

**REPORT**  
**on the Free Movement of Workers**  
**in Spain in 2002-2003**

Rapporteurs: Prof. dr. E. García Coso  
and Prof. dr. G. Gortázar  
(with the collaboration of Prof. dr. D. Carrillo,  
Prof. dr. M. Fernández and Prof. dr. C. Martínez)

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## General remarks

1. The analysis of the Spanish legal provisions applicable to community workers and their families requires a brief reference to the evolution of these provisions since Spain joined the European Community.

More particularly, the changes made during 2003, which is precisely the period of time this Report refers to, require that we explain the methodology to the reader. We will refer to two different legal systems: the judicial framework in force until 2003 and the new legal system in force since 2003 as a consequence of the last reform applicable to nationals of the European Economic Area and their families.

2. The accession of Spain to the European Community in 1985 imposed obligations on the Spanish State, among which was the obligation to adopt the internal measures required to comply with the directives concerning the abolition of discrimination among the workers of the Member States due to nationality and those regarding the free movement of employees and self-employed workers who plan to move to and live in Spain. However, fearing a possible massive movement of Spanish workers towards the employment markets of the Member States, transitory exceptions were introduced for Spanish employees, who would continue to be obliged to obtain a work Permit in the other Member States until December 31, 1992. This deadline was eventually brought forward to December 31, 1991 except for Luxembourg.

In order to comply with these obligations, Royal Decree 1099/1986, of May<sup>1</sup> was adopted. This dealt with the entry, permanence and employment of citizens from the Member States of the European Community. This Royal Decree implemented the norms of the Treaties, the applicable regulations and directives in Spain, it established the modalities for the concession of Work and Residence Permits to Community employees and their families, and it extended the right to reside and work to the families of Spanish citizens.

3. In 1990 the Directives 90/364, 90/365 and 90/366 were approved dealing respectively with the right of residence in general of employees and self-employed workers who may have ceased their professional activity and the right of students.

In order to transpose these Directives within the period established – June 30, 1992 – the Spanish Government adopted Royal Decree 766/1992,<sup>2</sup> on the entry and permanence in Spain of nationals of the Member States of the European Community. Until 2003, this Royal Decree of 1992 regulated the administrative formalities regarding the exercise of the rights of entry to and permanence in Spain for the nationals of the Member States and their families. In addition, the Royal Decree of 1992 included the fundamental innovations of the extension of the right of the spouse and children of the Community citizen to work as self-employed workers when these are nationals of third countries and the extension of the right to work to descendents other than the children who live under the charge of the Community citizen.

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1 *Official State Gazette* of June 11, 1986, No. 139, page 21200.

2 *Official State Gazette* of June 30, 1992, No. 156. page 22275. Hereinafter also 1992 Royal Decree.

4. The entry of the Agreement on the European Economic Area (1994) into force, the subsequent accession of Austria, Finland and Sweden to the European Union (1995) and the adoption of certain case law declarations made by the Court of Justice of the European Community in this regard (Case 267/83 *Diatta v. Land of Berlin*), led to the need to modify the Royal Decree of 1992 by the Royal Decrees 737/1995, of May 5<sup>3</sup> and 1710/1997, of November 14. The first of these extended the scope of personal application to the nationals of the States of the European Economic Area, eliminated the de facto separation as a reason for the annulment of the Permit issued to the spouses of Community citizens and transposed Directive 93/96 which replaced Directive 90/3666 on students. The second modification Decree only replaced the obligation students have to accredit their financial resources, which are to be guaranteed by a declaration or another means offering equivalent proof.

5. Finally, as stated above, the legal provisions applicable to the Community citizens and their families was again modified as from 2003 by Royal Decree 178/2003, of February 14<sup>4</sup> on the entry to and permanence in Spain of nationals from the Member States of the EU and from the other States which are parties to the agreement on the European Economic Area. In general, these new regulations, which are currently in force, are intended to adapt Agreement 21 of June 1999 made by the EEC and the Swiss Confederation in Spain, placing the legal treatment for Swiss nationals and their families on the same footing as the legal treatment laid down for the citizens of the EU.

Furthermore, the approval of the 2003 Royal Decree meant the adoption in Spain of the Declaration of July 28, 2000, whereby France, Germany, Italy and Spain suppressed the obligation to have a residence Permit in certain cases.

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3 *Official State Gazette* of June 30, 1995, No. 133, page 16547.

4 *Official State Gazette* of February 22, 2003, No. 46, page 7397. Hereinafter, also 2003 Royal Decree.

## Chapter I

### Entry, Residence, Departure

#### A. Entry

1. As was pointed out in “General Remarks” supra, until the reform made in 2003, the regulations applicable to Community aliens and their families are focused on the 1992 Royal Decree, with its modifications and implementation rules, which are explained in the following chart.

#### *Spanish regulations applicable to the nationals of the member countries of the European Community*

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- The conditions for the accession of Spain and Portugal and the adaptations of the treaties made in Lisbon and Madrid on June 12, 1985.
  - Royal Decree 1099/1986 of May 26, on entry, permanence and work in Spain as regards citizens of Member States of the European Community.
  - Royal Decree 766/1992 of June 28, on entry, permanence and work in Spain as regards nationals of Member States of the European Community.
  - Law 17/1993 of December 23, 1993, on the access of the nationals of the other Member States of the EEC to certain sectors of the Public Administration.
  - Royal Decree 737/1995 of May 5, which modifies Royal Decree 766/1992 of June 28, on entry, permanence and work in Spain as regards nationals of Member States of the European Union.
  - Royal Decree 1710/97 whereby the provisions on the entry to and permanence in Spain of nationals from the Member States of the European Union and from the other states which are parties to the Agreement on the European Economic Area are partially modified.
  - Royal Decree 543/2001 of May 18, on the access to public employment in the General Administration of the State and its Public Bodies for nationals from other States to whom the right of free movement of workers applies.
  - Ministerial Order of February 22, 1989 on the economic conditions for entry to Spain.
  - Ministerial Order of April 11, 1996 on the exemption from visas.
  - Order of February of 1997, whereby the alien Permit is regulated.
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Thus, until 2003, the 1992 Royal Decree regulated the administrative formalities for the exercise of the rights of entry to and permanence in Spain by nationals from the Member States of the European Union and from other States parties to the Agreement on the European Economic Area, on condition that the purpose of the entry to and permanence in Spain was to work as an employee, as a self-employed person, in order to provide services, to study, to reside as pensioners or with no employment but with sufficient financial resources.

The 1992 Royal Decree was intended for the Community citizen as the holder of the right of entry, residence and work, as well as his or her family, whatever the nationality, as long as the family members were those stipulated in article 2 of the Royal Decree:

- The spouse on condition that there is no de iure separation;
- The descendants and the descendants of the spouse on condition that they are not separated de iure, those under twenty-one years old (the right to reside and work) or those over twenty-one years old who live at their expense (the right to reside and work);
- The relatives in the ascending line and those of the spouse on condition that they are not separated de iure, who live at their expense (only the right to reside), with the exception of relatives in the ascending line of students and their spouses, who would not have the right of residence.

The Spanish Aliens Act will be applicable to all those who do not accredit coming under the scope of application of the 1992 Royal Decree. Spanish Aliens Act provisions were originally laid down in Organic Law 7/1985, subsequently repealed by Organic Law 4/2000, modified by Organic Law 8/2000 and modified once more by Organic Law 14/2003 of November 20. It is not necessary to point out that all the formalities and requirements of the general provisions on aliens are, in any case, much more severe and stricter than those which apply to Community citizens and their families.

The persons described in article 2 of the 1992 Royal Decree had the right to enter, leave, move and remain freely on Spanish territory in accordance with article 4 of the aforementioned Royal Decree once they had complied with the formalities stipulated which allowed them to obtain the Residence Permit. Possession of the Permit and compliance with the formalities gave them the right to work, except for the relatives in the ascending line of community citizens and their spouses and the relatives in the ascending line of students or their spouses, who do not have the right of residence either.

This exclusion was highly debatable from the perspective of Community Law and, specifically, after the Decision of the Court of Justice of the European Community of May 25, 2000, *Commission/Italy*, in which Italy was condemned for demanding excessive requirements from students as regards proof of sufficient financial resources to keep themselves and their families in Italy.<sup>5</sup> In fact, Italy intended to hinder the access of the student's family to the employment market.

Entry to Spanish territory was made by presenting a passport or another document in force which recorded the nationality of the holder in the terms demanded by article 5 of the 1992 Royal Decree. However, the fact that Spain belonged to the Schengen Convention of June 14, 1985 and its Implementation Agreement of June 19, 1990 meant that the need for these documents when the person came from another State which was a party to the Convention had become relative. However, the members of families of Community citizens who had the nationality of third countries also needed the corresponding visa in order to enter the country, although the issue of this visa was free of charge.

It is precisely the requirement of a visa for the families of Community citizens who are third country nationals which has focused Spanish judicial practice as regards the relative guarantee of the principle of family unification. Curiously, there have been some

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5 Along similar lines see Decisions of the European Court of justice Plenary Session Sept. 20, 2001. Case: C-184/99: *Rudy Grzelczyk*.

judicial pronouncements made by Spanish courts on the visas of foreign spouses of Spanish citizens which come under the 1992 Royal Decree. A detailed examination of these is made in Chapter IV.

2. As from February 2003, the 1992 Royal Decree was repealed by the 2003 Royal Decree. This Royal Decree became the new regulation framework for the entry, movement, permanence and employment of citizens and their families and is currently in force. Generally speaking, the 2003 Royal Decree delimits the same scope of personal application as the 1992 Royal Decree, both as regards the holders, Community citizens, citizens of the European Economic Area and those from Switzerland and their families.

The three innovations as regards entry as from 2003 are those laid down in articles 2, 3.3 and 4.3 of the 2003 Royal Decree. The first innovation concerning article 2 of the 1992 Royal Decree is that the families of Community citizens or citizens of the European Economic Area included in this provision are requested to “(...) *live together in a stable, permanent relationship with these*”, so that they may enjoy the rights included in the 2003 Royal Decree. Through this obligation, the Spanish legislator intends to fight against marriages of convenience entered into in abuse of the law.

This innovation and other questions were the subject of an appeal to the Spanish Supreme Court and led to the important Decision of the Supreme Court of June 10, 2004. This Decision of the Supreme Court declared the invalidity of the requirement that the family members live together in a stable, permanent relationship with the Community or European Economic Area holder of the right. In particular, it mentions articles 10 to 12 of Regulation 1612/68, the Decisions of the Court of Justice of the European Community of September 17, 2002 and of September 23, 2003 (*Hacene Akrich*) and pointed out that

“... the appeal must be resolved on the basis that, in the opinion of the Court, the expression regarding the obligation of a stable, permanent relationship refers to the unit of lodgings as obligatory for the family members with regard to the application of the provisions of Royal Decree 178/2003 appealed against. Thus, the precept appealed against is not in conformity with Community provisions which do not demand the unity regarding living together under the terms of stability and permanence referred to in the section in article 2 which is the subject of the objection and, therefore, it must be invalidated”.<sup>6</sup>

The second innovation concerning entry to Spain is laid down in article 3.3 of the 2003 Royal Decree. This provision stipulates that, except in the cases mentioned in the Decree, the Community citizens and the citizens of the European Economic Area will, in general terms, not be obliged to request a residence permit under the terms we will refer to below although their families will have to have a visa and submit the documentation stipulated in article 11 of the aforementioned Royal Decree.

With regard to the documentation to be submitted, the Declaration of the Supreme Court of June 10, 2004 questions the requirements demanded in article 11.3.C).4, of the 2003 Royal Decree which require that the family member “accredit living together in Spain for at least one year”, so that he or she may obtain a visa. With arguments based

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6 See below Chapter IV and Chapter V.

on Community Law and the Case Law of the Court of Justice of the European Community, the Spanish Supreme Court lays down that

“... in accordance with the case law of the Court of Justice of the European Community, no more requirements should be demanded than the accreditation of the relationship as spouse in order to permit entry to Spain since, as the Decision of the Court of Justice of the European Community of July 25, 2002 [*MRAX*] states, articles 3 of Directive 68/360 and 3 of Directive 73/148, as well as Regulation 2317/95, considered in the light of the principle of proportionality, must be interpreted in the sense that a Member State cannot refuse entry at the border to a national of a third country who is the spouse of a national of a Member State, when this person attempts to enter its territory without an identification document or a valid passport or, possibly, a visa, when this spouse can prove his or her identity and the matrimonial relationship and, if there are no circumstances which demonstrate that he or she represents a risk to public policy, public security or public health... And, as regards the case of illegal entry without a visa, the same Decision states that articles 4 and 8 respectively of the aforementioned Directives, must be interpreted in the sense that they do not authorise the Member States to refuse a residence permit nor to adopt an expulsion order against a national of a third country, who can provide proof of identity and marriage to a national of a Member State, for the simple reason that he or she entered the territory of the Member State in question illegally.”

These considerations of the Spanish Supreme Court are fundamental as regards reducing the leeway the Spanish administrative authorities have for acting when impeding or hindering entry or filing proceedings against a person for illegal entry into Spain.

The third innovation refers again to the control and maintenance of administrative difficulties for the foreign family members of Community Citizens or those from the European Economic Area. Article 4 of the 2003 Royal Decree requires that a visa be provided for the family once it has been recognised that entry to Spain took place with a passport or identification document in force which stipulates the nationality of the holder.

It should be pointed out that this provision is focused on an apparent restriction to the Spanish Administration as section 4 of the provision stipulates that any resolution rejecting a request for a visa for the family members included in article 2 must be justified by stating the grounds of public policy, public security or public health the rejection is based on and the party concerned must be informed of these unless this is counter to the security of the State. In our opinion, this drafting gives rise to doubts concerning its compatibility with Community provisions and the recent case law of the Court of Justice of the European Community quoted above as regards exceptions to free movement.

Finally, it is necessary to point out that the Second Final Provision of the 2003 Royal Decree establishes a reference to the Aliens Act for the family members of nationals from the European Union or from the European Economic Area who fail to comply with the requirements of the 2003 Royal Decree, and the general supplementary application of the Aliens Act.

This reference involves a very different legal treatment and it should be stated that the possible application of the general supplementary provisions on aliens will only apply as regards those legal aspects which might benefit the rights of the nationals of the European Union or the European Economic Area with regard to entering, moving,



residing and working in other Member States together with their family members, in the wide sense.

Concerning this line of argument, it should be borne in mind that, as regards the Aliens Act, Organic Law 14/2003 of November 20 for the Reform of Organic Law 4/2000 of January 11 on the rights and liberties of aliens in Spain and their social integration, modified by Organic Law 8/2000 of December 22 and by Organic Law 11/2003 of September 29, came into force on December 22, 2003.<sup>7</sup> This last reform made through Organic Law 14/2003 adds more doubts to the reference of a supplementary nature of the general provisions to Community citizens, citizens of the European Economic Area and their families as it raises the criminalizing of certain questions related to aliens to the rank of law as it introduces criminal proceedings where before there were only administrative proceedings.

As regards the inter-relation of the Aliens Act and the legal framework of the Community citizens and their families, the instructions given by the Spanish Interior Ministry which affect the requirements laid down for the families of Community citizens should be observed. This is the case with regard to the suppression of article 31.7 of Aliens Organic Law 4/2000 made by the 14/2003 Aliens Organic Law as concerns the exemption from visas. This modification means that, as from December 22, 2003 (date of enter into force of Organic Law 14/2003), new requests for the exemption from visas (those appealed against by the families of Community citizens) as, from that date, this no longer exists in Spanish judicial provisions. In principle, this innovation also positively affects the provisions applicable to Community citizens. As from December 22, 2003, the families of Community citizens who accredit that they come under any of the cases of article 11.3.C), 1 to 10, of the 2003 Royal Decree will obtain the permit for members of families of Community residents requested with no need to process exemption from visas. However, it is necessary to await administrative practice in order to reaffirm the positive nature of this modification.

