. This has effectively removed the opportunity for persons in the position of Ms Chen and her mother to avail of free movement rights under Community law.

The Collins Case (C-138/02) – Job-Seeker's Allowance

In the *Collins* judgment the Court of Justice established that it could be regarded as legitimate for a Member State to grant a job-seeker's allowance only after it is possible to establish that a genuine link exists between the job-seeker and the host Member State's employment market. The existence of such a link could be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State.

A residence requirement is, in principle, appropriate to ensure such a link, provided it is proportionate. Specifically:

a) its application by the national authorities must rest on clear criteria known in advance; and
b) provision must be made for the possibility of a means of redress of a judicial nature.

In any event, any residence requirement must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.

The Court specifically ruled as follows:

> "The right to equal treatment laid down in … Article 39(2) EC … , read in conjunction with … Articles 12 EC and 17 EC … , does not preclude national legislation which makes entitlement to

27 http://www.oireachtas.ie/documents/bills28/acts/2004/a27th04.pdf.
28 No. 38 of 2004 (http://www.oireachtas.ie/documents/bills28/acts/2004/a3804.pdf).

a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the person concerned and proportionate to the legitimate aim of the national provisions."

The *Collins* judgment has been used to justify the introduction of a habitual residence requirement for a variety of social assistance payments. This is discussed in Chapter IX below. However, it should be noted here that the new Irish regime covers a far wider range of payments than a jobseeker's allowance and its application to workers from other Member States is problematical.

Commission v. Denmark (Case C-464/02) – Company Car Taxation

In *Commission v Denmark*, the Court held that Denmark had failed to fulfil its obligations under Article 39 of the EC Treaty insofar as its legislation and administrative practice:

1. did not allow workers resident in Denmark and employed in another Member State in work which is not their principal employment to use for business or private purposes a company vehicle registered in that other Member State where the employer is established;
2. allowed employees resident in Denmark and employed in another Member State to use for business purposes, or business and private purposes a company vehicle registered in that other Member State in which the employer has a registered office or principal establishment, the vehicle neither being intended to be essentially used in Denmark on a permanent basis nor being actually so used, only subject to the condition that the employment with that employer is their main employment and that a tax is paid for that purpose.

The position in Ireland as regards vehicle registration requirements for company vehicles registered in another Member State (ordinarily the UK) used by workers resident in Ireland is as follows:

1. All motor vehicles in the State are required to be registered and are subject to an excise duty – Vehicle Registration Tax (VRT);[29]
2. The legal basis for a *temporary* exemption from registration is provided in Section 135 of the Finance Act 1992. This states:
   "A vehicle which is temporarily brought into the State may be exempted by the Commissioners from the requirement to be registered, in such manner and subject to such conditions, restrictions and limitations as the Minister may prescribe by regulations … if the vehicle is:
   brought into the State by a person established outside the State for his private or business use;
3. 1993 Ministerial Regulations prescribe the criteria for eligibility for exemption from the requirement to be registered with the Revenue Commissioners where a vehicle is temporarily brought into the State.[30] It is stated, in Regulation 5(1), that:
   "The exemption under Section 135(a) of the Act shall be granted for a period not exceeding 12 months from the date upon which the vehicle concerned was brought into the State or such longer period as the Commissioners in their discretion may allow in any particular case, if the vehicle
   a) is owned by or registered in the name of a person established outside the State,
   b) is not disposed of or hired out in the State or lent to a person established in the State, and
   c) whilst in the State, is not driven by a person established in the State save with the permission of the Commissioners."
4. According to a leaflet published by the Revenue Commissioners,[31] a State resident who is employed by an employer established in another Member State may, on application to the Revenue Commissioners, be approved to use a Category A vehicle (cars, minibuses and other smaller motor vehicles) or a motor cycle registered in another Member State (either owned or leased by the employer) for business/private use in the State. However, this vehicle must be used *primarily* in

29 Section 131 and 132 of the Finance Act 1992 (No. 9 of 1992). (http://www.irishstatutebook.ie/ZZA9Y1992.html).

30 Temporary Exemption from Registration of Vehicles Regulations, 1993 (SI No. 60 of 1993). (http://www.irishstatutebook.ie/ZZSI60Y1993.html).

31 Vehicle Registration Tax: Foreign Registered Vehicles Temporary Exemptions – VRT 2 (as amended 28 June 2006) (http://www.revenue.ie/leaflets/vrt2.htm).

the other Member State. (Application forms for this temporary exemption are available from Vehicle Registration Offices).

It is clear from the *Denmark* judgment that the Member State of the employee's residence would be entitled to insist on registration and payment of tax where the vehicle is to be used permanently in that Member State. In this context, it seems to be acceptable that the exemption in Ireland applies only where the vehicle is temporarily brought into the State. However, the requirement that the vehicle be used "primarily" in the other Member State does seem to suggest that the exemption will not be applicable where the employee is not using the vehicle mainly in the other Member State, which could be the case if the employment in the other Member State is not the employee's *principal* employment (this clearly raises a compliance issue). Further possible difficulties are that the system is predicated on the discretion of the Revenue Commissioners and that the relevant employees must obtain approval.

Chapter VII
Policies, texts and/or practices of a general nature with repercussions on free movement of workers

Immigration and Residence Bill

In June 2002, the Government committed to prepare a new Immigration and Residence Bill to consolidate legislation in the area and provide for future developments. In April 2005, the Department of Justice, Equality and Law Reform issued a discussion document containing outline policy proposals for an Immigration and Residence Bill which will:

> "seek to review, amend, consolidate and enhance the current body of legislation which dates from the Aliens Act 1935. In general, the Bill will not deal with the area of asylum, an area where policy is well-developed and where legislation has been substantially revised in recent times in the Refugee Act 1996 and subsequent amendments. However, certain areas where the immigration system and the asylum process interact, particularly in the area of removals, will be dealt with in the proposed legislation.

No Bill had been published by the time of writing this Report.

Immigration for Employment

The Current Position

Under Section 2 of the Employment Permits Act 2003, a non-national may not be employed except in accordance with an employment permit granted by the Minister. Penalties apply to non-nationals who work, and those who employ them, without such a permit. The requirement does not apply to refugees, those entitled to enter and be employed in the State pursuant to the European Communities Treaties and those permitted to remain by the Minister for Justice without the need for an employment permit.

The work permit system is administered by the Department of Enterprise, Trade and Employment[32] which distinguishes between two main methods for acquiring permits. First, the standard Work Permit can be applied for by employers in Ireland, who are required to have demonstrated that they have made every attempt to employ an EEA national – and Accession State nationals. The Minister for Enterprise, Trade and Employment has designated, on a rolling basis, certain occupational sectors as ineligible for work permit application purposes, reflecting the belief that these jobs can be filled by workers from the EEA and Accession States. Those wishing to employ workers in eligible occupational sectors must be registered with the State employment agency – FÀS – for a four week period to see if the position can be filled by an EEA/Accession State worker and it must be shown that every effort has been made to source nationals from these States. Second, there is the Working Visa/Work Authorisation scheme which is designed to attract third-country nationals to sectors where skill shortages are acute – covering information technology workers, construction professionals and medical/healthcare professionals. Applications for such workers can be made and processed at Irish embassies and Consulates abroad.

A third type of employment permit is the intra-company transfer facility, which allows companies to bring in senior personnel from overseas companies belonging to the same group to an Irish undertaking to fulfil a specific role on a temporary basis. Since October 2002, this has been granted on a case-by-case basis.

In February 2004, a Spousal Work Permits Scheme was introduced giving greater ease of access to employment for spouses of certain categories of non-EEA employees in the State. The new arrangements do not remove the requirement for a work permit for eligible spouses, but facilitate access to employment by: (a) not requiring the employer to advertise the job with FÁS (the State employment

32 See, generally, the material in the DETE Work Permits section which is updated on a regular basis (http://www.entemp.ie/labour/workpermits/).

service); (b) allowing access to jobs (e.g., child minders) that would not otherwise be eligible for work permits; and (c) waiving the application fee.

Economic Migration: Government Policy

The approach of the Irish Government to economic migration has been summarized in the 2005 Report of the Department of Enterprise, Trade and Employment:[33]

> "In order to continue moving forward in the context of a knowledge-based, innovation-driven economy, we must ensure that we have an adequate supply of labour to sustain our economic growth. If we are to continue to increase the number of people in the workplace, in the context of a decreasing number of young people coming into the labour market, we will need to adjust our economic migration policy in order to address identified labour shortages and skills needs. While economic immigration is not a substitute for up-skilling and training the resident population, migration, if managed properly, can contribute positively to the economy. The Expert Group on Future Skills Needs/Forfas report, launched during the year, identified the areas where skills gaps occur across the economy and examined in detail the potential of European Economic Area (EEA) countries to meet skills demand in Ireland, concluding that the ten EU accession countries offer the best potential for attracting workers in terms of labour availability, mobility and skill level."

The Employment Permits Bill 2005

The Employment Permits Bill 2005[34] is currently being debated by the legislature. It provides for a new employment permits system involving the establishment of a Green Card system for occupations where there are skills shortages, a re-established Intra-Company Transfer Scheme for temporary transnational management transfers and a Work Permit Scheme for a restrictive list of occupations where there is labour rather than skills shortage. The Bill also contains a number of important new protections for migrant employees. Employment permits will be granted to the employee rather than to the employer, and the employee may now apply for a permit. The permit will contain a statement of rights and entitlements of the migrant worker, including the right to change employment by obtaining a permit for another employer. Employers will be prohibited from deducting expenses associated with recruitment from pay and from retaining personal documents belonging to the employee. Breaches of the new legislation will attract significant fines and, in the case of individuals, prison sentences.

Employment of non-EEA national students

From April 2000, all non-EEA nationals with permission to study in Ireland were, until recently, entitled to take up casual employment. This was abused by some education providers who offered courses to such nationals as a means of enabling access to the Irish labour market. Moreover, after the accession of the 10 new Member States in May 2004, it was considered that there was a plentiful supply of labour available to Irish employers and recognised that preference had to be given to nationals of the EU Member States in access to employment. In December 2004, the Minister for Justice, Equality and Law Reform announced new arrangements, taking effect from 18 April 2005, preventing new students from outside the EU, the EEA or Switzerland from access to employment unless they are attending a full time programme of at least one-year's duration leading to a qualification recognised by the Minister for Education and Science.[35] The Department of Education and Science has issued a note setting out provisional arrangements until March 2006, pending emerging developments in relation to the

33 http://www.entemp.ie/publications/corporate/2005/AnnualReport2005.pdf. The Report of the Expert Group on Future Skills Needs referred to in the extract is to be found at: http://www.skillsireland.ie/press/reports/pdf/egfsn051027role_of_migration_webopt.pdf.

34 Bill No. 19 of 2005. As passed by both Houses of the Oireachtas, the Bill is available at http://www.oireachtas.ie/documents/bills28/bills/2005/1905/b19c05d.pdf. It has not yet been enacted.

35 These requirements were last updated in March 2006. See http://www.justice.ie/80256E01003A21A5/vWeb/flJUSQ673KPF-en/$File/Feb06StudentVisa.pdf.

implementation of recommendations in the Report on the Internationalisation of Irish Education Services.

Application of Employee Protection Legislation

The Current Position

Irish law endorses the principle of non-discrimination in relation to the *treatment* of workers, whether they come from Ireland, the old 15 EU Member States, the new 10 Member States, the other EEA Member States or from third countries.

As might be expected, differential treatment exists in relation to entry for the purposes of employment, where a broad distinction may be drawn between privileged EU/EEA nationals, privileged third-country nationals (including Turkish workers) and a residual class of third-country nationals. Such differences will continue once the proposed "green card" system proposed in the Employment Permits Bill 2005 comes to pass. Such differential treatment in relation to access is not in itself antithetical to the idea that, once employed, there should be equality in treatment as regards pay and other conditions of employment.

A key provision, introduced "for the avoidance of doubt", is contained in Section 20 of the Protection of Employees (Part-Time Work) Act 2001 which states that a series of enactments conferring rights on an employee applies, and shall be deemed always to have applied to, a posted worker (within the meaning of Directive 96/71) and

> "a person, irrespective of his nationality or his place of residence, who
> - has entered into a contract of employment that provided for his or her being employed in the State;
> - works in the State under a contract of employment; or
> - where the contract has ceased, entered into the contract of employment or worked in the State under a contract of employment,
>
> *in the same manner, and subject to the like exceptions not inconsistent with this subsection, as it applies and applied to any other type of employee*" (emphasis supplied).

The full range of employee protection legislation thus formally applies to foreign workers, posted or otherwise, and irrespective of origin.

Controversial Cases

The principle of equality of national and non-national workers in relation to pay, and other terms and conditions of employment, has featured in a number of well-publicised and controversial cases.[36] Two of these are briefly addressed here.

The first case involves the Turkish multinational GAMA. The facts of the case are still a matter for some speculation. Although the activities of GAMA in relation to Turkish workers posted to Ireland have been criticised by Government ministers and Unions, publication of the report of the Labour Inspectorate is still blocked by court injunction, so the precise nature of GAMA's failings remains unclear. It is sufficient here to note that it was alleged that posted Turkish construction workers had been paid at substantially below the national rate and that they were not paid for their overtime. It then transpired that a part of the worker's wages had been paid into a Dutch bank account, of which at least some of the workers concerned seemed unaware. A solution of sorts appears to have been brokered by means of executive action, with the Department of Enterprise, Trade and Employment refusing the grant of further work permits, negotiating with the Dutch bank concerned and securing undertakings that Turkish workers would not be sent home pending resolution of the difficulties. Whatever the facts of the matter, which may never be finally established, the GAMA incident displayed the lack of resources and inadequate staffing of the Labour Inspectorate, and measures are being taken to improve the inadequate enforcement regime.