As regards the considerations concerning entry in the 2003 Royal Decree and bearing in mind the Decision of the Court of Justice of the European Community of July 25, 2002 (*MRAX*), we recommend that the Commission monitor the compatibility of the Spanish provisions on entry to Spain of the families of Community citizens and citizens from the European Economic Area with Community Law taking into account the alternatives to the visa recognised as valid and the aspects of the documentary proof required to obtain these in Spain.

In our opinion, the Spanish provisions seem to be excessive as regards the right of all Community citizens and the citizens of the European Economic Area to enter, move and remain in another Member State with their families and they also impose requirements which place obstacles regarding the time for entry to Spain.

Another situation which requires monitoring is the possibility the children of Community citizens not included in article 2 of the 2003 Royal Decree have of working since, despite the fact that the domestic situation regarding employment will not be taken into

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7 Hereinafter, Aliens Act 2003.

account when dealing with their applications for employment, they will require authorisation to work and this treatment is evidently not equal to the treatment given to the children of Spanish citizens or of Community citizens who comply with the requirements of the 2003 Royal Decree. This question is dealt with in article 40 section b) of the 2003 Aliens Act which establishes a new specific case in which the domestic employment situation will not be taken into account as regards

“The spouse or child of an alien resident in Spain with a renewed permit, as well as the children of nationalised Spanish citizens or Community citizens on condition that the latter have legally resided in Spain for at least one year and Community applications are not applicable to the children”.

#### *Recent legal literature*

Álvarez Rodríguez, A., Régimen de extranjería comunitaria en el ordenamiento jurídico español (Análisis del Royal Decree 766/92, sobre entrada y permanencia de nacionales de Estados miembros de las Comunidades Europeas), *La Ley. Suplemento Comunidades Europeas*, Nº 80, 1 de octubre de 1993.

González Rivas, J.J., *Extranjería y libre circulación de personas*, Edit. Comares. Granada, 1995.

González-Trevijano Sánchez, P.J., *Libertades de circulación, residencia, entrada y salida en Españ*, Edit. Cívitas. Madrid, 1991.

## **B. Residence**

1. As in the previous section, the regulation of the residence of Community citizens, citizens of the European Economic Area and their families was subject to two different systems during the period under study (2002-2003). On the one hand, the system in force until 2003 laid down in the 1992 Royal Decree and its modifications, and on the other hand, the system which came into force with the 2003 Royal Decree.

As regards the 1992 Royal Decree, this required that the beneficiaries mentioned submit the application for a residence permit as from the first month from their entry into Spain with certain nuances which will be mentioned below. The declaratory nature of the residence permit should be pointed out, as well as the fact that its beneficiaries had the right to obtain it. In particular, the necessity for and the cases requiring residence permits were stipulated in article 6 of the 1992 Royal Decree. Thus, there were several types of residence permit for Community citizens:

- When the stay in Spain was less than three months, the passport or identity card was sufficient.
- If nationals of the EU or of the European Economic Area stayed in Spain for periods greater than three months and less than one year, a temporary residence permit was issued for the limited period of stay foreseen.
- If the residence situation of nationals of the EU or of the European Economic Area is for a period longer than one year, a residence permit was granted for a period of five years renewable automatically.

- The members of the family who were nationals of third States received a Community family residence permit for the same period of time as the person they depended on;
- In all cases, the members of families of Spanish citizens received a residence permit for a period of five years;
- If the citizen of the EU or of the European Economic Area worked in Spain and was a resident in another State, to which, in principle, he returned every day or at least once a week, he received the border worker permit for five years which was automatically renewable.

The period of validity of the permits and their renewal was conditioned by the fact that the holder continued to come under any of the cases which gave the right to obtain the permit, with the following restrictions (article 7 of the 1992 Royal Decree):

- In the case of students, the period of validity of the permits was limited to the duration of the period of studies, and if this period was longer than twelve months, they were granted a permit for one year which was renewable annually.
- In the case of retired people and those not working, the duration of the first permit was two years, once renewed, its period of validity changed to five years once compliance with the financial requirements had been accredited.
- As regards unemployed workers, the permit could not be withdrawn or its renewal refused in certain cases, and only in the case of the first renewal and when the holder had been unemployed for more than twelve months, could the period of validity be limited to, at least, one month.

The residence permit was issued or renewed automatically for nationals of the EU or of the European Economic Area who had worked as self-employed workers or as employees and had stopped working on Spanish territory, as well as their families, in the specific cases of retirement, permanent incapacity to work in another State of the EU or of the European Economic Area as stipulated in articles 8.1 and 8.2 of the Royal Decree.

The permit was issued to or renewed for the family members when the holder of the right to reside on Spanish territory permanently had died after acquiring this right. The case of the holder of the right to reside dying in the course of his working life before having acquired this right is more relevant as, then, the residence permit was issued to or renewed for the members of his family in the following cases:

- If the person concerned had resided in Spain, on the date of death and for at least two years.
- If the death was due to an accident at work or a work related illness.
- If the surviving spouse was a Spanish citizen and had lost Spanish nationality as a result of marriage to the deceased.

In these cases, the beneficiary had a period of two years in which to exercise the right of residence counting from the day on which he or she acquired the right to obtain it.

The documentary requirements as regards the Community provisions were fully stipulated in article 10 of the 1992 Royal Decree and, in addition to the generic require-

ment for the presentation of the passport or identification document and the compulsory request for a medical certificate by the Administration, these can be summed up under the following categories:

- In the case of employees: a copy of the work contract or the work certificate.
- In the case of self-employed workers: the same requirements, authorisations and registers which are requested from a Spanish citizen in order to carry out similar activity.
- In the case of the supply of services: the titles or diplomas demanded in order to carry out the activity and the justification that the person is legally established and working in the country of origin or the country he had come from.
- In the case of border workers: documents corresponding to the activity and the certificate of residence in the other Member State.
- In the case of those not working: accreditation of sufficient financial resources, which will be considered to be sufficient if they are greater than the minimum retirement pension for those over 65 years old, and comprehensive medical insurance.
- In the case of retired persons: an invalid or retirement pension which provides sufficient resources and comprehensive medical insurance.
- In the case of students: registration in a official or recognised centre, comprehensive medical insurance and the guarantee, not the accreditation, through a declaration or equivalent means that the person has sufficient resources to pay the studies and the cost of the stay.
- In the case of the families of any of the above: accreditation of the relationship, accreditation of the fact that they live at the expense of the citizen in the cases of relatives in the ascending line and descendents over 21 years old, and a visa in the case of nationals from third States. As regards family members who do not work, retired persons and students, the accreditation of sufficient financial resources and comprehensive medical insurance for the holder and his or her family members.

As concerns Spanish judicial practice with regard to residence and work, some decisions continue to reveal that there is some confusion in the Spanish administrative authorities when guaranteeing the legal provisions affecting Community citizens. Thus, the Decision of the Madrid High Court of Justice of December 21, 1995, annulled the sanction imposed in proceedings concerning an employment offence by a Community company in Spain which had contracted a British national who did not have a work permit. The Court stated that

“... the event described in the proceedings – failure to have a work permit – has not been sanctioned due to the admittance of the fact that the person considered to be the offender had British nationality and did have the documentation required – a residence permit – according to the certificate of the Provincial Head Commissar for Aliens and Documentation in the Balearic Islands, dated April 26, 1995, and Royal Decree 766/1992 of June 26 was alleged by the appellant as applicable legislation, for these reasons which have been admitted, the appeal is allowed and the sanction imposed is annulled”.

Similarly, the Decision of the High Court of Justice of Andalusia of January 3, 2001 contests the resolution of the Government Delegation in Melilla of January 31, 1996.

This resolution disallowed the acquisition of a Community permit by the plaintiff, Mr Ahmed O., a French citizen, so that he could work as a self-employed architect in Melilla as he failed to comply with the requirements laid down in article 10, sections b) and c) of the 1992 Royal Decree. The Court dictated that

“the following documentation: residence permit of a national from a Member State of the European Community valid from May 1989 until May 1994, census declaration for taxation purposes, receipt from the Melilla Town Hall for the Tax on Economic Activity during 1994, certificate of membership of the Official Association of Architects of Eastern Andalusia, showed that he is fully capacitated to freely exercise his profession. In addition, it is on record that he resides in Melilla in a rented house and has a Sanitas medical insurance policy valid from April 1, 1989”.

2. The legal provisions described above were repealed by the 2003 Royal Decree which lays down requirements and conditions which are similar but require an analysis of the changes made. As we stated above, among these changes, attention should be drawn to the elimination of the Community Residence Permit in certain cases.

Specifically, article 6 of the 2003 Royal Decree establishes that the following are the beneficiaries of the right to reside in Spain without the need to have a residence permit through the documentary accreditation of their Community or nationality or of being from a State of the European Economic Area or being a family member of one of these:

- Nationals from the Member States of the EU or from other States which are in the European Economic Area, who are self-employed workers, employees, students or beneficiaries of the right to reside permanently.
- Family members of the persons mentioned in the previous paragraph, as well as the family members of Spanish citizens, with one of the relationships established in article 2 of this Royal Decree on condition that they are nationals of a Member State of the EU or are from other States in the European Economic Area.
- The nationals of the Member States or of the States of the European Economic Area who work in Spain and reside in the territory of any of these States and return there every day or, at least, once a week.

However, the Spanish legislator has added section 2 to article 6 and this is a contradiction as regards the elimination of the residence permit and gives rise to certain doubts regarding the practice of the Spanish Administration. It states that

“if the person concerned (see those described above) requests this residence permit, the administrative bodies will have the obligation to inform the person concerned that the permit is not required. However, if, despite this, the person concerned presents the relevant application for the residence permit he will be issued with the corresponding residence permit or a residence certificate”.

The drafting of this section is a contradiction and it would be recommendable that the Commission ask the Spanish Administration in which situations the person concerned can or must have a Community residence permit.

In any case and notwithstanding the doubt as concerns 6,2 of the 2003 Royal Decree, it can be stated that this Royal Decree only requires a residence permit for the foreign family members of Community citizens or of citizens from States in the European Economic Area. This is laid down in article 8 of the Royal Decree which stipulates that residence in Spain for a period longer than three months must be documented through a Community Residence Permit for the family members who might have the nationality of a third country. In our opinion, the obligatory nature of this Community residence permit for the family members may give rise to certain objections as regards the case law of the Court of Justice of the European Community as regards the *MRAX* and *Akrich* cases, whose objective is to make the principle of family unification within the European Area more flexible.

As regards residence, the Spanish legislator has also considered the right of permanent residence in Spain. In order to have this right, Community nationals and nationals from the States of the European Economic Area who have worked as self-employed workers or as employees in Spain and their families must comply with the conditions stipulated in article 7 of the Royal Decree:

- At the time they cease activity, they must have reached the age for retirement with a pension laid down by Spanish legislation and have worked during the previous 12 months, as well as having resided in Spain for over three years.
- They have ceased to work as a result of permanent incapacity to work and have resided in Spain for more than two years uninterruptedly. It will not be necessary to accredit any period of residence if the incapacity is the result of an accident at work or a work related illness which might give rise to a pension which is the total or partial responsibility of a Spanish State body.
- After three years continual working and residence on Spanish territory, they work in another Member State and maintain their residence in Spain, returning to Spanish territory at least once a week.

As can be observed, the requirement for residence in Spain for different periods of time ( more than 3 years) for the holder and for his family previous to the acquisition of the right to permanent residence can be a disproportionate restriction if there are means to guarantee that the beneficiary and his family are not a burden to the Spanish State. On compliance with this requirement, the necessity of another condition may go beyond what is permitted by Community Law in order to guarantee the right to move, reside and work in any Member State.

Finally, the procedural aspects of applications, processing, issue and renewal of residence permits are regulated by articles 10 to 15 of the 2003 Royal Decree, which, despite the fact that these must be complied with only by the foreign family members of Community citizens or of citizens from the European Economic Area, again refer to the steps which must be followed by these family members even though their applications are sufficient to accredit their circumstances (article 10.1), which is undoubtedly an incongruence as regards the elimination of the Community Residence Permit.

The documentary requirements for the family members of Community nationals or of the nationals from the European Economic Area are stipulated in article 11, and the

compatibility of this article with Community Law has been judged to be partially contrary to Community provisions in the Decision of the Supreme Court of June 10, 2004, which declared section 3, letter c), No. 4 of article 11 to be invalid although all of section 3 should have been declared to be invalid as the parties had requested.

Therefore, we suggest that the Commission study the compatibility of section 3 of article 11 of the 2003 Royal Decree as regards Community provisions.

*Recent legal literature:*

Esplugues Mota, C. & De Lorenzo Segrelles, M., *El nuevo régimen jurídico de la inmigración en España*, Tirant lo Blanc, Valencia 2001.

Oliván López, F., *Constitución y extranjería : la dialéctica de la integración* (2004).

### **C. Departure**

1. The legal framework applicable to the expulsion of citizens of the EU and those of the European Economic Area and their possible family members up to 2003 was included in articles 14 to 18 of the 1992 Royal Decree. Specifically, article 15 stipulated grounds of public policy, public security and public health as reasons for the refusal to allow entry to Spanish territory, the refusal to issue or renew the residence permit and even return or expulsion from Spanish territory. These measures could be revoked *ex officio* or *ex parte*.

In line with what is stipulated by Directive 64/221, expulsion measures could not be adopted for financial reasons and had to be based exclusively on the personal behaviour i.e. the individual, real, serious and present threat of the person involved in cases of public policy or public security, and it was not sufficient just for the person to have a criminal record. This follows the policy marked out by the case law of the Court of Justice of the European Community, in the Decisions of February 26, 1975 (*Bonsignore*), the Decision of April 8, 1976 (*Royer*), the Decision of October 28, 1975 (*Rutili*), the Decision of December 4, 1974 (*Van Duyn*) and, more recently, the Decision of January 19, 1999 (*Calfa*).

The only illnesses which could justify the prohibition to enter or expulsion measures based on grounds of public health were listed in article 15.4 of the Royal Decree:

- Quarantine diseases stipulated in the International Health Regulations No. 2, of May 25, 1951 of the World Health Organisation.
- Drug addiction, substantial psychic alterations, manifest states of psychopathic illness with agitation, «delirium», hallucinations or confusion psychosis when these may endanger public policy or public security under the terms stipulated in the legislation in force.
- Other infectious or parasitically contagious diseases insofar as these are the subject of protection provisions as regards Spanish nationals in Spain.

These measures could not be adopted in the case of illnesses acquired or contracted after the issue of the first Permit.

The interpretation of these exceptions must always be carried out restrictively in accordance with the case law of the Court of Justice of the European Community mentioned above, as they involve a restriction to one of the basic pillars of the European Community, which is the free movement of persons. One exception which is specifically justified was laid down for cases involving sports “hooligans”, extremists with radical ideologies and cases related to the consumption and trafficking of narcotics and sexual exploitation.

Other infringements such as the failure to apply for the issue or renewal of the permit or the failure to notify the modification of the circumstances which gave rise the granting of the permit could not be sanctioned other than by a fine which in no case could be greater than 2 million pesetas (12,000 euros) in accord with article 16. Finally, articles 17 and 18 of the 1992 Royal Decree stipulated the procedural guarantees (a decision of the ex officio Judicial Service or an ex parte request) and the minimum periods for exit from Spanish territory of between 15 days and one month, except in cases of urgency which are duly justified. In this regard, no information was given.

Spanish judicial practice as regards expulsion within the framework of the 1992 Royal Decree can be classified as vacillating as, on occasions, there is evidence of certain attempts of the Spanish Administration to get round the restrictions imposed by Community Law and Case Law.

In the Decision of the Supreme Court of May 31, 1994, concerning the expulsion of a British citizen due to his having successively entered Spain illegally, the Court laid down that the expulsion was illegal due to the fact that

“We must not forget either that article 6 of Royal Decree 766/1992, of June 26 (RCL 1992/1469) on entry to and permanence in Spain of nationals from the Member States of the European Community establishes that, as regards the cases of residence in Spain for any reason, if this is longer than three months and less than one year, a temporary Residence Permit for this period of time will be issued to the persons concerned. Article 16 stipulates that failure to request the Permit can only be sanctioned with a fine which must be proportional to the offence, and practically repeats the content of article 23 of the Royal Decree of May 26, 1986 in this regard.”

In the Court Decision of February 9, 1996 and the Decision of the Supreme Court of March 4, 1996, concerning the attempts to expel two Community citizens, an Italian and a Belgian respectively, and the requests for the suspension of the expulsions, the Spanish Counsel for the State appealed against the precautionary suspension. However, in both cases the appeals were rejected in order to safeguard the specific interest of the Community citizens with regard to such a restrictive measure.

However, in the Decision of March 14, 2000 the Spanish Supreme Court did not admit the appeal against the refusal to suspend the expulsion of a British citizen, alleging that

“... in the case examined, this Court considers that the grounds of public policy alleged are sufficient to prevail over the particular interest affected. It was on record that Mr John A. had been condemned on April 24, 1987 by the Provincial Court of Alicante as the perpetrator of an offence against public health and sentenced to eleven years imprisonment. Independently of the consequences of a criminal nature of the sentence, it also shows the potential danger to the



public interest of the person concerned considering the nature of the offence committed and the severity of the sentence imposed, which accredits the importance of the conduct sanctioned ... Thus, a criminal sentence can only be admitted to the extent that the circumstances which gave rise to this sentence show the existence of personal conduct which might constitute a current threat to public policy (Decision of *Bouchereau* [...]). In accordance with European case law, this Court considers that, as explained above, the principle of Community Law mentioned does not prevent the understanding that the suspension of the expulsion order is not valid when the danger to the public interest can be inferred from the conduct of the person concerned shown in the criminal sentence for a specific, serious offence committed against public health, which shows that an activity harmful to the health of the population and not only potentially dangerous for the health of the person concerned has been carried out”.

2. As regards expulsion, the new provisions established by the 2003 Royal Decree, do not introduce any modifications. The mechanism for expulsion is regulated in articles 16 to 18 of this Royal Decree. However, the reference made to the criteria of Organic Law 4/2000 reformed by Organic Law 8/2000 by section 2 of article 16 of the 2003 Royal Decree gives rise to serious doubts concerning its compatibility with Community provisions, bearing in mind that the criteria included in the Aliens Act do not provide much guarantee. Thus, aliens involved in expulsion proceedings may be expelled by emergency proceedings (24 hours) or ordinary proceedings. Moreover, the administrative act of expulsion is automatic and this would entail discriminatory treatment against Community nationals as compared to Spanish citizens. Thus, we suggest that the Commission analyse the reference to the criteria of the Aliens Act in order to guarantee the principle of equality of treatment and that it ask the Spanish Administration to which specific criteria Community citizens or citizens of the European Economic Area would be subject in the event of expulsion.

#### *Recent legal literature*

Rodríguez Candela, J.L., La expulsión del Extranjero en el Nuevo Código Penal, *Jueces para la Democracia*, Nº 33, Noviembre 1998.

Rodríguez Candela, J.L., Las Expulsiones con intervención judicial en la Law de Extranjería, *Cuadernos Jurídicos*, Nº 28, Marzo de 1995, año 3º.

Del Río Hernández, L.J., Garantías en la detención y Expulsión de Extranjeros, *Revista La Ley*, Nº 4471 (1998).

## Chapter II Equality of Treatment

### *a) Adaptation of Directives 2000/43 and 2000/78 on non-discrimination due to race, ethnic origin, religion or beliefs, incapacity, age or sexual orientation in Spain*

1. In order to adapt Spanish legislation to these Directives, Law 62/2003, of December 30 on tax, administrative and social measures was adopted<sup>8</sup> (hereinafter the Law). It came into force in January 2004. Evidently, there is no Spanish judicial or administrative practice to refer to.

In fact, any commentaries on this Law will be meaningful in the reports on the year 2004 and beyond as we only have a Draft Bill for the period this report refers to. Therefore, it will suffice to provide a short preview of the main content.

In Chapter III the Law stipulates the measures for guaranteeing the application of Directives 2000/43 and 2000/78. In general, it is stipulated that this Law is intended to establish measures for the real and effective application of the principle of equal treatment and non-discrimination, in particular, due to gender, racial or ethnic origin, religious convictions, incapacity, age or sexual orientation under the terms which are established in the Law itself. It applies to all persons in the public and in the private sector.

The principle of equal treatment is deemed to be the absence of all direct or indirect discrimination. Thus, it includes the definitions laid down in the Directives regarding what must be understood by “Direct Discrimination”, “Indirect Discrimination”, “Harassment”, “Sexual Harassment” and any other type of practice tending towards discrimination in Spanish legislation. It should be pointed out that, in principle, the Spanish legislator does not refer to the possibility of restricting the scope of application to Spanish citizens or nationals from the EU and from the European Economic Area although there is a reference to the fact that the present draft bill will not prejudice the Aliens Act laid down in Organic Law 4/2000, reformed by Organic Law 8/2000, which, a priori, can mean that the alien’s situation must be normalised in Spain in order to have this protection against all types of discrimination. In any case, it is positive that, in principle, all persons are protected regardless of their nationalities.

The Law includes specific measures concerning equal treatment and non-discrimination due to the racial or ethnic origin of persons (article 29-33). These are specified by making equal treatment and non-discrimination due to the racial or ethnic origin of persons real and effective in education, health, social benefits and services, housing and, generally speaking, as regards the supply and access to any goods and services.

With regard to the measures concerning equal treatment and non-discrimination at work (article 34-36). The purpose of these provisions is to establish the measures needed to make the principle of equal treatment and non-discrimination real and effective as regards access to employment, affiliation to and participation in trade union and company organisations, work conditions, professional promotion and continuing vocational training. The Women’s Institute has been designated as the public body responsi-

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8 Official State Gazette of 31 of December 2003, No. 313. pages 46901 et seq.

ble for these measures. This Institute will have to carry out the promotion, analysis, monitoring and support for equal treatment of persons with no discrimination due to gender.

2. The provisions adopted through Law 62/2003 have led to the modification of Spanish legislation in order to accommodate these new measures. These will only be listed since they will come into force as from 2004 as was mentioned before.

This involves the reform of the following legislation: the Law on the Workers' Statute, the revised text approved by legislative Royal Decree 1/1995 of March 24 (articles 4.2.c), e), 16.2., 17.1, 54.2.g),<sup>9</sup> Law 13/1982 of April 7 on the Social Integration of Incapacitated Persons (article 37 and article 37 bis which is introduced); Law 45/1999 of November 29 on the movement of workers within the framework of the supply of services (Article 3.1.c); the Employment Procedure Act, revised text approved by Royal Decree 2/1995 of April 7 (article 96., 181); the Law on infringements and sanctions in the social area, revised text approved by Royal Decree 5/2000 of August 4 (article 8.12, 8.13, 8.13 bis is added, art. 16.2).

Due to its special consequences, we include the third additional provision of the Law on the non-affect on legislation on aliens:

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9 Article 4.2. Concerning the employment relationship, the workers have the right c) "not to be discriminated against directly or indirectly as regards employment, or, once employed, due to gender, marital status, age within the limits stipulated by this Law, racial or ethnic origin, social condition, religion or convictions, political ideas, sexual orientation, affiliation or non-affiliation to a trade union, as well as for reasons of language within the Spanish State. Neither can they be discriminated against due to incapacity on condition that they have the aptitude to carry out the work or employment in question".

Article 4.2.e) As regards the employment relationship, the workers have the right e) "To respect for their privacy and due consideration for their dignity, including protection from harassment due to gender, racial or ethnic origin, religion or convictions, incapacity, age, sexual orientation and sexual harassment".

Article 16.2 "The existence of employment agencies for profit is prohibited. The Public Employment Service can authorise non-profit employment agencies under the conditions stipulated in the relevant Collaboration Agreement once the General Council of the National Employment Institute has been informed on condition that the remuneration received from the entrepreneur or worker is restricted exclusively to the expenses arising from the services provided. These agencies must guarantee the principle of equality as regards access to employment within their scope of action and cannot establish any discrimination based on racial or ethnic origin, gender, age, marital status, religion or convictions, political opinion, sexual orientation trade union affiliation, social condition, language within the State and incapacity on condition that the workers have the aptitudes to carry out the work or employment in question".

Article 17.1 "The legislative precepts, the clauses in the collective agreements, the individual agreements and the unilateral decisions of the entrepreneur which contain unfavourable direct or indirect discrimination due to age or incapacity or favourable or adverse discrimination as regards employment, as well as remuneration, the working day, and the other conditions of work due to gender, racial or ethnic origin, marital status, social condition, religion or convictions, political ideas, sexual orientation, affiliation or non-affiliation to trade unions and their agreements, family relationships with other workers in the company and language within the Spanish State".

Article 54.2.g) The employment contract can be extinguished by a decision of the entrepreneur by dismissal based on serious, culpable non-compliance by the worker. 2. Contractual non-compliance is deemed to be the following: g) "Harassment due to gender, racial or ethnic origin, religion or convictions, incapacity age, sexual orientation and sexual harassment of the entrepreneur or the persons who work in the company".

“The stipulations of this Law are understood without prejudice to the legislation laid down as regards the entry, permanence, work and establishment of aliens in Spain in Organic Law of January 11 on the rights and liberties of aliens in Spain and their social integration modified by Law 8/2000 of December 22”.

The entry into force of this Law means that Spain complied with its commitment to transpose both Directives before December 2, 2003 with a short delay of hardly one month. We must insist that the application and observance of this Law will be the subject of study in the 2004 report.

3. However, before ending, it is necessary to point out the judicial practice in the Decision of the Madrid Social Court No. 12 of October 26, 2001, which anticipated the adaptation of Spanish legislation to the these Directives on non-discrimination (in the case of minority sexual orientation). The Decision surpassed the Court of Justice of the European Community which, in its Decision of February 17, 1998 (*Grant*), did not recognise the rights of a de facto lesbian couple in the United Kingdom due to the lack of a Community legal base as regards such recognition. Despite the fact that the situation was similar to the one in the United Kingdom, the Spanish Decision established that

“The claim lodged by the claimant, Celso de C. G., against the Public State Company *Renfe* has been allowed, and it is declared that this claimant forms a de facto couple with José Carlos G. H., and, consequently, the stipulations of the XIII Collective Agreement of *Renfe* regarding de facto couples is applicable and I declare that the worker has the right to the benefits which this Agreement grants to de facto couples, in particular, the right to recognise the partner as the beneficiary of the transport entitlement while the partner continues to be a member of the de facto couple, under the terms of the conventional norm (article 489). Therefore, the State Company Red de Ferrocarriles de España is condemned to comply with this declaration and to hand over to the claimant the transport entitlement his de facto partner is entitled to”.

*b) The principle of non-discrimination due to nationality*

1. In Spain, this principle has traditionally been complied with as shown by several Community norms which were directly applicable. The clearest evidence regarding compliance was the Declaration of the Spanish Constitutional Court in 1992 which admitted the reform of article 13.2 of the Spanish Constitution in order to guarantee the passive suffrage of Community residents in the municipal elections and the elections to the European Parliament.<sup>10</sup>

Nevertheless, Spain has also been condemned by the Court of Justice of the European Community for infringing this principle, due to discriminating against Community nationals over 21 years old as regards access to Spanish museums,<sup>11</sup> and reserving the employment or entrepreneurial activity of sworn security guards for Spanish citizens.<sup>12</sup>

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10 Notification No. 1236/1992. This gave rise to Organic Law No. 1/97 of 30/05/1997 on the modification of the Organic Law on the General Electoral System in order to transpose Directive 94/80/EC on Municipal Elections, *Official State Gazette* number 130 of 31/05/1997, p. 16828 (Marginal 11653).

11 Decision of the Court of Justice of the European Community (Plenary) of March 15, 1994.

12 Decision of the Court of Justice of the European Community of October 29, 1998.

2. As regards discrimination, the most relevant debatable point concerning Spanish legislation involved reserving the employment of captain and first officer in the merchant navy for Spanish nationals. Thus, the Decision of the Court of Justice of the European Community of September 30, 2003, declared against Spain that

“article 39.4 of the European Community Treaty must be interpreted in the sense that it only authorises a Member State (Spain) to reserve employment as captain and first officer of merchant ships which fly its flag for its citizens if the prerogatives of public power attributed to captains and first officers are effectively habitually exercised and do not represent a very reduced part of their work ... article 39 opposes that a Member State submit access of nationals from other Member States to the aforementioned employment to the condition of reciprocity, as those included in article 8.3 of Royal Decree 2062/1999, whereby the minimum level of training in maritime professions is regulated”.

However, in its Decision of December 4, 2003, the Spanish Supreme Court adopted the minimum laid down by the Court of Justice of the European Community and only declared the invalidity of article 8.3 which stipulated that

“Notwithstanding the stipulations of the previous paragraph, the citizens of the European Union who have a title issued by a Member State can exercise command in merchant ships with a gross tonnage of below 100 GT, which carry cargo or less than 100 passengers, those which operate exclusively between ports located in areas in which Spain exercises sovereignty, sovereign rights or jurisdiction and when the person concerned accredits the right of reciprocity of the State he is a citizen of with regard to Spanish citizens.”

The Supreme Court maintains the rest of the legislation, which gives rise to serious doubts concerning compatibility with the Treaty of the European Community.

Specifically, article 77.2 of Law 27/1992 of November 24, which reserves employment on the crews of ships which involves the exercise of public functions, even though this is occasional, for Spanish citizens, and the fifteenth additional provision of this Law, according to which “the captains and the first officers of ships must, in all cases, be Spanish citizens” when the ships are registered in the Special Register, which affects the ships of the shipping companies whose centre of operations is based in the Canary Islands, or those which are based in the other parts of Spain and have a permanent establishment in the Canary Islands. As we have stated, the Court of Justice of the European Community pointed out that the public functions had to be carried out habitually and the Spanish legislator, which extends to the Spanish Supreme Court, upholds the validity of this provision which recognises the occasional nature of the functions concerning public power in order to reserve the employment for Spanish citizens, and the fifteenth additional provision, which retains the criteria of flexible interpretation instead of declaring incompatibility with Community Law.

Thus, we recommend that the Commission urge the Spanish Administration to inform on the scope of this provision as its current terms are contrary to the Decision of the Court of Justice of the European Community and to inform on the position held by the Spanish Supreme Court.

*Recent legal literature*

*Mujer, inmigración y trabajo*, Colectivo IOÉ, 2001, ISBN: 84-8446-039-8.

Aparicio Gómez, R. y Tornos, A., *El Estado de Bienestar y la inmigración en España*, 2002. 124 p. ISBN: 84-8446-050-9.

## Chapter III

### Employment in the Public Sector

#### *1. Nationality condition for access to the public sector*

##### *a) Applicable Legislation*

The analysis of the legislation applicable in Spain concerning whether or not Spanish nationality is required to access a vacancy in the Public Administration must take into account the three territorial levels (the State level, the Autonomous Community level and the local level), which also involve different legislative and administrative regulations. Therefore, it is essential that we deal with the distribution of competences between the State and the Autonomous Communities and determine which are the possible competences of the local Administrations.