36 There has been widespread debate in the media, in the trade union movement and in the legislature on the GAMA, Irish Ferries and other cases. Much of this has been highly political in nature and it is not proposed to summarise all of the elements of the debate here. It should also be noted that – at least in the view of the author of this Report – much of what is pure speculation has passed for fact, especially in the GAMA case.

The second case involved Irish Ferries. Over the past couple of years, Irish Ferries has developed into "The Low Fares Ferry Company" and its detractors might assert that this extends to low wages. In making the transition, it has sought to outsource the crewing of the French route, it has on occasion paid extremely low rates to third country nationals "on contract" and, to cap it all, has sought to "re-flag" in Cyprus, taking advantage of the EU rules on establishment, and effectively removing the right to impose Irish employment rules. Towards the end of last year, there were large Union-organised popular demonstrations, under the banner of halting the "race to the bottom". However, it is generally accepted that little can be done in legal terms to prevent re-flagging, though the Government has, in the context of its Social Partnership discussions has lamented the approach taken by Irish Ferries in terms of industrial relations.[37]

More generally, there have been concerns – expressed in particular by the trade unions – that there is a "race to the bottom" in relation to employee protection rights. There have been widespread reports that nationals from the new Member States enjoy less favourable terms and conditions of employment than host nationals.

Although it is difficult to conclude that Irish law and policy has encouraged a "race to the bottom", it is clear from the examples given above that some employers are attracted by the idea of lower-cost labour and have breached, or been able to circumvent, the equality rule. In addition to straightforward discrimination, de facto employees have been treated as "self-employed" and workers employed by sub-contractors are often disadvantaged. The overarching principle of equality – which is still endorsed by "official" Ireland, the Union and by a good number of "right-thinking" persons - has also undoubtedly been undermined by enforcement difficulties. The Labour Inspectorate has been undermanned. Migrants themselves have been insufficiently informed and vulnerable.

The Social Partnership Agreement 2006-2015

In the context of Social Partnership, it has been recognised that there is a need to strengthen employment protection measures, to improve inspection and enforcement systems, to focus on the position of vulnerable workers from abroad and thereby "to secure an appropriate balance between employment protection and labour market flexibility".

The Ten-Year Framework Social Partnership Agreement 2006-2015[38]addresses these concerns in some detail. In summary,

> "A major package of measures has been agreed by the parties …. Including the establishment of a new statutory Office dedicated to employment rights compliance; a trebling in the number of Labour Inspectors; greater coordination among organisations concerned with compliance; new requirements in respect of record-keeping; enhanced employment rights activity; the introduction of a new and more user friendly system of employment rights compliance; increased resourcing of the system; and higher penalties for non-compliance with employment law."[39]

Family Reunification

The Department of Justice issued guidelines on 14 February 2006 entitled "Family Reunification for Workers", which deal with the visa application procedures for the spouse and dependant unmarried children of non-EEA nationals who have valid work permits/work visas and fulfil certain other conditions.[40] In applying for a visa for the purposes of family reunification, persons must be able to show that:

- They are the spouse of a "qualifying sponsor" whose marriage is subsisting on the date of the application; or

37 See, as a general indication of the Government's position, the Statement by the Minister for Enterprise, Trade and Employment on 29 November 2005 in relation to the Irish Ferries dispute (http://www. entemp.ie/press/2005/20051129a.htm).

38 Towards 2016: Ten-Year Social Partnership Agreement 2006-2015, June 2006. http://www.taoiseach.gov.ie/attached_files/Towards2016PartnershipAgreement.pdf.

39 Paragraph 12.3.

40 www.justice.ie/80256E01003A21A5/vWeb/flJUSQ6LZJJ9-en/$File/WrksFamilyReunif.pdf.

- They are the dependant unmarried child of the sponsor under 18 years; and
- The qualifying sponsor fulfils the minimum income requirement where relevant; and
- They have private medical insurance; and
- They must have a passport valid for at least 12 months from the date of receipt of the application.

Studies on Migration

The IOM Study on Migration

The International Organization for Migration (IOM) is currently carrying out a wide-ranging study of the phenomenon of migration in Ireland on behalf of the National Economic and Social Council. This will examine questions such as Irish migration trends in the international context, causes and determinants of migration, labour market performance of migrants, the economic and social effects of migration and fostering integration. The study was due to be completed in the course of 2005, but did not appear to have been completed at the time of writing (August 2006).

Nationality Law

In June 2004, a referendum approved a constitutional amendment removing the constitutional right to Irish citizenship of all those born in the island of Ireland. With the Irish Nationality and Citizenship Act 2004,[41] children of non-Irish nationals (save for UK nationals) born after 1 January 2005 will be entitled to *jus soli* citizenship only if a non-national parents has satisfied minimum residence requirements (residence in the island of Island for three out of four years immediately preceding the child's birth). This constitutional *disentitlement* to citizenship and the resulting more restrictive *jus soli* entitlement to Irish nationality reflected concerns that there had been a degree of "citizenship tourism", with non-nationals unlawfully resident in Ireland claiming residence rights on the basis of the birth of Irish citizen children and women in advanced stages of pregnancy coming to Ireland to give birth. (See, also, the discussion of the *Chen* case in Chapter VI.)

It should be noted that the new nationality regime applying to children of non-Irish nationals favours the children of UK nationals and those born of a parent entitled to reside in Northern Ireland without restriction on period of residence. The first appears to reflect the "special relationship" between the UK and Ireland and the existence of the Common Travel Area, and the second reflects the principle that it is birth on the island of Ireland that in principle confers Irish nationality. In relation to satisfying the residence requirement, it should be noted that nationals of EU Member States other than the UK, other EEA Member States and the Swiss Confederation will, on making a statutory declaration, be regarded as having been resident in the island of Ireland for the requisite period unless the contrary is proved (this puts applicants with such parents at a slight advantage to those with third-country national parents).

Ireland operated a system of post-nuptial citizenship by declaration for spouses of Irish citizens, which was abolished in 2001 subject to transitional provisions which were to come to an end in November 2005. This rights-based system, which had no Irish residence requirements, has been replaced by a naturalisation regime, stated to be in the "absolute discretion" of the Minister for Justice, which requires qualifying periods of residence in Ireland. This need for closer links with the island of Ireland reflected abuses of the declaratory procedure, with "paid for" marriages entered into to secure the passport of a EU State and the consequent rights of free movement.[42]

See, for a recent overview of Irish nationality law taking into account the 2004 Act, Handoll, J., 'Ireland', in Rainer Bauböck, Eva Ersbøll, Kees Groenendijk and Harald Waldrauch (eds.), *Acquisition and Loss of Nationality. Policies and Trends in 15 European States*, vol. 1: Comparative Analyses, vol. 2: Country Analyses. Amsterdam University Press, IMISCOE series, forthcoming 2006.