Thus, article 149.1,8 of the Spanish Constitution stipulates that the conditions for accessing the civil service are the competence of the State while their development will correspond to the Autonomous Communities.

In application of this constitutional stipulation, Law 17/1993 of December 23 (Official State Gazette of December 24) on access to certain sectors of the civil service by the nationals of the other Member States of the European Community was approved and continues to be in force. This Law was developed by Royal Decree 543/2001 of May 18, of the Ministry for Public Administrations, on the access to public employment in the General Administration of the State and its public bodies by the nationals from other States to whom the right to the free movement of workers applies.

The essential points of this State Legislation are as follows:

- The recognition of the principle that the Law is based on the implementation of the free movement of workers within the European Community, and all discrimination as regards the nationalities of the workers of the Member States of the EU concerning employment, remuneration and the other employment conditions remains abolished. In particular, article 1.1 states that “the nationals of the other member States can access the teaching, postal, health assistance and other sectors of the civil service which the free movement of workers applies to, in the same conditions as Spanish citizens”.
- However, this principle has restrictions in Spanish legislation. Thus, the jobs in the sectors we have just referred to and which imply the exercise of public powers or the responsibility to safeguard the interests of the State or the Public Administrations are reserved for the civil servants with Spanish nationality. This legislation, which is an exception to the general principle described above must be interpreted restrictively in such a way that, unless it is expressly stated that that the job is reserved for Spanish nationals, this may be taken up by nationals of other Member States in the same terms.<sup>13</sup>

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13 In this regard article 2 of Law 17/1993 stipulates that, in order to be admitted to the selection procedures the nationals of the other Member States of the European Community must accredit their nationalities (thus, the loss of the nationality will entail the loss of their conditions as civil servants unless they acquire the nationality of another Member State, art. 3 of the Law) and compliance with

- As concerns the determination of the posts the nationals of other Member States are excluded from, article 1.2 of Law 17/1993 stipulates, as regards the conditions of the statutory regime of the civil servants in the terms of article 149.1.18 of the Constitution, that “within the scope of their respective competences, the Government or possibly the relevant bodies of the Autonomous Communities or of the other Public Administrations will determine the Bodies, Positions, Posts or Jobs the nationals of the other Member States of the European Community cannot access”. That is to say, the formal instrument for determining which specific posts are legitimately excluded from the application of the aforementioned principle will be the lists of posts.
- Finally, with regard to the subjective scope of application of this legislation, Law 17/1993 applies to the nationals of the Member States of the European Community and to the nationals of those States to which, by virtue of International Treaties signed by the European Community and ratified by Spain, the free movement of workers apply in the terms in which this is defined in the Constituent Treaty of the European Community.

After the modification made by article 37 of Law 55/1999 of December 29 on Fiscal, Administrative and Social measures, the personal scope was extended to the spouses of Spanish nationals and the spouses of the nationals from the other Member States of the European Union, on condition that they are not separated de iure, as well as to their descendants and to those of their spouses on condition that they are not separated de iure, and to those under 21 years old and those older than this who live at their expense.

*b) Community and Spanish Case Law*

Although the approach by sectors is an important starting point for controlling the application of the principle of free movement of workers (in the terms in which this was made by our Law 17/1993), in the opinion of the Commission and in accord with the evolving European Case Law, only two categories of employment can be distinguished: on the one hand, those which involve the exercise of public power and the responsibility to protect the general interest of the State and, on the other hand, all the rest. The sectors included in the Annex of Royal Decree 543/2001 correspond to the areas in which the Commission continues to consider that the exception to the principle applies, in particular, the cases involving the specific functions of the State and Public Bodies, the armed forces, the police and other forces responsible for maintaining public order, the judiciary, taxation work and the diplomatic corps, although it specifies that not all the jobs related to these sectors must be excluded. Which jobs can be held by nationals of other Member States will be determined in accordance with this restrictive interpretation in the lists of jobs.

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the requirements laid down for all the participants, and they must also accredit that they are not subject to any disciplinary sanctions or criminal sentence which prevents their access to the civil services in their States.



There is no specific case law on this question. Some of the decisions which are quoted below refer generically to the application of the principle of free movement of workers in the Public Administrations.

## *2. Recognition of diplomas for access to the public sector*

### *a) Applicable Legislation*

Generally, insofar as the title has been awarded in recognition of the termination of a certain level of education or training, this title must be recognised.

In particular, Royal Decree 86/1987 of January 16 on the accreditation of foreign titles applies.

### *b) Community Case Law and Spanish Case Law*

The Decision of the High Court of Justice of Aragón, No. 867/2003 (Section 2 of the Contentious-Administrative Court) of October 13.

The holder of the “BSc in Technology Management” from the University of Wales” awarded by the centre it has in Málaga is excluded from an announcement for applications whose conditions require that the person who applies for the exams be in possession of a University Education” as it is considered that the title issued by a foreign centre must be approved in order to be valid in Spain.

Decision of the High Court of Justice of Aragón (Section 2 of the Contentious-Administrative Court) of January 19, 2001 (Appeal 82/2000), quoted in the previous Decision as the grounds of its doctrine regarding the possible accreditation of the title of Bachelor Of Arts in Business Administration issued by the University of Wales at the centre it has in Málaga as the Spanish title of Graduate in Management and Business Administration, in a case which is practically identical to the case resolved in the aforementioned decision. The Court puts forward arguments along different lines:

- On the one hand, as regards the infringement of the norms of Community law (prohibition of discrimination as regards nationality, the free movement of workers and the freedom to settle), insofar as the appellant obtained the title at the centre which a British University has in Spain and, therefore, they have not travelled to study nor have they practised the profession the title obtained empowers them to practise in any other country of the Community nor do they intend to continue to practise the profession corresponding to these titles after having done so in any other Member State, in this case, it is clear that the provisions of Community Law do not apply as this is a purely internal situation of one of the Member States.
- On the other hand, as regards the accreditation of titles, the basic presupposition is that the title invoked be one which, due to its nature and validity is capable of being placed on the same footing as those which are of an official nature in Spain and, therefore, those which are not of this nature are excluded and can only be recognised reciprocally by Universities. Thus, “as the title is official and fully valid in the country where it was issued, the Administration cannot question this nature, since the definition of the nature of the title is not its province, but has to be processed

as stipulated in Royal Decree 86/1987 and its implementation rules and resolved in consequence...”. The doctrine contained in this Decision supposes the requirement of the previous accreditation of the studies done at a foreign university which have education centres on Spanish territory with a view to determining the equivalence of these studies with those required by Spanish legislation in order to obtain the corresponding Spanish title.

### *3. Obligation to participate in a competition which gives access to training and afterwards to a post in the public sector*

#### *a) Applicable Legislation*

There are no specific regulations concerning this question. It will be necessary to analyse the content of the conditions of the announcements of the personnel selection procedures made by the Public Administrations.

#### *b) Community Case Law and Spanish Case Law*

No Spanish Case Law concerning this specific question has been found.

### *4. Recognition of professional experience and seniority acquired in another Member State*

#### *a. Applicable Legislation*

In principle, the requirements which the foreign candidates must have or comply with will be accredited in accordance with what is determined by each announcement. At the time the application to participate in the selection processes is submitted, the nationality must be accredited (and in the case laid down in article 2.2.1.b of Royal Decree 543/2001, the family relationship, and possibly the fact of living at the expense or being under the responsibility of a national of a Member State of the European Union). For these purposes, according to the final drafting of Law 17/1993 article 2.3, the Ministry of Public Administrations is responsible for determining the system of accreditation of the requirements (article 8 of Royal Decree 543/2001).

In addition, the announcements of the selection process will determine the way to accredit adequate knowledge of Spanish and it may be necessary to pass tests for this purpose unless the selection tests entail the demonstration of such knowledge (article 9 of Royal Decree 543/2001).

#### *b) Community Case Law and Spanish Case Law*

The Decision of the High Court of Justice of Andalusia, Granada, No. 812/2003 (Section 1 of the Contentious-Administrative Court) of December 1 (Ref. 2004/71473).

Merit consisting of the provision of professional services as a nurse in the Portuguese Institute of Oncology belonging to the Portuguese Health Service must be scaled as services provided in the public health service, not necessarily in the Spanish Health Service. Any other interpretation of the conditions of the announcement of hiring would be “contrary to the principle of free movement of workers enshrined in article 48 of the

Treaty of the European Union as this principle not only prohibits manifest discrimination based on nationality, but also any concealed discrimination which leads to the same result by applying other criteria of differentiation”.

It quotes the Decision of the High Court of Justice of Andalusia in Málaga of December 21, 2000 (Ref. 2001/482) which, in an identical case to the one mentioned above and after a meticulous study of Community legislation and Case Law, states that “...We cannot interpret the conditions of the announcement to establish the scale applicable to training for the employment bureau as the defendant Administration and the Decision appealed against have done as this interpretation conceals discriminatory treatment of a Community citizen, who is Spanish, in this case, due to the mere fact that part of his professional training was done at a health institution in Germany”.

## Chapter IV Family Members

1. With regard to the free movement of the family members of an EU citizen, we must not forget that a substantial legislative change was made in Spain during the period under analysis.

As mentioned in the *General Remarks* of this Report, during 2003, the legislation on the free movement of workers in the EU (the European Economic Area and Switzerland), which had been included in the 1992 Royal Decree,<sup>14</sup> was regulated by the 2003 Royal Decree.<sup>15</sup>

For this reason, in this Chapter and in Chapter I we will refer separately to the period before and the period after the entry into force of the 2003 Royal Decree.

Some of the questions concerning the treatment given to the family members of citizens of the EU (the European Economic Area and Switzerland) under Spanish Law have already been analysed in Chapter I of this Report on “Entry, Residence, and Exit”. Therefore, in this Chapter we will deal only with the more relevant items and refer to Chapter I regarding these.

2. The family members of Community Citizens who benefit from the right of entry and residence or the right of entry, residence and work, while these Community citizens exercise their right to free movement, are listed in article 2 of the 1992 Royal Decree. These are now included in article 2 of the 2003 Royal Decree with the differences which we will analyse below.

In both Decrees (the 1992 Royal Decree and the 2003 Royal Decree) mention is made of the following:

- The spouse who is not separated de iure;
- The descendents of the citizen of the EU and those of the spouse who is not separated de iure who are under twenty-one years of age or older if they depend financially on the citizen of the EU;
- The relatives in the ascending line of the EU citizen and those of the spouse not separated de iure, in the event that these relatives in the ascending line depend financially on the EU citizen. However, in the case of relatives in the ascending line, they will only have the right to residence recognised and in no case will they have the right to work recognised. In addition, the relatives in the ascending line of Community students and of their spouses are ex professo excepted from the right of residence;<sup>16</sup>
- The rest of the family members of the Community citizen are subject to the Aliens Act.

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14 *BOE (Official State Gazette)* of June 30, 1992, No. 156, p. 22275.

15 *BOE (Official State Gazette)* of February 22, 2003, No. 46, p. 7397.

16 This exclusion was debatable after the Decision of the Court of Justice of the European Community of May 25, 2000, *Commission/Italy*. *Vid supra* Chapter I.

In both the 1992 Royal Decree and the 2003 Royal Decree the family members of EU citizens with the nationalities of third countries require an entry visa, although this is issued free of charge.

3. In this regard, there has been administrative practice in Spain which we understand to be absolutely contrary to Community Law concerning certain examples of refusal to provide visas for family members with the nationality of third countries. This anomalous situation had to be guaranteed subsequently by the judges. However, taking into account the fact that a substantial period of time elapses in Spain before a case is judicially decided, such practice entails a serious infringement of the rights of family members of EU citizens.

Article 4.4 of the 2003 Royal Decree stipulates that the resolution refusing the request for a visa by the family members mentioned in article 2 (beneficiaries of the liberties of the Community citizen under the terms laid down) must “be justified, stating the reasons of public policy, security or public health the refusal is based on and the person concerned must be informed of these unless this is contrary to the security of the State”. Despite these cautions, there is a possibility that administrative practice misuses the security reasons referred to.<sup>17</sup>

4. With regard to the above question, there is the question of the cases involving exemption from visas.

During the period of validity of the 1992 Royal Decree, the “exemption from visa” laid down by the Aliens Act was frequently used by the family members of Community citizens. For example, the Courts recognised that the Spanish Aliens Act, which required that the marriage had lasted at least three years in order to qualify for the exemption of a visa, did not apply to the spouses of Community citizens, when these spouses are nationals of third countries.

Thus, the Decision of the High Court of Justice of the Basque Country of June 22, 1998 stated that the Order of April 11, 1986 on the exemption from visas was not applicable as regards the provision which required three years of previous marriage for the spouse who was a national of a third country to be exempt from a visa. The Court accepted the arguments of the appellant and understood that the requirement regarding three years of previous marriage in order to be exempt from a visa did not apply as this measure, “did not comply with the Community mandate concerning the granting of all kinds of facilities in order to obtain this document, thus hindering the right of free movement of persons enshrined in the constituent Treaties of the EU”.

Furthermore, in the Decision of the High Court of Justice of the Canary Islands of June 4, 2001, The Court pronounced on a request for exemption from a visa for a Russian national married to a British citizen who was legally resident in Spain. The Spanish authorities had rejected the visa exemption for this family member of a Community citizen based on the requirement laid down in the aforementioned Ministerial Order of April 11, 1996 on visa exemptions. The Court understood that

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17 *Vid supra* Chapter I .

“(...) the administrative resolution infringed the applicable legislation as there were exceptional, substantial and significant grounds to such an extent that the exemption from a visa had to be chosen. The citizen was married to a Community resident and the marriage union and link was a sufficiently qualitative circumstance to render the dispensation applicable...”.

It should be borne in mind that the latest modification to the Spanish Aliens Act (Organic Law 14/2003 of November 20) suppresses the “exemption from a visa”. Therefore, as from the entry into force of the 2003 Aliens Act (that is to say, since December 22, 2003), there is no possibility that the family members of Community citizens may appeal to this exemption from a visa.

5. Another interesting question in Spain is the matter of the rights of the spouse or the children of a Spanish citizen when this spouse and/or the children have the nationality of a third country.

As is already known, Community Law does not extend its protection to the Spanish citizen who resides and works in Spain and has not exercised his right to free movement. Community Law does not guarantee the rights which it guarantees to the spouses and children of other citizens of the EU who are in Spain exercising their rights of free movement to the spouse and children of a Spanish citizen when these have the nationality of a third country.

However, the 1992 Royal Decree treats the rights of the Community citizens who were residing and working in Spain by virtue of their rights of free movement, residence and work as equal to the rights of Spanish citizens. Thus, the spouse and the children of a Spanish citizen with the nationality of a third country came under the privileged provisions of the 1992 Royal Decree and did not come under the scope of application of the Aliens Act.

In this regard, the Decision of the Spanish Supreme Court of April 11, 1995, rejected the refusal to allow an EU citizen who was a minor to enter Spain where she intended to visit her mother who was married to a Spanish citizen. The reason put forward for this refusal was the lack of financial resources. The Supreme Court permitted the minor to enter the country as it considered that the legislation on citizens of the EU applied to the case (that is to say, it was not a question of a case regulated by the Aliens Act) and that, with regard to the lack of financial resources, “( ...) a regulation which was inapplicable to the case could not be infringed as this requirement did not affect the persons included in the scope of application of the 1992 Royal Decree”.

6. With the entry into force of the 2003 Royal Decree, there were certain innovations as regards the rights of family members of EU citizens.

It should be stressed that some of these innovations were annulled by the Decision of the Supreme Court of June 10, 2004.

7. One of the new provisions of the 2003 Royal Decree which was annulled by the Spanish Supreme Court refers to the requirement that the family members of citizens of

the EU who have the right of free movement must maintain “a stable, permanent relationship involving living together with these citizens”<sup>18</sup>.