In July 2006, a number of Senate members introduced the Irish Nationality and Citizenship (Amendment) (an Garda Síochána) Bill 2006, designed to provide an entitlement for non-national members of an Garda Síochána to acquire Irish citizenship. It is too early to predict whether this will have Government and other support.

41 No. 38 of 2004. (http://www.oireachtas.ie/documents/bills28/acts/2004/a3804.pdf).
42 See Minister for Justice, Seanad Debates, 8 December 1999.

Non-National Parents of Irish Citizen Children

In its 2003 judgment in *L & O v. Minister for Justice*, which involved cases of rejected asylum seekers and asylum seekers covered by the Dublin Convention each with Irish children born in Ireland, it was held by a majority of the Supreme Court judges that non-national parents did not have the right to remain in the State by virtue of the residence rights of their Irish citizen children. The Court made it clear that where the Minister decided to deport the non-national parents – where this was in the common good on the basis of the need to preserve respect for the integrity of the asylum and immigration system – they could be accompanied by the Irish citizen child.

As a result of the 2003 Supreme Court judgment, the Minister for Justice, Equality and Law Reform decided no longer to accept applications for residency for persons on the basis of their parentage of an Irish-born (and hence Irish citizen) child. However, by mid-2004, it became clear that, of the estimated 11,000 persons subject to the possibility of deportation following the ruling, only around 1,000 had been given notice of deportation and a small number actually deported.

In January 2005, the Department of Justice, Equality and Law Reform introduced revised arrangements regarding the granting of permission to remain in the State of non-nationals who are the parent of an Irish-born child.[43] These arrangements applied only to non-national parents of a child born in the State before 1 January 2005. Under the revised arrangements, which in practice involved quite onerous information and documentary requirements, *with applications to be submitted by 31 March 2005*, successful applicants were given permission to remain legally in the State for an initial period of two years, which may be renewed for a further three years subject to conditions. Though not expressly characterised as such, these revised arrangements can be seen in terms of regularisation of a specific category of irregularly-present immigrants. In March 2006, the Department issued a notice stating that the arrangements had terminated. Details relating to the operation of the scheme were issued in May 2006.[44]

Public Perception of Recent Immigration Trends

Until relatively recently, Ireland was a country of emigration. It has been for several years a country of net immigration. In addition to nationals of other EU Member States and returning Irish nationals, a significant number of asylum-seekers have entered Ireland in recent years (though this is declining) and a growing number of persons have entered for the purposes of employment.

It is extremely difficult to get a clear view of public perceptions of the migration phenomenon. However, some indications of public attitudes appears from the results of an Irish Times/TNS mrbi poll in January 2006, which took place at a time when the Gama case and the Irish Ferries dispute, were in the public consciousness. A number of headline conclusions can be summarised here:

- A majority regard the presence of foreign workers as good for the economy and society. At least as regards non-national workers, there is little indication of racism or xenophobia.
- Only 23% of those polled believed that more foreign workers should come to Ireland. 41% believed that those here should be able to stay and no more should come in. 29% sought a reduction in the number of foreign workers.
- 78% of those polled believed that workers from the new Member States should be subject to a work permit regime.

Recent Legal Literature

Cashman, J., "Migrant Workers and the Law", (2005) 2(2) *Irish Employment Law Journal* 40. Brief overview of rules relating to access to employment by, and conditions of employment, of non-EEA nationals.

Handoll, J., "Horns of a Dilemma? Ireland, the EU and the Treatment of Migrant Workers", (2006) 100(4) *Gazette of the Law Society of Ireland* 60. Discusses the application of the equality principle to the conditions of work of migrant workers and outlines attempts to halt "the race to the bottom".

43 http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ68MNEK-en.
44 http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6PLE7P-en.

Quinn, E. & Hughes, G., *Illegally Resident Third-Country Nationals in Ireland: State Approaches towards their Solution* (ESRI/EMN study financed by the European Commission DG Justice, Freedom and Security and Department of Justice, Equality and Law Reform, Ireland.

Immigrant Council of Ireland, *Family Matters: Experiences of Family Reunification in Ireland* Dublin, 2006 (A critical analysis of Irish Government policy and procedure on family reunification, documenting the experiences of those who have sought reunification and making recommendations for change.)

Chapter VIII
EU enlargement

General

Ireland has decided to allow access to work by nationals of all eight of the acceding Member States subject to the transitional regime[45] from the date of their accession in May 2004. Section 3 of the Employment Benefits Act 2003, which was designed to tighten-up the rules on access to employment for non-nationals, provides that the requirements for employment permits will not apply to nationals of the acceding Member States after enlargement. However, it is provided that, in accordance with the Treaty of Accession, the Minister for Enterprise, Trade and Employment may re-impose the requirement for a limited period after accession, if labour market circumstances so require.

The large number of migrants from Poland and elsewhere,[46] and widespread reports of low wages and exploitation, has led to calls for the work permit system to be reintroduced. As seen above, an Irish Times/TNS mrbi poll in January 2006 showed a significant majority of those polled in favour of introducing work permits for nationals of the new Member States. This has been resisted by the Irish Government and by the European Commission, which in its recent report on the right to work of new Member State nationals has pointed to the liberalised Irish regime as a model to be followed by the Member States which have hitherto imposed restrictions.

There has been disquiet about the outsourcing by a ferry operator – Irish Ferries – of jobs formerly performed by Irish nationals to Latvian nationals being paid at lower rates. Irish Ferries has also proposed to reflag its vessels. The Irish Government appears to have concluded that, in the light of international rules relating to reflagging and the freedom to source crew-members, there is little it can do to prevent such changes. However, it should be noted that the Irish Government has decided to intervene in a case currently before the European Court of Justice, involving a Latvian company building a school in Sweden on lower rates than would be applicable to Swedish workers.

Social Assistance

It should be noted that the Social Welfare (Miscellaneous Provisions) Act 2004, which entered into force on 1 May 2004, introduced a "habitual residence" test for obtaining certain social assistance payments: this appears partly to have reflected concerns that Ireland should not attract "welfare-scroungers" from the new Member States. This is addressed in more detail in Chapter IX.

Mention should be made of a recent "scandal" surrounding the introduction of the new childcare payment, which is to be made to EU nationals (including those from the new Member States) in Ireland even where the children are resident in the country of origin. The Government has correctly taken the view that this is required as a matter of EU free movement law, though there has been some querulous debate about the cost implications especially taking into account the number of migrants from the new Member States.

Position in Relation to Bulgaria and Romania

The Irish Government favours the accession of Bulgaria and Romania to the European Union. In a meeting with the President of Bulgaria in December 2005, the Taoiseach assured him of Ireland's continuing support for Bulgaria's preparations for EU membership.[47]

In promoting the European Communities (Amendment) Bill 2006,[48] to enable the accession of the two States, the Minister for Foreign Affairs, Mr. Treacy, identified the free movement of workers as "one of the most sensitive issues surrounding the 5th enlargement. The Minister made it clear that the liberal approach taken in relation to the Member States that acceded in 2004 this would not pre-

45 That is, the acceding Member States, save for Malta and Cyprus.
46 See Chapter IX below for a consideration of the relevant statistics for immigrant workers, including those from the new Member States.
47 Department of the Taoiseach Press Release 2005.
48 Parliamentary Debates (Dáil Éireann), 10 May 2006.

judge the Government's decision in relation to Bulgarian and Romanian workers after their countries' accession to the Union. This decision would be taken closer to the date of Accession and would be based on full consideration of the relevant issues, including the prevailing labour market situation.

The Taoiseach (the Prime Minister) has been reported as indicating that the Government has an open mind on the question, but that he would "like to see the other countires doing what we did before we made up our mind on that".[49]

It is difficult to predict the stance that the Government will take on this, particularly in the run-up to the 2007 General Election, but, in view of a perceived public sentiment that such controls should be reintroduced, it seems quite possible that a less liberal approach will be taken than before. It is certain that Ireland will not introduce a liberalised regime if other Member States fail to do so.

No specific position on the issue has been publicly expressed by any of the NGOs concerned with immigration issues.

49 Irish Times, "Ahern calls on EU States to lift restrictions on migrants workers" (2 May 2006) and "Taioseach to delay move on wider EU Work Rights (9 May 2006).

Chapter IX
Statistics

General

In September 2005, the Central Statistics Office published Population and Migration Estimates for the 12 months to April 2005.[50] The total immigration flow into Ireland is estimated at 70,000 – the highest number since the series of Estimates started in 1987. 38% of immigrants were nationals of the 10 new Member States: 17% of immigrants were from Poland and 9% from Lithuania.

In 2005, the Central Statistics Office started to publish estimates of the labour force classified by nationality, ILO status and NACE Economic Sector. These figures are published as part of the Quarterly National Household Survey and are regarded as "'tentative' as the very large migration flows in recent years present a significant measurement challenge in a general purpose household survey such as the QNHS". It was, however, felt that the estimates presented provide a broadly accurate picture of the current situation and current trends (though subject to review in the results of the 2006 Census).

Relevant links to the QNHS are attached, providing data on:

- The estimated number of persons aged 15 years and over classified by nationality and ILO economic status, (http://www.cso.ie/qnhs/documents/table_a1_post_census.xls); and
- The estimated number of persons aged 15 years and over in employment (ILO) classified by nationality and NACE Economic Sector, (http://www.cso.ie/qnhs/documents/table_a2_post_census.xls).

In Q4 2005, 171,100 non-Irish nationals represented 8.6% of the total of 1,980,600 in employment, compared with nearly 7% in Q4 2004. UK nationals represented 2%, the other 14 "old" Member States represented 1%, the 10 "new" Member States represented 3.1% and "other" represented 2.4%. As compared with Q4 2004, there was a significant increase in the number of UK nationals, and a huge increase (more than double) of new Member State nationals, in employment. The number of employees coming from the other "old" Member States has only very slightly increased.[51]

The new figures are significant in the context of the current debate on "job displacement" and arguments that immigration of "low-cost" employees from the new Member States in particular is encouraging a "race to the bottom". It does appear from the sectoral data that non-nationals have taken a disproportionate share of "new" jobs in the manufacturing, "hotel and restaurant" and construction sectors. However, in the job market as a whole, unemployment has remained low at 4.4%. It thus appears that non-nationals have been able to take up new jobs in the economy without prejudicing the position of Irish nationals. There may, of course, be significant variations at local level and these figures do not measure any effect the employment of migrants may have on overall wages.[52]

This situation is set to continue. In a short report produced by AIB Global Treasury Economic Research, in response to the QNHS Q1 2006, it was noted that "non-Irish nationals … also remain an important driver of overall labour force and employment growth, with a continued strong inflow of non-Irish national workers, particularly from the EU Accession States".[53]

Repartition by sex/branch/skills-qualifications/region

See above.

50 http://www.cso.ie/releasespublications/documents/population/current/popmig.pdf.

51 Since drafting this text, the figures for Q1 2006 have appeared. There appears to be no material difference between these and the Q4 2005 figures.

52 See, generally, two important reports in February 2006 from AIB Global Treasury Economic Research, based on QNHS data, which examine the scale and sectoral distribution of non-national employment in Ireland. http://www.aibeconomicresearch.com/downloadPDF.asp?620; http://www.aibeconomicresearch.com/downloadPDF.asp?624.

53 http://www.aibeconomicresearch.com/downloadPDF.asp?675.

Trends

The Central Statistics Office has produced statistics on estimated migration classified by sex and country of destination/origin, and by sex and nationality, for 2000-2005.[54] There has been fairly consistent migration during this period in relation to persons coming from the 15 old EU Member States, though it appears to have declined in the 12 months to April 2005. There was relatively high migration for those coming from the 10 new EU Member States in 2005: it is not possible to assess any trends over the period since immigration from the 10 new Member States was – for the previous 5 years counted as "Rest of world": however, anecdotally, it is thought that, even prior to accession, there was substantial immigration from Poland and the Baltic States.

54 http://www.cso.ie/releasespublications/documents/population/current/popmig.pdf.

Chapter X
Social security

Social Insurance

The Social Welfare (Consolidated Payment Provisions) (Amendment) (No. 1) (Treatment Benefit) Regulations 2005[55] provided the basis for extending the Department of Social Affairs' Treatment Benefits Scheme, which provides a range of dental and optical benefits and supports on the basis of PRSI contributions, to customers receiving treatment in another EC Member State. The Scheme, which is based on PSRI Contributions, in 2004 benefited more than 700,000 people at a cost of more than EUR 60 million and covers Dental Benefit, Optical Benefit, contact lenses and hearing aids.

In June 2005, the Minister for Social Affairs announced that the Department's Treatment Benefits Scheme would in future offer the additional choice to qualifying customers of having the relevant treatment carried out in any of the other EU Member States.[56]

Social Welfare

Social Assistance Payments: Introduction of a "Habitual Residence" Requirement

General

Social assistance payments are means tested and may be paid to people who do not qualify for social insurance benefits. Until May 2004, EU citizens who were in Ireland and had little or no income were eligible for Unemployment Assistance or Supplementary Welfare Allowance if they satisfied the means test and, in the case of Unemployment Assistance, were genuinely looking for work.

The Social Welfare (Miscellaneous Provisions) Act 2004,[57] which entered into force on 1 May 2004, introduced a "habitual residence" condition for obtaining certain social assistance payments under the Social Welfare (Consolidation) Act 1993[58] (as amended). The relevant legislation was consolidated in the Social Welfare Consolidation Act 2005.[59]

The relevant social assistance payments are:

- Unemployment Assistance;
- Old Age Non-Contributory Pension;
- Widow's and Orphan's Non-Contributory Pension;
- Lone Parent's Allowance;
- Disability Allowance;
- Supplementary Welfare Allowance, save for exceptional and urgent needs payments;
- Child Benefits (with certain exceptions).