In fact, the Supreme Court declared the invalidity of the requirement for the family members to live together in a stable and permanent relationship with the citizen of the EU or of the European Economic Area.

Referring, *inter alia*, to the Decision of the Court of Justice of the European Community of September 23, 2003 (*Akrich*) it stated that “the precept appealed against was not in conformity with Community legislation which did not require living together in a stable and permanent relationship as referred to in the point in article 2 which was the subject of the appeal and, therefore, must be annulled”.

Another of the provisions of the 2003 Royal Decree annulled by the Decision of the Supreme Court of June 10, 2004 is the one concerning the requirement to accredit “living together in Spain for at least one year”,<sup>19</sup> so that the spouse of the EU citizen might obtain the visa.<sup>20</sup> The Spanish Supreme Court laid down that,

“in accordance with the case law of the Court of Justice of the European Community, no requirements can be demanded to allow entry into Spain other than the accreditation of a matrimonial relationship since, as the Decision of the Court of Justice of the European Community of July 25, 2002 [*MRAX*] states, article 3 of the Directive 68/360 and 3 of Directive 73/148, as well as Regulation 2317/95, considered in the light of the principle of proportionality, must be interpreted in the sense that a Member State cannot refuse entry at the border to a national of a third country who is the spouse of a national of a Member State and intends to enter its territory without an identity document or a valid passport or, possibly, a visa, when the spouse can prove his or her identity and the matrimonial relationship, and if there are no circumstances which show that he or she represents a risk to public policy, security or public health”.<sup>21</sup>

8. With regard to the residence of family members of the EU citizen, we must bear in mind that, according to the regulations of the 1992 Royal Decree, the members of the family who were nationals of third countries received a Family Community Residence Permit for the same period of time as the permit of the person they depended on. However, the family members of Spanish citizens received a residence permit valid for five years.

The 2003 Royal Decree makes substantial innovations. Among these, it establishes that those who have the nationality of any State of the EU or of a State of the European Economic Area or those who are family members of these citizens<sup>22</sup> can reside in Spain and are not required to have a residence permit, and only need the documentary accreditation of their nationalities or the family condition which gives the right of residence.

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18 Article 2 of the 2003 Royal Decree.

19 Article 11.3, C) of the 2003 Royal Decree.

20 Although the 2003 Royal Decree suppresses the obligation to apply for a residence permit in the case of Community citizens who exercise their right to free movement (*vid supra*), the family members of these Community citizens still have the obligation to apply for an entry visa.

21 *Vid supra* Chapter I.

22 Family members listed in article 2 of the 2003 Royal Decree. *Vid supra*.

Nevertheless, the 2003 Royal Decree continues to require the Community Residence Permit for the family members of a Community or European Economic Area citizen when these family members have the nationalities of third countries.<sup>23</sup>

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23 Article 8 of the 2003 Royal Decree. As we pointed out above (Chapter 1), in our opinion, the requirement of a residence permit for the family members of Community citizens who have the nationality of a third country could be in contradiction with the case law of the Court of Justice of the European Community in the MRAX and AKRIH cases.



## Chapter V

### Relevance of Recent Court of Justice Judgments on Free Movement of Workers

In this Chapter we would stress the most outstanding decisions of the European Community Court of Justice, which have affected the decisions of the Spanish case law. All of them are analysed at the correspondent Chapter of the present Report.

1. There are two important aspects related to free movement of European Union family members given by two recent decisions of the European Community Court of Justice which were the ratio decidendi of a Spanish Supreme Court judicial decision.<sup>24</sup>

One of the decisions of the ECCJ is the decision of September 23, 2003 on the Case of *Hacene Akrich*. Following this case law, the Decision of the Spanish Supreme Court of June 10, 2004 declared the invalidity of the Spanish provision in the new 14/2003 Aliens Act of November 20, on the requirement for family members to live together in a stable permanent relationship with the holder of the freedom of movement right.<sup>25</sup>

The other decision is the case of *MRAX*. Following that case, another provision of the 14/2003 Aliens Act of November 20 was declared invalid by the Spanish Supreme Court (also by decision June 10, 2004). This provision required that the spouse needed to “accredit living together in Spain for at least one year”, so that he or she may obtain a visa. The Spanish Supreme Court lays down that

“... in accordance with the case law of the Court of Justice of the European Community, no more requirements should be demanded than the accreditation of the relationship as spouse in order to permit entry to Spain since, as the Decision of the Court of Justice of the European Community of July 25, 2002 [Case of *MRAX*] states, articles 3 of Directive 68/360 and 3 of Directive 73/148, as well as Regulation 2317/95, considered in the light of the principle of proportionality, must be interpreted in the sense that a Member State cannot refuse entry at the border to a national of a third country who is the spouse of a national of a Member State, when this person attempts to enter its territory without an identification document or a valid passport or, possibly, a visa, when this spouse can prove his or her identity and the matrimonial relationship and, if there are no circumstances which demonstrate that he or she represents a risk to public policy, public security or public health...”<sup>26</sup>

2. Regarding non-discrimination on nationality, the most ECCJ relevant decision for Spain on is the *Bosmann* Decision of December 15, 1995. The *Bosmann* case, which entailed the principle of equal treatment to persons benefiting from the agreements with the countries of Central and Eastern Europe and with other third countries, gave rise to a debate regarding its application to sportspersons. In Spain, this has given rise to the issue of the free movement of the so called “B Communitarians”.

The conflict arises when the players, nationals of third countries with a work and residence permit in accordance with the Spanish general aliens legislation, ask for a federation card stating that they are “assimilated to Community citizens” claiming their rights,

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24 Even though the Spanish Supreme Court’s decision is dated at June 2004, the subject is important enough to be mentioned in this report.

25 See below Chapter IV.

26 *Id.*

through the co-operation or association agreements, in order not to take up a place as a foreigner.

Recently, the Spanish Social Courts, which previously had supported the position that the so called B Communitarians were “assimilated to Community citizens” stood down from that position and follow the new Spanish contentious-administrative case Law which considers that the so called “B Communitarians” are nationals of third countries and must play as foreign players.

This change appears clearly in the Decision of the Central Court of the Contentious-Administrative of October 29, 2002 concerning the claim presented to the Social Court of Barcelona by Karnisovas in 2000, a Lithuanian professional basketball player.<sup>27</sup>

However, the Decision of the ECCJ of May 8, 2003 (Maros Kolpak) on the interpretation of article 38, section 1 of the Association Agreement made by the European Community and its Member States and the Slovak Republic concludes that

“Article 38, section 1, first point of the Agreement must be interpreted in the sense that it is opposed to the application of a rule adopted by a sports federation of a Member State to a professional sportsperson with Slovak nationality contracted properly by a club from the same Member State when, by virtue of this rule, the clubs are only authorised to line up a limited number of players from third countries which are not part of the Agreement on the European Economic Area”.

Thus, the Spanish Courts need to change their case Law, to adapt it with the jurisprudence of the ECCJ.

3. There is another relevant debatable point in Spain regarding the legislation which reserves the employment of captain and first officer in the merchant navy for Spanish nationals. Thus, the Decision of the European Community Court of Justice of September 30, 2003, declared against Spain that

“article 39.4 of the European Community Treaty must be interpreted in the sense that it only authorises a Member State (Spain) to reserve employment as captain and first officer of merchant ships which fly its flag for its citizens if the prerogatives of public power attributed to captains and first officers are effectively habitually exercised and do not represent a very reduced part of their work ... article 39 opposes that a Member State submit access of nationals from other Member States to the aforementioned employment to the condition of reciprocity, as those included in article 8.3 of Royal Decree 2062/1999, whereby the minimum level of training in maritime professions is regulated”.

However, the Spanish Supreme Court, in its Decision of December 4, 2003, declared the invalidity of article 8.3 of the Royal Decree 2062/1999, maintaining the rest of the Spanish legislation on the matter.<sup>28</sup>

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27 See Chapter VII of this Report. All this debate on the so called “B- Communitarians” has been quite controversial and has had social relevance in Spain through the mass media.

28 See Chapter II of this Report. From our point of view, other aspects of the legislation give rise to serious doubts concerning compatibility with the Treaty of the European Community.

4. As concerns Social Security and free movement of workers, the approval of Law 35/2002 of July 12 on measures establishing a system for gradual, flexible retirement and Royal Decree 1132/2002 of October 31 on its development, recognises certain rights of workers who take early retirement, among others, the obligation of the companies which retire workers early to subscribe to Special Agreements with the Social Security until they reach retirement age.

These rights recognised in Spanish legislation could be in danger if they are opposed to the doctrine of the Decision of the European Community Court of Justice of June 4, 2002, in the Beckmann Case. As far as the ECCJ is concerned, they do not constitute retirement, disablement or survivor benefits pursuant to the complementary professional insurance regimes of article 3.3 of Directive 77/187 on the approximation of legislation concerning the maintenance of the rights of workers in the event of the change of ownership of companies, business centres or parts of business centres.

5. Another issue related to Social Security concerns the Resolution of the General Directorate of the National Institute of the Social Security of January 24, 2003, on the Bilateral Agreement between Spain and Switzerland and the application of article 43 of Regulation (EEC) 1408/71 on permanent disablement pensions and those subsequent to old age. The Resolution attempts to respond to the question on which legislation will apply to a worker with a disablement pension recognised under the Agreement made between Spain and Switzerland, and its possible revision in accordance with what is stipulated in article 43 of Regulation 1408/71, once the Swiss body recognises the old age pension after the person concerned has applied for this.

The General Directorate resolved following Decisions of the European Community Court of Justice dictated in the *Röndfeld* Case (Decision of 07.02.91), the *Gómez Rodríguez* Case (07.05.98), the more recent *Kaske* Case (05.02.2002) and the *Martínez Domínguez* Case (24.09.2002), and the conclusion was that a more favourable benefit based on a bilateral Social Security Agreement is not lost as a result of the entry into force of the Regulation.

6. Another question involved the exclusion of the payments made by the National Employment Institute (INEM) of the totalization of the payments and which led the Number 3 Social Court of Orense to refer a pre-judicial question through the Order of March 30, 2002, registered by the European Community Court of Justice as case C-255/02. The doubts of the Spanish judge of the Social Court entailed articles 45 and 48.1 of Regulation (EEC) 1408/71 and the Spanish legislation which will involve a modification to the Law on the Social Security (LGSS) through its Provision 28, whereby it is laid down that the payments made by the entity managing unemployment insurance the National Employment Institute (INEM), in the case of retirement, will not be judicially valid or efficacious as regards accrediting the minimum period of payment required (article 161 Law on the Social Security) to access a retirement pension, as this period of lack should have been accredited at the time of the request for the unemployment subsidy.

7. Another issue of interest is the legislative integration of the Community Regulations and the bilateral agreements made by the Member States regarding Social Security. That is the case of the High Court of Justice of the Castile-León of July 8, 2002, applying the Spanish-German Agreement, and of the Decision of the Supreme Court of December 16, 2002 on the Spanish-Dutch agreement. In both cases, without expressly mentioning the doctrine of the European Community Court of Justice, the bilateral agreements are applied as these are considered to be more favourable than the Community Agreements as stipulated by the Court in the *Röndfeldt* Case and more recently, in the *Hervein and Lorthiois* Cases of March 19, 2002 and the *Kaske* Case of February 5, 2002.

## Chapter VI

### **Policies of a General Nature with Possible Repercussions on the Free Movement of Union Citizens**

#### *a) Autonomous decentralisation concerning immigration and its possible incidence concerning Community workers*

1. The process for the decentralisation of competences of the Central Government to the Autonomous Communities now taking place in Spain affects some important legal aspects of foreign immigration. This autonomous process, which has clear nuances related to legislative federalism, can affect the family of the Community worker with regard to aspects not covered by article 2 of the 2003 Royal Decree on Community citizens, as well as other aspects related to social measures and measures for integration.

A number of Autonomous Communities have developed their competences as regards questions of social integration of the immigrants residing in their respective Autonomous Communities through internal legislation. This makes the Autonomous Community bodies competent to intervene to the detriment of the State. Therefore, with regard to the Autonomous Communities which have developed their own legislation, the following should be mentioned: Decree 40/2002 of February 12 of the Basque Government on the organic and functional structure of the Department of Housing and Social Affairs, Decree 138/2000 which created the Department for the Coordination of Migration Policies of the Andalusian Government, Decree 270/2001 of December 13 on the organic structure of the Department of Social Services of the Community of Madrid, Decree 293/2000 of August 31 whereby the Secretariat for Immigration of the Government of Catalonia was created and Decree 188/2001 of June 26 of the Government of Catalonia whereby Organic Law 4/2000 on the rights and liberties of aliens in Spain and their social integration was developed.

As is already known, the Autonomous Communities in Spain (unlike other systems such as those in Belgium and Germany) do not have direct representation on the Council of Ministers of the EU. Therefore, the Autonomous Communities do not participate in the adoption of Community decisions, and are not responsible as regards the EU for failing to comply with Community legislation which, in Spain, must be executed and guaranteed by the Autonomous Communities by constitutional mandate. This situation can lead to tensions which affect the principle of equality of Community workers and their families, a circumstance which should be correctly delimited by the Spanish Government in order not to incur non compliance.

2. In an attempt to prevent the Autonomous Communities accessing knowledge of the collateral aspects of immigration, the Spanish Government appealed for the annulment of Decree 40/2002 of February 12 of the Basque Government on the organic and functional structure of the Department of Housing and Social Affairs, specifically with regard to

“Article 16. Department of Immigration. Apart from the functions attributed to the Department of Immigration by article 6 of this Decree, it also has the following functions: a) The definition of a particular strategy for the Autonomous Community of the Basque Country as regards immigration. b) Planning action concerning immigration and the drafting of legislative projects

in this regard. c) The proposal of action and measures intended to achieve the social integration of immigrants and their incorporation into the systems for social protection. d) The proposal of mechanisms and instruments for coordination with the State and other Public Administrations with regard to immigration and without prejudice to the competences of the Vice-President of the Government. e) The proposal and execution of measures to make the population aware of the need to accept and support associative and inter-cultural activities”.

The appeal was resolved by the Spanish Supreme Court through the Decision of September 30, 2003, which declared the legality of such provisions as regards the Spanish Constitution and, therefore, it opened the way to state and autonomous regulation which might negatively affect the harmonised employment market. Specifically, the Court established that

“As the legislative provision challenged was drafted in accordance with the judicial provisions while the provisions of article 16 which attributed functions to the Department of Immigration are to be understood to be within the scope of competence of the Autonomous Community, the appeal must be dismissed without prejudice to the fact that this does not obviate that there may be negative incidences which the exclusive competence of the State might ignore as regards specific action within the exclusive State competence in immigration matters....”.

The Supreme Court does not discard the fact that this Autonomous Community competence might be the focus of conflict between the State and the Basque Autonomous Community (or, by extension, other Autonomous Communities), as well as the State with the EU, taking into account the Community involvement in questions of immigration..

Therefore, we suggest that the Commission monitor and obtain information on the process of decentralisation of competences in order to determine the extent of compliance with Community legislation in each and every one of the Autonomous Communities. It is common practice in the historical Autonomous Communities to favour the employment of persons with knowledge of the language spoken in the Autonomous Community and who have been registered on the electoral roll for quite a time in the Autonomous Administrations.

*b) The adaptation of the practice of employment contingents or quotas for aliens to the principle of national or Community preference*

1. Community Legislation on the free movement of workers demands that the vacancy be offered for four weeks through the usual official procedure in the Member State and through EURES so that, in the event that any citizen of another Member State wishes to apply for the job offered in Spain, he is granted preference with regard to the nationals of third countries who wish to come and work in Spain. This situation leads us to question whether the policy of work contingents developed by the Spanish Administration is compatible with these obligations.