Certain other payments – pre-retirement allowance, blind pension, deserted wife's allowance and prisoner's wife's allowance – have not been made subject to the habitual residence condition.

No concrete test of habitual residence has been laid down in the Act. However, Section 246 of the 2005 Act provides that

> "It shall be presumed until the contrary is shown, that a person is not habitually resident in the State at the date of making his/her application concerned unless he has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date".

55 SI No. 185 of 2005, 5 April 2005.
56 Department of Social and Family Affairs, Press Release 5/6/2005.
57 No. 4 of 2004.
58 No. 27 of 1993.
59 No. 26 of 2005 (http://www.oireachtas.ie/documents/bills28/acts/2005/a2605.pdf).

According to guidelines issued by the Department of Social and Family Affairs,[60] the condition applies to applicants regardless of nationality. (It is clear, however, that the regime naturally advantages those who have been resident in other parts of the Common Travel Area, in particular the UK).

As far as the negative statutory presumption is concerned, the Department accepts that a short holiday of, say two to three weeks in each year, will be accepted as not breaching the requirement of continuous residence in the CTA. Where the negative presumption does not apply, there is no corresponding presumption that a person living in Ireland or elsewhere in the CTA is habitually resident.

The term "habitually resident" is "intended to convey some degree of permanence and is intended to refer to a regular physical presence enduring for some time, usually (but not always) beginning at a date in the past and intended to continue for a period of time into the foreseeable future". It implies a close association between the applicant and the country from which payment is claimed and relies heavily on the fact" and that the "most important factors for habitual residence are the length, continuity and general nature of actual residence rather than intention".

The decision on whether a person is habitually resident in the State is one for determination by a statutorily appointed Deciding Officer or in the case of Supplementary Welfare Allowance, an officer of the Health Board who is duly authorised to determine entitlement. The decision will be made on the basis of applying five factors set down by the European Court of Justice in deciding whether a person is habitual resident.[61] These factors, which are not exhaustive, are:

- the applicant's main centre of interest;
- length and continuity of residence in a particular country;
- length and purpose of absence from a country;
- nature and pattern of employment in a country;
- the future intention of the applicant concerned as it appears from all the circumstances.

The officers will have to regard to these five factors and to any additional information elicited by way of further enquiries. No single factor will be conclusive and the evidential weight to be attributed to each factor will depend on the circumstances of each case.

The Department has indicated that the following will/are likely to satisfy the habitual residency condition:

- Any applicant, regardless of nationality, who has spent most or all of his/her life in Ireland (*should* satisfy the condition);
- An applicant who has been present in Ireland for two years or more, works there and has a settled intention to remain in Ireland and makes is his/her permanent home (*will* satisfy the condition);
- Persons who has lived in other parts of the Common Travel Area for two years or more and then moved to Ireland with the intention of settling there (*quite likely* to satisfy the condition);
- Most applicants who have been in Ireland for more than two years prior to application (*likely* to satisfy the condition *in absence of contrary indications*).

As provided for by law, decisions of the Deciding Officer can be appealed to the independent Social Welfare Appeals Officer or, in the case of Supplementary Welfare Allowance to a Health Board Appeals Officer and if necessary subsequently, to the independent Social Welfare Appeals Office.

The Social Welfare Appeals Office is beginning to hear cases relating to the habitual residence requirement. According to its 2004 Annual Report,[62] Appeals Officers have been concerned about the adequacy of safeguards to ensure consistency of the decision-making process: for example, whether a person could satisfy the condition for the purposes of Supplementary Welfare Allowance, but not for unemployment assistance.

In one appeal, it was held that a native of a south African country seeking One Parent Family Payment should be regarded as habitually resident in Ireland where she had spent more than two years in Ireland, had worked there, her family was based there and her father and stepmother worked in Ireland. The Appeals Officer noted her statement that she intended to remain in Ireland and had hopes of

60 www.welfare.ie/publications/hrc.html.
61 See Case C-138/02 *Collins v Secretary of State for Work and Pensions* (Judgment of 23 March 2004).
62 http://www.socialwelfareappeals.ie/pubs/report2004.html. The Report for 2005 has not yet been published.

finding work. He was satisfied that the weight of the evidence and the circumstances of the case indicated that the appellant should be regarded as habitually resident in Ireland.

Social Welfare Appeals Officers have expressed concerns about the application of the habitual residence condition to the Child Benefit Scheme. The Social Welfare Appeals Office has pointed out that the condition cannot be applied for Child Benefit claimed by those claiming EEA free movement of workers rights. Concerns have also been expressed that the condition might be in breach of the UN Convention on the Rights of the Child, to which Ireland is signatory. These concerns have been passed on to the Department of Social and Family Affairs and are to be considered as part of an ongoing review of the operation of the habitual residence condition.

The position of persons entitled to payments under EU law

A guideline on the Habitual Residence Condition[63] located on the Freedom of Information section of the website of the Department of Social and Family Affairs makes it clear that persons entitled to payments under EU law do not have to satisfy the habitual residence condition.

This is the case for a number of benefits classified as "family benefits" under Regulations 1408/71 and 574/72: Child Benefit and, from 5 May 2005, One Parent Family Payment and Orphan's (Non-Contributory) Pension. An employed or self-employed person subject to Irish PRSI claiming one of these payments does thus not have to show habitual residence.

It is also made clear that a national of an EEA Member State who is employed or self-employed in Ireland and subject to the Irish PRSI system is entitled to payments classified as Family Benefits under EU law, even if his or her children are habitually resident in another EEA Member State. Such entitlement will continue even where the person concerned becomes unemployed and receives Irish Unemployment Benefit. The amount of Family Benefits payable will depend on whether there is entitlement in the other EEA Member State to Family Benefits.

It is stated that a "Deciding Officer should have due regard to EU law when deciding such cases" and that "in general EU law takes precedence over National Law".

The guideline also addresses the question of the application of the Habitual Residence Condition to EEA workers. In light of the ruling by the European Court of Justice that social benefits guaranteeing the minimum means of subsistence, such as the Irish Supplementary Welfare Allowance, fall within the meaning of "social advantage" in Regulation 1612/68, it is recognised that workers from other EEA Member States should be treated in the same way as national (Irish) workers in determining entitlement to Supplementary Welfare Allowance.

It is stated that this requirement does not apply to other social welfare payments such as Unemployment Assistance or Old Age Pension, since there are covered by Regulation 1408/71 which takes precedence over Regulation 1612/68.

Some guidance is given on the meaning of "worker" in EU law and the need to establish that the claimant is in effective and genuine employment, and is not in work "on such a small scale as to be marginal and ancillary". Some useful guidance is given to Community Welfare Officers.