The general legislation on aliens lays down the procedure for contingents or quotas for jobs offered to the nationals of third countries. The quotas are fixed, specifically, each year. In the event that the job which the alien will do is as an employee, the domestic employment situation will be taken into account in each individual case as regards the initial concession of the work permit (article 38 Organic Law 4/2000 of January 11. In

order to specify the domestic employment situation as regards each individual case, two basic elements must be taken into consideration in accordance with article 70.1 of the 2001 Regulations:

- 1) The lack of Spanish, Community or alien workers authorised to work throughout the national territory and capacitated to work in the profession or job requested by the company.
- 2) The processing of the offer of employment through the Public Employment Service has concluded and the vacancy has not been filled.

In addition, the system of reciprocity in the country of origin of the alien must be taken into account. The domestic employment situation is not taken into consideration in the cases of articles 71, 76, 77 and 79 of the 2001 Regulation and in the cases of nationals from countries in respect of which it may not be necessary to take into account the domestic employment situation in application of international agreements (due to the fact that there are migratory clauses): Chile and Peru.<sup>29</sup>

Moreover, as regards the processing of quotas, the international agreements on the rules and regulations regarding migratory flows made by Spain and whose “preferential aspects” may generate problems with respect to Community citizens and their families must be taken into account. There are international agreements of this type with Morocco,<sup>30</sup> Colombia,<sup>31</sup> Ecuador,<sup>32</sup> the Dominican Republic,<sup>33</sup> Rumania,<sup>34</sup> Poland<sup>35</sup> and Bulgaria. The agreement with Andorra must also be taken into account,<sup>36</sup> as well as

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29 International Agreements made in Santiago de Chile on May 24, 1958 (*14-11-1958*) and in Madrid on May 16, 1959 (*Official State Gazette 19-4-1960*).

30 The provisional application of the agreement concerning residence and work permits made between the Kingdom of Spain and the Kingdom of Morocco and signed “ad referendum” in Rabat on February 6, 1996 (*Official State Gazette No. 129 of May 28*). This came into force on March 7, 1997 (*Official State Gazette No. 211 of September 3*).

31 Provisional application of the agreement made by Spain and Colombia concerning the rules and regulations concerning the work migratory flows signed in Madrid on May 21, 2001 (*Official State Gazette of 4-7-2001*).

32 Provisional application of the agreement made by the Kingdom of Spain and the Republic of Ecuador concerning the rules and regulations of migratory flows signed in Madrid on May 29, 2001 (*Official State Gazette of 10.8.01, No. 164*).

33 Provisional application of the agreement made by the Kingdom of Spain and the Dominican Republic concerning the rules and regulations on migratory flows signed in Madrid on December 17, 2001 (*Official State Gazette of 5.2.2002, No. 31*).

34 Provisional application of the agreement made by the Kingdom of Spain and the Republic of Rumania concerning the rules and regulations on migratory flows signed in Madrid on January 23, 2003 (*Official State Gazette of 3.12.2002 No. 289*).

35 Provisional application of the agreement made by the Kingdom of Spain and the Republic of Poland concerning the rules and regulations on migratory flows signed in Warsaw on May 21, 2002, (*Official State Gazette of 20.9.2002*).

36 Agreement made by the Kingdom of Spain, the French Republic and the Principality of Andorra concerning the entry, movement, residence and establishment of their nationals made “ad referendum” in Brussels on December 4, (*Official State Gazette of June 27, 2003*).

other specific immigration agreements such as those made with Guinea Bissau<sup>37</sup> and Mauritania.<sup>38</sup>

2. The European Commission should request Spain for information on compliance with the obligation to publish the annual contingents or quotas in EURES as article 70 of the 2001 Regulation seems to refer only to Community citizens who are in Spain. It is also necessary to coordinate the preferential channel marked out by Spain through the international agreements on the rules and regulations of the migratory flows mentioned with the Commission.

3. In order to verify the amount of vacancies allotted to these contingents or quotas, those planned for 2002 and 2003 can be checked.

In fact, as stated in the report of the Consejo Económico y Social de España (Spanish Economic and Social Council).<sup>39</sup> the 2002 contingent for vacancies not covered a priori by nationals or Community citizens was fixed at 32,079 vacancies and 10,884 of these were stable jobs, (64 per cent in construction and services) and 21,195 were temporary jobs (75 per cent of these were in the agricultural sector). In addition, as we stated above, preference would be given to candidates from those countries which have signed agreements on the rules and regulations on migratory flows with Spain.

In the Agreement of the Council of Ministers which set out the contingent for 2003, the vacancies would be processed through the body in charge of the pre-selection in the countries Spain has subscribed agreements with on the rules and regulations on migratory flows (Morocco, Colombia, Ecuador, Dominican Republic, Rumania, Poland and Bulgaria), whose citizens have priority as regards obtaining a vacancy available through the contingent. With regard to 2003<sup>40</sup> the initial forecasts amount to 24,247 vacancies, of which 10,575 would be stable jobs and 13,672 would be temporary with 9,919 vacancies being reserved for the holders of seasonal permits in previous years.

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37 Provisional application of the agreement made by the Kingdom of Spain and the Republic of Guinea Bissau concerning immigration, signed in Madrid on February 7, 2003 (*Official State Gazette* of 27-3-2003).

38 Provisional application of the agreement made by the Kingdom of Spain and the Islamic Republic of Mauritania concerning immigration, signed in Madrid on July 1, 2003 (*Official State Gazette* of 4-8-2003).

39 *Consejo Económico y Social (Economic and Social Council)*, Report on Immigration and the Job Market in Spain. 2004. pages 75 et seq. Resolution of January 11, 2001 of the Sub-Secretariat (Ministry of the Presidency), whereby provisions are made for the publication of the Agreement of the Council of Ministers of December 21, 2001, whereby the contingent of non-Community foreign workers is determined for 2002 (*Official State Gazette* of 12-1-2001). Memorandum 1/2002 of the Ministry of Employment on the general instructions regarding the contingent of non-Community foreign workers for 2002 and the procedure for covering vacancies.

40 Resolution of January 14, 2003, of the Sub-Secretariat, whereby provisions are made for the publication of the Agreement of the Council of Ministers of December 27, 2002, whereby the procedures for hiring are regulated and the number and characteristics of the employment vacancies are fixed for 2003 as regards foreigners legally resident in Spain and foreigners who are neither in Spain nor are resident there.



c) *Questions concerning the agreements made by Spain and third States regarding social security*

1. In this regard, mention should be made of Regulation (EC) 859/2003<sup>41</sup> whereby the provisions of the Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 were extended to the nationals of third countries who, due only to their nationalities, were not covered by these provisions.

By virtue of the new regulations, the nationals of third countries who already reside legally in a Member State and wish to work in another Member State can benefit from the transfer of their Social Security rights. This reform is in line with the idea of creating a flexible job market together with inter-Community job mobility.

2. If this occurs with aliens within the European Area, the question arises whether a Community citizen, who had worked in third countries and changes residence to Spain, can have the principle of equal treatment recognised and benefit from the agreements Spain has signed concerning Social Security with third States<sup>42</sup> in order to maintain and guarantee the rights to the social benefits corresponding to him for the periods worked in those third States. The question ought to be answered affirmatively a priori but the scope of personal application of the multiple agreements Spain has signed in this regard with third States remains to be seen in order to determine the real scope. A detailed analysis of the scope of personal application of these agreements made by Spain and third States concerning Social Security reveal that they only refer to their respective

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41 Regulation (EC) No. 859/2003 of the Council of May 14, 2003, whereby the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 are extended to the nationals from third countries who, due only to their nationalities, are not covered by these.

42 The agreement with Argentina of May 28, 1996, the provisional application of the Complementary Agreement to the Administrative Agreement for the application of the Social Security Agreement made by the Kingdom of Spain and the Argentinean Republic on May 28, 1966, signed in Valencia on May 14, 2002 (*Official State Gazette* of 19.9.02), with Brazil on May 16, 1991, with Canada on November 10, 1986 with an Administrative Agreement on the same date and an additional protocol signed on October 19, 1995 (*Official State Gazette* of 1.12.87). With Chile on January 28, 1997, together with an Administrative Agreement on the same date, the provisional application of the Complementary Agreement to the Social Security Agreement made by the Kingdom of Spain and the Republic of Chile on January 28, 1997 (*Official State Gazette* of 25.3.98), signed in Valencia on May 14, 2002. With Ecuador on April 1, 1960, an additional agreement and an Administrative Agreement of May 8, 1974 (*Official State Gazette* of 13.4.88). With the United States on September 30, 1986, with Mexico on April 24, 1994 and an Administrative Agreement of November 28, 1994, the provisional application of the complementary agreement to the Social Security Agreement made by the Kingdom of Spain and the United States of Mexico on April 25, 1994, signed in Madrid on April 8, 2003. Paraguay: an agreement of June 25, 1959 and a complementary agreement of May 2, 1972 (*Official State Gazette* of 6.9.75). Peru: an agreement of April 24, 1964 and an Administrative Agreement of November 21, 1978, the provisional application of the complementary agreement to the Spanish-Peruvian Administrative Agreement on Social Security of November 24, 1978, signed in Valencia on May 14, 2002, (*Official State Gazette* of 19.9.02). Uruguay: an agreement of December 1, 1997 and an Administrative Agreement of June 24, 2000. Panama: a health assistance agreement of 1978. Venezuela: an agreement of May 12, 1988 and an Administrative Agreement in 1989. Morocco: November 8, 1979, an Administrative Agreement in 1984 and an additional protocol of January 27, 1998 (*Official State Gazette* of 10.6.85). Tunisia: an agreement of February 2, 2001. The Philippines: an agreement of May 20, 1991 (*Official State Gazette* of 29.3.93). Australia: January 31, 2002 and an Administrative Agreement of December 20, 2002 (*Official State Gazette* of 25.2.03). An Instrument for the Ratification of the Social Security Agreement made by the Kingdom of Spain and the Ukraine, signed in Madrid on October 7, 1996.

nationals. If this is so, they are against the principle of non-discrimination due to nationality unless, in practice, Community citizens resident in Spain can be covered by the agreements referred to.

In any case, faced with the practical doubts arising in this case, we suggest that the Commission request information on the possibility of a Community citizen resident in Spain and who has worked in third States to be covered by the agreements subscribed to by Spain as regards Social Security when claiming the social benefits corresponding to him.

## Chapter VII

### EU Enlargement

1. In this Chapter, we will study the Spanish legal regulations applicable to the nationals of the countries which were candidates to the enlargement of the EU during the period analysed in this Report (2002 and 2003). The access of these citizens to the Spanish job market during the period of time previous to their accession to the EU was regulated by the Aliens Act.<sup>43</sup> Thus, according to the Aliens Act, in order to access the Spanish market properly, they must have an entry visa (article 27.2), a foreign identity card (article 4.2), a work permit or authorisation (article 36 et seq.), residence authorisation (article 30 et seq.) and they can request family regrouping (articles 17, 18 and 19).

2. Only when the requirements mentioned above have been complied with, would the framework clauses on equal treatment as regards employment conditions, dismissal and retirement stipulated in all the agreements of association made by the EU and the countries of Central and Eastern Europe and the rest of the cooperation agreements with North African countries such as Algeria and Tunisia, especially the agreements with Morocco and Turkey come into play. These agreements and the direct application in the Member States of their respective provisions regarding the principle of equal treatment in the employment area, establishment and the provision of services have been included in the Decisions of the Court of Justice of the European Community for some years. The more recent Decisions are the Decision of the European Court of Justice of November 20, 2001 (*Aldona Malgorzata Jany and others*) on the interpretation of articles 44 and 58 of the Association Agreement made by the European Community and its Member States, on the one hand, and the Republic of Poland, as well as articles 45 and 59 of the Association Agreement made by the European Community and its Member States, on the one hand, and the Czech Republic; Declaration of the Court of Justice of the European Community of January 29, 2002 (*Beata Pokrzeptowicz-Meyer*), on the interpretation of article 37, section 1 of the Association Agreement made by the European Community and its Member States, on the one hand, and the Republic of Poland; Declaration of the Court of Justice of the European Community of September 27, 2001 (*Eleanora Ivanova Kondova*) on the interpretation of articles 45 and 59 of the Association Agreement made by the European Community and its Member States, on the one hand, and the Republic of Bulgaria, among others also concerning other agreements.<sup>44</sup>

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43 Organic Law 4/2000 of January 11, (hereinafter AA), on the rights and liberties of aliens in Spain and their social integration, modified by Organic Law 8/2000, of December 22, and by Organic Law 11/2003, of September 29, and by Organic Law 14/2003 in force, this latest reform, from December 23, 2003, as well as the Implementation Rules for the Act were approved by Royal Decree 864/2001. It should be understood that the latest reforms have only been applicable for months, or even days, as regards the period analysed.

44 *Inter alia*, the decisions of May 4, 1999, *Sürül case* (Court of Justice of the European Community 1999\98) and November 26, 1998, *Birden case* (Court of Justice of the European Community 1998\295). The Decision of January 15, 1998 (Court of Justice of the European Community 1998\7), *Babahenini case*, on the interpretation of the Cooperation Agreement made by the European Economic Community and the Popular Democratic Republic of Algeria Popular, signed in Algiers on April 26, 1976 and approved on behalf of the Community through Regulation (EEC) No. 2210/78 of the Council of September 26, 1978).

3. However, as it seems more interesting for the Commission, our analysis will focus on what the Bosmann Decision of December 15, 1995 meant as regards the free movement of professional sportspersons who were nationals of a Member State. The Bosmann case, which entailed the principle of equal treatment included in the agreements with the countries of central and Eastern Europe and cooperation with third countries, gave rise to a debate regarding its application to sportspersons who were nationals of the States associated through the cooperation or association agreements when they were signed by Spanish teams. In Spain, this has given rise to the problem of the free movement of the so called “B Communitarians”.

The conflict arises when the players who are nationals of third countries with a work and residence authorisation in accordance with the Aliens Act (the Aliens Act) begin to put forward the clauses of their agreements of association in order to claim their rights to have a federation card stating that they are “assimilated to Community citizens” in order not to take up a place as a foreigner and, therefore, add value to their employment contracts as professional sportspersons.

The conflictive Spanish legislation is additional provision 2, paragraph 8 of Royal Decree 1252/1999, according to which

“The determination of the number of non-Community foreign players authorised to participate in trials or official competitions of a professional nature at State level will be made by common agreement of the Spanish sports federation, the professional league and the corresponding association of professional sportspersons. In addition, the Consejo Superior de Deportes (Department of Sport) will draft a resolution establishing the number of non-Community foreign players who can participate in the competitions of the professional leagues in the event of disagreement between the Spanish sports federations, the professional leagues and the associations of professional sportspersons in this regard, as well as the conflicts concerning interpretation deriving from such agreements.”

In fact, as a result of this additional provision, the sports federations and the associations of professional sportspersons reached different agreements in order to reduce the number of non-Community players, agreements which have negatively affected the pretensions of the “B Communitarians” negatively even though they are private agreements.

These agreements supported by the Department of Sport<sup>45</sup> meant a change in the initial position of certain sports federations, such as the Basketball Federation,<sup>46</sup> supported by the Spanish Employment Courts which allowed the players who were nationals of those countries which were candidates to enlargement and those from other States which had agreements to play as “assimilated to Community citizens”.<sup>47</sup>

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45 Controlling Body of Spanish Sport in accordance with Law 10/1990 of October 15, on Sport and Dependent on the Spanish Ministry of Education, Culture and Sport.

46 As regards basketball, this measure benefited four Lithuanians, *Timinskas and Stombergas* of Tau, and *Karnishovas and Jasikevicius* of Barcelona, one Slovene *Millic* and two Czechs *Zidek and Starosta* of Real Madrid.

47 Decision of the No. 12 Social Court of Barcelona of June 14, 2000 *Mills case* (Turkish). Decision of the No. 2 Social Court of Oviedo of August 21, 2000, *Onopko case* (Russian), (annulled by a decision of the High Court of Justice of the Autonomous Community of Asturias of January 12, 2001). Decision of the No. 1 Social Court of Pamplona of November 13, 2000, *Lilia case Malaja* (Polish). Decision of the No. 15 Social Court of Madrid of November 23, 2000, *Karpin case* (Rus-

Specifically, the Spanish Social Courts, which previously had supported the position which regarded the nationals from candidate countries and from other countries which had association agreements (the so called B Communitarians) as “assimilated to Community citizens” stood down in favour of the contentious-administrative jurisdiction. In certain Decisions, the judges have understood that the so called “B Communitarians” are the nationals of third countries and must play as having been signed as foreign players.

This change in case law is clearly appreciable in the Proceedings of the Central Contentious-Administrative Court of February 7, 2001 and of March 16, 2001, the former declared the competence of the contentious-administrative judge to resolve the lawsuit presented by several basketball players who had obtained the precautionary measures of the Social Courts of Vitoria-Gasteiz so that they could play as “B Communitarians”, although this could not come into effect until the judge of the contentious-administrative had given his Decision. The latter case followed the same lines and eliminated the competence of the Social Court of Santander, where the Russian football player, Vladimir, had filed a claim.

The final result of this change which had been instigated by the Department of Sport, the Federations and the Associations can be seen in its full form in the Decision of the Central Court of the Contentious-Administrative of October 29, 2002, concerning the claim presented to the Social Court of Barcelona by Arturas Karnisovas in 2000, a Lithuanian professional basketball player.

The Spanish judge analysed the agreement and whether the possibility of having a licence as an assimilated Community citizen is a requisite submitted to the principle of equal treatment in the following terms:

“We must now determine whether the federation licence constitutes a work condition as it clearly does not affect remuneration or dismissal, or whether, on the contrary, as the defendants claim, it affects access to work and, consequently, would not be counter to the area of equality established in the agreement. As regards the federation rules concerning the issue of licences, the only consequence deriving from the non-Community foreign citizenship of the player is the fact that the club can only have available and line up a limited number of these player in State competitions. The question comes down to determining whether the limitation of the number of players, which is the only consequence deriving from the type of licence issued by the Federation, constitutes a work condition and, therefore, infringes the right to equality of Russian citizens as stipulated in article 23 of the Agreement(...)we continue to hold that this is not the scope to be given to the corresponding articles of the Agreements subscribed to by the EU and those countries which will join the EU in the future.”

With this position, the Decision analysed finally stated that

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sian). Decision of the No. 30 Social Court of Madrid of December 12, 2000, *Millic case* (Slovene). Decision of the No. 2 Social Court of Corunna of January 2, 2001, *Petr Kouba case* (Czech). Decision of the No. 3 Social Court of Vitoria of January 31, 2001, *Cosmin Contra case* (Rumanian). Decision of the No. 1 Social Court of Ciudad Real of December 1, 2000, *Ben Habid Siuod case* (Tunisian). Decision of the High Court of Justice of the Canary Islands of December 19, 2001, *Andrei, P case* (Byelorussian). Decision High Court of Justice of Catalonia of March 13, 2001, *Senol case* (Turkish).

“the limitation of the number of non-Community players is in accordance with Community and internal judicial regulations in force at the present time and does not infringe the fundamental right of equality legally stipulated for these person and the administrative act challenged, dictated in accord and in application of these rules, is in accord with Law and must be confirmed”.

However, in our opinion, Community Law could be infringed and the Commission could initiate proceedings against Spain for failing to comply with Community Law.

The Decision of the Court of Justice of the European Community of May 8, 2003 (*Maros Kolpak*) on the interpretation of article 38, section 1 of the Association Agreement made by the European Community and its Member States and the Slovak Republic can be added in support of this recommendation as it concludes that

“Article 38, section 1, first point of the Agreement must be interpreted in the sense that it is opposed to the application of a rule adopted by a sports federation of a Member State to a professional sportsperson with Slovak nationality contracted properly by a club from the same Member State when, by virtue of this rule, the clubs are only authorised to line up a limited number of players from third countries which are not part of the Agreement on the European Economic Area”.

If the Spanish Courts do not change their case law, they could fail to comply with the case law of the Court of Justice of the European Community. Therefore, Spain would fail ton comply with its obligations regarding Community legislation. The Commission must also intervene through the Department of Sport in order to guarantee that the regulations of the Spanish Federations eliminate the prohibition to line up a limited number of foreign players.

#### *Recent Legal Literature*

Cardenal Carro, M. & Buendía Jimenez, J.A, A raíz de los comunitarios «b»: algunas reflexiones sobre extranjería y deporte profesional, *Diario La Ley*, Nº 5267, de 14 de marzo 2002.

Molina Navarrete, C., La ilegalidad sobrevenida de las cláusulas de nacionalidad en el acceso al empleo: los casos del deporte profesional y de la función publica, *Diario La Ley*, No 5571, de 21 de junio de 2002.

## Chapter VIII Statistics

The national statistical data from the Ministry of Interior does not allow the distinction between workers from the European Economic Area (EEA) and the members of their families. The principal reason is of legal nature: such residents get a communitarian permit of residence which also allows them to get a job. The permit of residence under the communitarian regulations, valid for five years, does not specify if it is only for residence or work as it certainly does with nationals of Third Countries.

However, statistical data from the Social Security administration provide the figures of nationals from the EEA who are currently working and paying social security taxes. According to these figures, 179,771 people were registered as paying social security taxes in 2002, this represents 49.5% of all the residents of the EEA during that year. This figure is considerably lower compared with the nationals of Third Countries: 67.8%.

*Table 1. Nationals from EEA and of Third Countries.*

Country of origin	1993	1996	1998	2000	2001	2002
E.E.E	230,038	252,034	295,259	306,203	325,511	362,858
Third Countries	254,304	286,950	424,388	589,517	783,549	961,143

Source: Anuarios Estadísticos de Extranjería, from the same years.

From 1993 to 2002, immigration has increased 60% in the countries members of the European Economic Area, compared to Third Countries 280% increase, almost three times of difference. In the past 3 years (from 2000 to 2002), according to table 1, the EEA nationals have increase only 18,5%, also considerably lower compared to the 63% increase of nationals of Third Countries.

In 2002, EEA nationals represented 27,4% of the total foreigner population. Ten years before they represented 47,5%. Despite these ten years' continuous increase, the increase of nationals from Third Countries has inverted the relation between both groups of countries. As a result, nationals of Third Countries constitute the biggest group.

*Table 2. Residents of EEA by sex (horizontal percentage)*

Years	European Economic Area		Third Countries	
	Men	Women	Men	Women
1998	50,02	49,98	53,11	46,89
1999	50,87	49,13	52,98	47,02
2000	51,26	48,74	55,36	44,64
2001	51,62	48,38	59,82	40,18
2002	51,97	48,03	57,4	42,6

Sources: Anuarios Estadísticos de Extranjería.

Distribution by sex among the members of EEA is similar, despite the small 1.95% increase of men from 1998 to 2002. Compared to Third Countries' figures, the difference

between the percentage of men and women has grown from 6 points in 1998 to 14 in 2002.

*Table 3. Residents of the EEA and Third Countries by age*

		0 - 15 years old	16 - 64 years old	64 years and older	Total
1998	European Economic Area	18,069	228,946	52,485	299,500
	Third Countries	58,967	344,392	16,788	420,147
1999	European Economic Area	19,740	243,417	53,843	317,000
	Third Countries	74,887	391,899	18,941	485,727
2000	European Economic Area	19,181	241,598	50,440	311,219
	Third Countries	83,088	484,551	16,862	584,501
2001	European Economic Area	20,656	256,628	54,068	331,352
	Third Countries	94,730	664,429	18,549	777,708
2002	European Economic Area	23,298	280,065	59,493	362,856
	Third Countries	125,462	813,582	21,906	960,950

Source: Anuarios Estadísticos de Extranjería. Ministry of Interior.

The age range of 77.2% of the residents from the European Economic Area goes from 16 to 64 years old. In other words, based only on their age, they would be able to perform any productive activity. 16.4% of them are older than 64 years, and only 6% are younger than 16 years. This age distribution has remained unchanged for the last 5 years. If we compare these figures with the ones from the nationals of Third Countries, we can see that they have a larger number of people old enough to work (85%). Children under 16 years old from Third Countries are the double in number than the ones from the European Economic Area (13%). In addition, the number of people older than 64 is decreasing: 15 points less than the ones from the European Economic Area.

The founder countries of the European Union represented in 2002 51,8% of the immigration to the European Economic Area. If we add the United Kingdom, all of these countries receive three fourths of all the immigrants to the European Economic Area.



*Table 4. Residents of EEA by country of origin 1993-2002*

Country of origin	1993*	1996	1998	2000	2001	2002
Germany	38,736	45,898	58,089	60,575	62,506	65,823
Austria	1,775	2,566	3,521	3,503	3,711	3,931
Belgium	8,460	9,847	11,997	12,968	13,541	14,631
Denmark	4,835	5,107	5,686	5,538	5,818	6,167
Finland	2,177	3,131	4,303	4,680	5,186	5,672
France	30,007	33,134	39,504	42,316	44,798	46,986
Greece	614	688	769	939	1,033	1,183
Ireland	2,719	2,870	3,293	3,542	3,779	4,208
Italy	18,636	21,362	26,514	30,862	35,647	45,236
Luxembourg	159	171	219	230	235	246
The Netherlands	12,344	13,925	16,144	16,711	17,488	18,722
Portugal	36,717	38,316	42,310	41,997	42,634	43,309
United Kingdom	64,703	68,359	74,419	73,983	80,183	90,091
Sweden	5,424	6,545	8,941	8,359	8,952	9,652
Iceland**				206	231	264
Liechtenstein**				20	23	20
Norway	2,732	802	4,241	4,790	5,587	6,717

\* In 1993 Austria, Finland and Sweden were not part of the European Union.

\*\* Before 2000 Iceland and Liechtenstein were not considered independent countries.

Source: Anuarios de Migraciones del Ministerio de Trabajo y Asuntos Sociales and Anuarios Estadísticos de Extranjería del Ministerio del Interior.

The increase of immigration of past 5 years of these countries (1998-2002), presents four groups of countries with different growth patterns. The first group of countries has a low or very low increase that does not reach 10%. The countries in this group are: Portugal, Sweden and Denmark. The second group, between 10 to 20%, is constituted by Austria, Germany, France, Luxembourg, and the Netherlands. The third group has a growth ranging from medium to high, 20 to 40%. The countries belonging to this group are Belgium, Finland, Ireland, and United Kingdom. Finally, the countries belonging to the fourth group with notorious are Greece, Norway and Italy. The latter is the most outstanding.

*Table 5. Nationals of EEA by Region*

Regions	2001	2002
Andalucía	61.981	70.036
Baleares	33.714	34.018
Canarias	44.696	47.387
Cataluña	51.350	57.594
Comunidad Valenciana	48.673	56.504
Galicia	11.841	12.252
Madrid	39.967	43.229
Others	39.130	41.838

Sources: Anuario Estadísticos de Extranjería, years 2002 and 2003, Ministry of Interior.

The geographic distribution of nationals of the European Economic Area in 2001 and 2002 reveals that 88% of the residents live in mostly tourist areas. Most of these (87.8%) work in the service sector and specially in hostelry industry. On the other hand, an important part of the nationals of the European Economic Area (16.4%) are retired elders who live temporal or permanently in such tourist areas.

*Table 6. Employment percentual distribution by industry, by large nationality groups, and employed people less than 50 years old, 2003*

Industry	Spaniards	European Union	Eastern European	Africans	Latin-Americans
Housekeeping	1,9	2,0	17,7	4,3	26,2
Hotel and Catering	6,0	10,8	11,0	8,2	16,1
Agriculture and Ranching	4,2	4,5	7,8	13,2	7,5
Construction	11,9	5,8	28,0	28,8	15,9
Forestry	0,2	0,5	0,0	0,9	0,2
Leather and Footwear Industry	0,6	0,0	0,4	1,5	0,8
Textile Industry	0,5	0,1	0,4	0,8	0,7
Furniture and other manufacturing	1,4	0,9	1,7	1,4	1,5
Total	26,7	24,6	67,0	59,1	68,8
Other Industries	73,3	75,4	33,0	40,9	31,2
Total	100,00	100,00	100,00	100,00	100,00

Source: Instituto Nacional de Estadística, microdata from the Survey on EPA.

Specifically, regarding the industries where the European nationals are employed, data from the Survey on Active Population (EPA) from the first three quarters of 2003 reveals that:

- Most of the nationals of EEA (75.4%) are employed at high professional levels. In addition, 57% of self employed foreigners belong to countries from the EEA.
- Most people from the other fourth part (24.6%) are employed in the Hotel and Catering industry (10.8%), followed in a smaller number by the Construction, Agriculture and Ranching industries.

We can then conclude that the employment distribution pattern of EEA nationals does not differ very far from that observed for Spanish workers.

## Chapter IX Social Security

### *a) Texts in force*

Throughout 2002 and 2003, Spanish legislation was passed at State and Autonomous Community level which gave rise to a number of questions on Social Security and the free movement of workers.

In the first place, the very concept of Social Security will be questioned together with the difference between Social Security and Social Assistance due to the distribution of competences between the central State and the Autonomous Communities. The question arises with the approval of Autonomous Community legislation recognising complements to the non-contributory benefits concerning old age and disablement for the residents in the Autonomous Community itself, through the Decree 311/2002 of December 23 of the Autonomous Community of Andalusia (Official Gazette of the Government of Andalusia of December 28, 2002). The approval of these measures could be the seed for future problems concerning the scope of application of article 4 of Regulation 1408/71 and the principle of non-discrimination.

Community legislation in article 4 of Regulations 1408/71 establishes the scope of application as “The general and special, contributory and non-contributory Social Security regimes”, and excludes Social Assistance. Therefore, attention should be drawn to the differences between Contributory Social Security and Non-Contributory or Assistance Social Security, together with the difference between the latter and Social Assistance. Among other cases, in the *Giletti* Case (C-20/96), and more recently in the *Jauch* Case (C-215/99), the Court of Justice of the European Community pointed out the distinction among the benefits which

- are considered to be of the Social Security when a) the benefit is granted to pre-determined groups by rule; b) the parties concerned have a legitimate right to these; c) the beneficiaries are granted a legally defined position and d) their regulation does not leave any leeway for the discretionary appreciation of the personal and the poverty of the beneficiary;
- social assistance is when the cover for the situation of need depends on a discretionary check on the real state of need of the beneficiary by the administering entity; and,
- finally, it considers situations which can have a dual classification: assistance when its finality lies in ensuring a minimum subsistence for persons who are not included in the Social Security system; and, Social Security, when its purpose is to ensure a complement to income from insufficient benefits of the Social Security system itself.

The analysis of the requirements to become a beneficiary of the benefits approved by the Autonomous Community of Andalusia seem to give them this dual nature.

In Decision 239/2002 of December 11, the Spanish Constitutional Court analyses the constitutionality of these complementary aids for retired and disabled pensioners, and

introduces a new concept: internal social assistance of the Social Security and social assistance external to the Social Security system, and concludes that the aid in Andalusia belongs to this last category, therefore it remains beyond State competence.

This resolution of the Constitutional Court, which does not coincide with Community Decisions as regards terminology, concept or references, gave the green light to the approval of several benefits in each Autonomous Community which open up the possibility of benefits, which are sometimes identified with those of the Social Security and sometimes with Social Assistance. In the end, it is a question of different protection in different territories of each Member State, with the possible discriminatory consequences which might arise.