The guidelines also make it clear that certain former workers have rights under Regulations 1612/68 and 1251/70. This covers:

- a person retiring after pension age (65) where he/she has continuously resided in the State for more than three years (or whose spouse is, or was before marriage, an Irish national) or was employed in Ireland for at least 12 months before retirement;
- a person who has ceased employment in Ireland as a result of permanent incapacity for work, where he/she has continuously resided in the State for more than two years (or whose spouse is, or was before marriage, an Irish national) and is entitled to disablement benefit because the incapacity was due to an occupational accident or disease;
- a person who has been temporarily laid off work and who is seeking reinstatement or re-employment with the same employer;
- a person who has voluntary given up work to take up vocational training linked to the previous job;
- a person who has become involuntarily unemployed and must take up vocational training because of the state of the labour market.

63 http://www.welfare.ie/foi/habres.html.

The guideline states that people who move in search of employment benefit from equal treatment under Regulation 1612/68 only as regards access to employment. First-time job seekers do not qualify for equal treatment with regard to social and tax advantages within the meaning of Article 7(2) of that Regulation.

Special Weekly Island Allowance extended to Inhabitants from other EU Member States
On 25 March 2005, the Minister for Social Affairs announced that a special island allowance of €12.70 per week is to be paid for the first time to recipients of pensions from other EU States who are residing on any one of 33 designated islands off the Irish coastline. Until now the payment was confined to people who were in receipt of certain Irish welfare payments: Old Age (Contributory or Non-Contributory Pension); Blind Pension; Retirement Pension; Invalidity Pension; Widow(er)'s (Contributory or Non-Contributory) Pension; Carer's Allowance; One Parent Family Payment; Widow(er)'s Benefit Under the Occupational Injuries Scheme.

Section 10 of the Social Welfare and Pensions Act 2005 therefore introduced a new Section 203F of the Social Welfare (Consolidation) Act 1993 extending the allowance to persons ordinarily resident on an island and entitled to or receiving a payment from another Member State which corresponds to a one of a number of specified pensions under the 1993 Act. This provision has now been replicated as Section 239 of the Social Welfare Consolidation Act 2005.[64]

It appears that the European Commission raised the legality of the non-entitlement of island residents in receipts of pensions from other Member States and that the new legislation responds to this concern.

The extension of the allowance payment will add about a further 50 to the 533 people who are already in receipt of the special allowance which was introduced in 2001 in recognition of the fact that people living on islands cut off from the mainland can face considerable extra expense in availing of basic services.

Supplementary pension schemes

Current position
Section 26 of the Pensions (Amendment) Act 2002 implemented Council Directive 98/49/EC (the "Mobility Directive") by requiring that benefit as defined in that Section be provided on a non-discriminatory basis as between members who leave service because they have gone to a another Member State and members who leave for another reason. This Section came into operation on 1 June 2002, by virtue of the Pensions (Amendment) Act 2002 (Part 1 and Sections 6, 9 to 12, 15 to 28, 30 to 36, 40, 44, 50 to 55 and 59 (Commencement) Order 2002 (SI No. 276 of 2002).

The Occupational Pension Schemes (Disclosure of Information) (Amendment) Regulations 2003 (SI No. 4 of 2003) give effect to Article 7 of Directive 98/49, requiring that those responsible for the management of pension schemes to provide information to members who move to other Member States to the same extent as is given to members who remain.

Occupational pension schemes
Under Article 20 of Directive 2003/41 on the activities and supervision of occupational pensions (the IORPs Directive), employers based in Ireland must be allowed to make contributions to pension institutions based in other European States and Irish-registered occupational pension schemes must be allowed to accept contributions from employers located in other States.

Section 37 of the Social Welfare and Pensions Act 2005[65] inserts a new Part XII into the Pensions Act 1990, dealing with the conditions for prior authorisation to operate as a cross-border scheme and the conditions for approval to accept contributions when authorised to operate as a cross-border scheme.

The Occupational Pension Schemes (Cross-Border) Regulations 2005[66] provide for:

64 No. 26 of 2005 (http://www.oireachtas.ie/documents/bills28/acts/2005/a2605.pdf).
65 No. 4 of 2005.
66 SI No. 592 of 2005.

- the member protection provisions of the Pensions Act 1990 to be applied to Irish-based members of overseas schemes. These include preservation requirements and the jurisdiction of the Pensions Ombudsman;
- the information required when an application for authorisation to operate cross-boder is submitted to the Pensions Board;
- additional conditions of authorisation;
- the information to be submitted to the Pensions Board once a scheme proposed to accept contributions from a foreign-based employer.

Complementary taxation changes were introduced in the Finance Act 2005.

At the time of implementing the IORPs Directive, it was unclear whether it would cover existing UK/Ireland schemes, which were registered in Ireland with members in the UK.[67] These schemes were approved by the Revenue Commissioners prior to 1994 under a reciprocal agreement with the UK: although such schemes could not be established after that date, schemes in existence before then have continued to operate and to accept new members. Following discussions with the European Commission, it has been accepted that the cross-border provisions of the Directive, and in particular the requirement for prior authorisation and to satisfy certain ongoing conditions, apply to these schemes.

A notice to UK/Ireland Schemes issued by the Pensions Board on 18 November 2005,[68] clarifying the position and advising that, in the interests of natural justice, some transitional arrangements would be introduced to accommodate these Schemes. Schemes were invited to contact the Pensions Board with a view to applying for authorisation if they elected to continue to operate on a cross-border basis.

67 See Pensions Board communication on "Position of UK/Ireland schemes under the EU IORPs Directive", 31 August 2005.

68 Pensions Board "Notice to UK/Ireland Schemes", 18 November 2005.

Chapter XI
Establishment, provision of services, students

Establishment

General

In a case before the High Court – *Leahy-Grimshaw v King's Inns*[69] – the applicant had been called to the English Bar but did not obtain a pupillage (on-the-job training) or practise as a self-employed barrister. She applied to be automatically admitted to the Irish Bar under Directive 89/84, but she was informed by the King's Inns (the body responsible for the training and admission of Irish barristers) that her application was to be refused under the Directive and would be considered when a procedure was put in place to deal with applications from EU applicants which would assess the knowledge and skills of such applicants. This decision was appealed under the European Communities (General System for the Recognition of Higher Diplomas) Regulation 1991. The applicant also sought an order of mandamus requiring the King's Inns to determine her application pursuant to her right of establishment.

The application was dismissed on the grounds that:

1. The EC Treaty did not confer an automatic entitlement to be admitted to the Irish Bar but rather an entitlement to have the King's Inns assess the extent of the applicant's qualifications and the degree to which those qualification should be supplemented in the Irish jurisdiction.
2. The applicant was out of time for appealing the decision under the 2001 Regulations.
3. The applicant did not comply with the mutual recognition provisions of the 1989 Directive or the 1991 Regulations, since she did not have the right to practise as an independent barrister in England and Wales.
4. It was reasonable that an overall scheme for ascertaining the degree and amount of information and expertise that EU applicants for admission to the Irish Bar possessed should be put in place – rather than ad hoc decisions based on individual cases – and the King's Inns had acted reasonably and in a timely manner.

It should be noted that a procedure to assess the knowledge and skills of EU applicants was put in place in November 2004.

Architects and Surveyors

The Building Control Bill 2005 contains provisions on the registration of Architects, Quantity Surveyors and Building Surveyors which take account of Directive 2005/36 of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

Lawyers

The Solicitors (Amendment) Act 2002 (No. 19 of 2002) provides the basis for Regulations implementing Directive 98/5 of the European Parliament and Council to facilitate practice of the profession of a lawyer on a permanent basis in a Member State.

The European Communities (Lawyers' Establishment) Regulations 2003 (SI No. 732 of 2003) introduced the measures necessary to comply with Directive 98/5 (and with related instruments applying to the other EEA member States and Switzerland). Provision is made for the registration of such lawyers, their professional activities, conduct and discipline and, subject to certain conditions, their admission into the professions of barrister and solicitor.

The European Communities (Lawyers' Establishment) Regulations 2003 (Qualifying Certificate 2005) Regulations 2004,[70] made by the Law Society of Ireland, gave effect to the Lawyers' Establishment Directive as provided for in the 2003 Regulations and came into force on 1 January 2005. The Regulations contain provisions on the making of an application for, and issue of, a qualifying

69 19/4/2005 (2004/878JR): not yet reported.
70 SI No. 799 of 2004.

certificate for registered lawyers, as well as for the payment of a Registration Fee and contribution to the Compensation Fund. The 2004 Regulations were replaced, with effect from 1 January 2006, by the European Communities (Lawyers' Establishment) Regulations 2003 (Qualifying Certificate 2006) Regulations 2005.[71]

The European Communities (Lawyers' Establishment) (Amendment) Regulations 2004[72] extend the European Communities (Lawyers' Establishment) Regulations 2003 to lawyers from the 10 new Member States. The latter Regulations gave effect to Directive 98/5/EC to facilitate practice of the profession of a lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

The Rules of the Superior Courts (Lawyers' Establishment Regulations) 2005[73] amend the Rules of the Superior Courts 1986 and prescribe procedures in respect of the European Communities (Lawyers ' Establishment) Regulations 2003 (as amended).

Veterinarians

The European Communities (Recognition of Qualifications in Veterinary Medicine) Regulations 2004[74] extend the circumstances which the Veterinary Council of Ireland is required to take account of when examining applications for recognition from persons with a relevant Third Country qualification where such a qualification has already been recognised in another Member State. These Regulations also amend the mutual recognition arrangements to take account of the accession of the new Member States on 1 May 2004.

The Veterinary Practice Act 2005[75] is designed to update and replace the Veterinary Surgeons Act 1931 (as amended in 1952 and 1960). It generally recognises that the environment in which this self-governing profession operates has changed significantly by virtue of membership of the EU, advances in technology and an increasing emphasis on food safety and animal welfare. The Minister for Agriculture and Food is by order to appoint a day to be the establishment day for the new Veterinary Council of Ireland.[76]

Among the specified functions of the Veterinary Council of Ireland is, where appropriate, to act as the competent authority for the purposes of mutual recognition obtained in or recognised by Member States and all matters referred to in the mutual recognition directives relating to veterinarians. Section 43 contains provisions on compliance with European Union requirements, implementing the regime set out in Directives 78/1026 and 78/1027 (as amended) in relation to establishment and the provision of services, and provides for an appeal to the High Court in the case of a decision not to register. A detailed Schedule 3 contains more detailed rules on the treatment of applications under mutual recognition requirements of the EU and of applications for temporary registration for the provision of services.

71 SI No. 718 of 2005.
72 SI No. 752 of 2004.
73 SI No. 15 of 2005.
74 SI No 265 of 2004.
75 No. 22 of 2005 (http://www.oireachtas.ie/documents/bills28/acts/2005/a2205.pdf).
76 See the Veterinary Practice Act (Establishment Day) Order 2005 (SI No. 598 of 2005) appointing 1 January 2006 as the establishment day.

Chapter XII
Miscellaneous

Studies, seminars, reports, legal literature (copies)

Cubie, D. & Ryan, F., *Immigration, Refugee and Citizenship Law in Ireland: Cases and Materials* Dublin: Thomson Round Hall, 2004. A useful sourcebook containing cases and materials in these three areas.

Annex

List of principal internet sites

Government

www.irlgov.ie (Irish Government's "entry" web-page)
www.taoiseach.gov.ie (Taoiseach (Prime Minister): high level policy)
www.justice.ie (Department of Justice, Equality and Law Reform: immigration and nationality policy)
www.entemp.ie (Department of Enterprise, Trade and Employment: work permits and other matters relating to third-country national workers)
www.welfare.ie (Department of Social and Family Affairs: access to social welfare benefits and application of habitual residence test). See, also, www.socialwelfareappeals.ie (the independent appeals office for entitlement to social welfare payments)

Legislation

www.oireachtas.ie (Parliament web-site: contains all enacted primary legislation and proposals)
www.irishstatutebook.ie (contains primary and secondary legislation, currently up to 2003)

Employment

www.labourcourt.ie (Labour Court)
www.lrc.ie (Labour Relations Commission)
www.publicjobs.ie (Public Appointments Service)

Statistics

www.cso.ie (Central Statistics Office)

NGOs

www.immigrantcouncil.ie (Immigrant Council of Ireland)

Note

This Report, finalisation of which is still subject to comments from the Commission, attempts to take account of comments on the draft Report (May 2006):

- I have tried throughout to make the Report less succinct. I hope that I have succeeded. In future Reports, I will provide a more detailed narrative. If, in this Report, more detail is needed on any subject, I will attempt to supply it.
- In relation to the text on habitual residence, which applies to social welfare rather than social security, I have found it difficult to say more than there is in the text. This is partly due to the dearth of sources and my (fairly modest) attempts to get more information from official sources met with little response. It may also be partly due to my failure to understand what the Commission wants: if on reading the text, there are specific questions, I will do my best to answer. (In general, I am aware that the Commission engaged with the Irish authorities on this issue and that the rather poorly publicised change resulted: I have not seen any exchanges of correspondence in this respect.
- I have tried to develop the section on statistics and introduced fresh material. However, I have been reluctant to attempt to interpret this data in any detail. Again if there are any specific questions, I will try to address these.
- I cannot give any meaningful information on the public perception in Ireland of the recent immigration waves beyond the short comments on the January 2006 Irish Times/ TNS mrbi poll. I have not been able to obtain/download a copy of this report (I will continue to try to do so and will forward a copy if successful.)
- In relation to the accession by Bulgaria and Romania, the rather sparse text in the Report is all there is to say: the rest is pure speculation and Government policy will become clearer in the coming months. The relative lack of current immigration from Bulgaria and Romania means that the interest of NGOs, etc., has not really been engaged.