Secondly, the approval of Law 35/2002 of July 12 on measures establishing a system for gradual, flexible retirement and Royal Decree 1132/2002 of October 31 on its development recognises certain rights of workers who take early retirement, among others, the obligation of the companies which retire workers early to subscribe to Special Agreements with the Social Security until they reach retirement age.

These rights, which are recognised in Spanish legislation, could be in danger if they are opposed to the doctrine of the Decision of the Court of Justice of the European Community of June 4, 2002, in the *Beckmann* Case (C-164-000). As far as the Court of Justice of the European Community is concerned, they do not constitute retirement, disablement or survivor benefits pursuant to the complementary professional insurance regimes of article 3.3 of Directive 77/187 on the approximation of legislation concerning the maintenance of the rights of workers in the event of the change of ownership of companies, business centres or parts of business centres.

Thirdly, several provisions have arisen as regards the bilateral agreements on Social Security subscribed to by Spain and their adaptation to Community Regulations.

In this regard, mention should be made of the Resolution of the General Directorate of the National Institute of the Social Security of May 27, 2002, whereby notification is given of the Agreement on the free movement of persons in the European Community, its Member States and the Swiss Confederation, and its consequences from the legislative point of view.

This resolution contains the criteria to be followed for the substitution of the bilateral regulations for Community citizens, as well as the main innovations as regards each of the Social Security benefits in order to benefit the free movement of persons.

This resolution will be complemented by that of June 21, 2002, which will provide a number of specifications on the provision of health assistance and the possible exportation from Spanish territory to the workers who fall within the scope of application of the aforementioned Agreement between the EEC and the Swiss Confederation.

With regard to these agreements, the Resolution of the General Directorate of the National Institute of the Social Security of January 24, 2003 on the Bilateral Agreement between Spain and Switzerland and the application of article 43 of Regulation (EEC) 1408/7 on permanent disablement pensions and those subsequent to old age was dictated. The Resolution attempts to respond to the question on which legislation will apply to a worker with a disablement pension recognised under the Agreement made between Spain and Switzerland, and its possible revision in accordance with what is stipu-

lated in article 43 of Regulation 1408/71, once the Swiss body recognises the old age pension after the person concerned has applied for this. It is a question of determining whether the more favourable rule applies or whether the Community rule should apply.

The General Directorate met in order to resolve the Decisions of the Court of Justice of the European Community dictated in the *Röndfeld* Case (Decision of 07.02.91), the *Gómez Rodríguez* Case (07.05.98), the more recent *Kaske* Case (05.02.2002) and the *Martínez Domínguez* Case (24.09.2002), and the conclusions reached regarding the fact that a more favourable benefit based on a bilateral Social Security Agreement is not lost as a result of the entry into force of the Regulation. In this case, the National Institute of the Social Security concludes that the benefits for disablement recognised under the Agreement made by Spain and Switzerland must not be revised in accordance with the stipulations of article 43 of Community Regulations even when Switzerland recognised the right to an old age pension after June 1, 2002, the date of the entry into force of the agreement on the free movement of persons made by the European Community and its Member States on the one hand and the Swiss Confederation on the other.

Finally, in this section, mention should be made of the signing of complementary accords and agreements by Spain and non-Community States concerning Social Security: with the Republic of Chile and the Argentinean Republic (both were signed on May 14, 2002, Official State Gazette of 19.09.2002) or the Agreement subscribed to with Australia on Social Security on January 31, 2002 (Official State Gazette of 19.12.2002 and the Implementation Rules signed on December 20, 2002, Official State Gazette of 25.02.2003)

With regard to these agreements, as noted in previous chapters of this report, it should be asked why there are no references in these bilateral agreements to the calculation of the payments of the services provided in these third countries by non-Spanish Community citizens resident in Spain and the possibility of requesting and benefiting from these by applying the principle of totalization. This is based on the delimitation of the subjective scope of application of the Spanish-Chilean and Spanish-Argentinean agreements where the criteria of nationality is used (they expressly speak of “Spanish”, “Chilean” “Argentinean”). Neither do we find references in the agreement signed with Australia; although this agreement uses residence and not nationality.

Nevertheless, we must remember that, in these cases, the doctrine laid down by the Court of Justice of the European Community in its Decision of January 15, 2002, in the *Gottardo* Case(C-55/00), according to which the workers who are nationals of other Member States must be granted the same advantages which the nationals from a Member State have under a bilateral Social Security Agreement which has been made with a third State as stated in Recommendation No. 22 of June 18, 2003 of the Administrative Commission of the European Community concerning the Social Security of migrant workers (Official Journal of the European Union No. 326 of December 13, 2003).

Another important question refers to the calculation of the voluntary payments made through the signing of a Special Agreement with the Spanish Social Security and the simultaneity with obligatory payments. This question is answered by the Resolution of the General Directorate of the National Institute of the Social Security of July 4, 2002 on simultaneous payments in Spain and in a country linked to Spain through

Community Regulations and/or a Bilateral Agreement with a Special Accord: through this, notification is given of the change of criteria of the General Treasury of the Social Security in the sense that, when there are simultaneous, special voluntary payments in Spain made through the Agreement and obligatory payments in another Community Social Security System, the validity and periods contained in the Special Agreement will be upheld.

This change of stance of the General Treasury of the Social Security, which previously had not taken the validity of these voluntary payments into account when they were superimposed, must be contrasted with the regime established in articles 15 and 46 of regulation (EEC) 574/72, applying the principle of totalization of payments, which stipulates that, in the event of the superimposition of obligatory and voluntary payments, only the former will be calculated as concerns acquiring the right to benefits, taking the voluntary periods into consideration only as regards the amount of the benefit.

Taking all this into account, in the aforementioned Resolution and more clearly in the la Resolution October 1, 2002, on the application of article 46 of Regulation 574/72, the General Directorate of the National Institute of the Social Security establishes a systematic criteria for acting described below:

1. The voluntary insurance periods superimposed on obligatory insurance periods complied with in another State cannot enter the calculation for the acquisition of the right to a pension by totalization.
2. Once the right is acquired and only taking the obligatory payments into consideration, both the obligatory and the voluntary periods (those corresponding to the Special Agreement) will be taken into consideration: both with regard to the calculation of the pension and for the determination of the regulation base and the ratio for determining the proportion of the pension the Spanish Social Security will have to pay.

Together with the questions mentioned above, several provisions have been dictated and these are listed below:

- Resolution of the General Directorate of the National Institute of the Social Security of June 11, 2002, concerning the classification of injuries sustained by a worker sent on a mission by his company outside Spanish territory, which will maintain the classification of accident at work, on condition that there are no circumstances which break the link between the provision of services and the damage, and this will be protected by Spanish Social Security as an accident at work.
- Resolution of the General Directorate of the National Institute of the Social Security of September 27, 2002, on the processing of pensions with Switzerland under Community Regulations, which refers to certain complaints made by the Swiss Social Security in relation to deficiencies in the processing of pensions.
- The Spanish-Portuguese Agreement whereby the particular modalities for the management and payment of reciprocal credits for health care are established in application of the provisions of the Regulations (EEC) 1408/71 and 574/72, subscribed to in Valencia on October 2, 2002 (*Official State Gazette* of January 7, 2003). An

agreement which completes those already signed with regard to the same matter with other Member States in previous years.

- Resolution of the General Directorate of the National Institute of the Social Security of June 3, 2003, on Regulation (EC) 859/2003 of the Council, of May 14, 2003: it notifies of the approval, entry into force, criteria for application and the transitory regime for the Regulation approved.
- Resolution of the General Directorate of the General Treasury of the Social Security of December 23, 2003, on the French-Spanish Agreement on article 17 of Regulation 1408/71, and French bull fighters: as the Spanish bull fighting entrepreneurs have difficulties regarding the registration of the bull fighting professionals in the French Social Security, which involved an obstacle to the free movement of workers, an agreement was made by the competent French and Spanish authorities for the application of article 17 of Regulation 1408/71, concerning the Social Security legislation applicable to the bull fighting professionals who work in both Member States and it came into force in January 2004. This agreement means that they will be subject to Spanish legislation when they are contracted by entrepreneurs established in Spain in order to carry out bull fighting activity in Spain, and they will be subject to French Social Security as regards the activity carried out in France.

*b) Judicial practice*

One of the important questions is the calculation of the fictitious payments made by workers to the Spanish Social Security (Employment Mutuality) previous to January 1, 1967 and the taking of this calculation into account in order to access the retirement pension.

This matter led the Number 3 Social Court of Orense to refer a pre-judicial question to the Court of Justice of the European Community, which pronounced in the Decision of October 3, 2002, the *Barreira Pérez* case against the National Institute of the Social Security and the General Treasury of the Social Security, (C-347-00). These management entities had excluded the payments made by Mr Barreira before 1967 when totalising his payments as they understood they were not included in the item “insurance periods” of article 1 of the Regulation since these were fictitious, not real payments.

The Court of Justice of the European Community maintained that the periods of fictitious payment established by the Ministerial Order of January 18, 1967 must be considered as insurance periods in the sense of article 1 r) of the Regulation, and must be taken into account at the time of the effective calculation of the pension. For the Court, if the Regulation were to be interpreted otherwise, the result would be harmful to the emigrant worker and would penalise precisely the exercise of free movement in comparison with those other workers whose working life is under the legislation of a single Member State.

Another of the questions involved the exclusion of the payments made by the National Employment Institute (INEM) of the totalization of the payments and which led the Number 3 Social Court of Orense to refer a pre-judicial question through the Order of March 30, 2002, registered by the Court of Justice of the European Community as case C-255/02. The doubts of the Spanish judge of the Social Court entailed articles 45

and 48.1 of Regulation (EEC) 1408/71 and the Spanish legislation which will involve a modification to the Law on the Social Security (LGSS) through its Provision 28, whereby it is laid down that the payments made by the entity managing unemployment insurance the National Employment Institute (INEM), in the case of retirement, will not be judicially valid or efficacious as regards accrediting the minimum period of payment required (article 161 Law on the Social Security) to access a retirement pension, as this period of lack should have been accredited at the time of the request for the unemployment subsidy.

With the exclusion of these payments the principle of totalization of article 45 of Regulation 1408/71 could be breached and this would be counter to the free movement of migrant workers, as appears to be the case of the claimant who had had duly proved compliance with the period of lack of article 161 of the Law on the Social Security, with periods of payment accredited under the legislation of another Member State, for the unemployment subsidy, and now these payments deposited by the National Unemployment Institute are not taken into account in order to give the right to a Spanish retirement pension or for its regulation base or the amount. However, these are taken into account for the regulation base and the amount for those insured who were granted the same unemployment subsidy, but on the base for the Spanish payments.

Another issue which was already included in the section on provisions, is the legislative integration of the Community Regulations and the bilateral agreements made by the Member States regarding Social Security. As in the case of the High Court of Justice of the Castile-León of July 8, 2002 (AS 2598), applying the Spanish-German Agreement, and in the Decision of the Supreme Court of December 16, 2002 (RJ 2331) on the Spanish-Dutch agreement. In both cases, without expressly mentioning the doctrine of the Court of Justice of the European Community, the bilateral agreements are applied as these are considered to be more favourable than the Community Agreements as stipulated by the Court in the *Röndfeldt* Case (C-227/89) and more recently, in the *Hervein* and *Lorthiois* Cases (C-393/99 and C-394-99) of March 19, 2002 and the *Kaske* Case (C-277/99) of February 5, 2002.

Finally, it should be pointed out that, as in the pronouncements of the Spanish Courts, there are still many lawsuits concerning the “*pro rata temporis*” principle with regard to the attribution of the proportional part of the pension at issue to the Member States. In this regard, we have the following Decisions:

- Decision of the Supreme Court of February 24, 2003 (RJ 3312).
- Decision of the Social Court of Galicia of May 19, 2003 (RJ 3123).
- Decision of the Social Court of Cantabria of March 6, 2002 (RA 1653).
- Decision of the Social Court of Castile-la Mancha of April 10, 2002 (RJ 2730).
- Decision of the Social Court of Seville of February 26, 2002 (RJ. 695).

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- Suárez Corujo, B., La coordinación comunitaria de las prestaciones especiales no contributivas: reflexiones en torno a la aplicabilidad de la doctrina jurisprudencial al marco español a partir de la STSJ de 8 de marzo de 2001, asunto *Jauch*, *Revista del Ministerio de Trabajo y Asuntos Sociales*, No. 47/2003.

## CHAPTER X

### Establishment, Provision of Services, Students

1. Many of the questions related to establishment, provisions and students have been analysed in the Chapter on the conditions of entry, permanence and residence of Community nationals, nationals of the European Economic Area and Swiss nationals.

In this Chapter, we will focus on the problems generated by Spanish legislation on the recognition of titles in general and the specific titles for some health professions, which may constitute direct or indirect obstacles to the exercise of the freedom of establishment or, to a lesser extent, the free provision of services guaranteed by articles 40 and 47 of the European Community Treaty and the case law of the Court of Justice of the European Community in this regard.

Thus, the Decision of the Court of Justice of the European Community of October 15, 1987 (*Unectef/Heylens*), in which the Court of Justice of the European Community stipulates that

“admittance of the equivalence of the degree must be carried out by considering exclusively the level of knowledge and qualifications which the degree allows us to suppose that the holder has, taking into account the nature and the duration of the studies and the practical sessions certified”; the Decision of the Court of Justice of the European Community of May 7, 1991, (*Vlassopoulou*) which holds that “as regards this comparative judgment, the Member States must take into account the qualifications and experience a person has acquired in order to exercise the same profession in another Member State”;

the Decision of the Court of justice of the European Community of February 26, 1991, (*Commission/France*) which considers that

“with regard to professional qualifications, the Member States must not establish conditions which are not objectively justified by the need to guarantee compliance with the professional rules and the protection of the interests which constitute the objective of these qualifications”.

We now analyse the Spanish legislation in the light of these considerations of the Court of Justice of the European Community on the recognition of titles. The general legal framework on the recognition of the higher education titles of the nationals of the Member States which require higher training for a period longer than three years is included in Royal Decree 1665/1991, with its modifications, the latest of these is Royal Decree 1171/2003 of September 12, which fully incorporates Directive 89/48. The second system of recognition is that which is laid down in Royal Decree 1396/1995 of August 4, which incorporates Directive 92/51 concerning post-secondary school training of less than three years or as regards professional experience after Secondary Education.

The general legislation on the recognition of Spanish titles included in Royal Decree 1665/1991, with the corrections made by Royal Decree 1171/2003, establishes the scope of application in article 2 as the nationals of the EU who wish to exercise a regulated profession in Spain as employed or as self-employed persons, as well as the lists annexed are referred to by article 3, specifically annexes I and II:

	ANNEX I (Royal Decree 1665/1991) List of Regulated Professions in Spain
Legal, Accounting and Economic Sector	Lawyer, Insurance Actuary, Industrial Property Agent. Real Estate Agent. Auditor. Holder of Diploma in Business Science and Commercial Teacher. Economist. Administrative Manager. Graduate in Social Work. Technician in pensions. Sworn Interpreter. Court Attorney. Technician in Tourist Business and Activities
Health Sector	Nurse with a speciality, except the specialities of obstetrics – gynaecology. Physiotherapist. Speech –Paediatrician. Optician. Chiropodist. Psychologist. Occupational Therapist.
Technical and Experimental Science Sector	Technical architect. Biologist. Wine Expert. Physicist. Geologist. Aeronautical Engineer. Agricultural Engineer. Weapons and Materials Engineer. Naval Weapons Engineer. Civil Engineer. Construction and Electricity Engineer. Mining Engineer. Forestry Engineer. Naval Engineer. Telecommunications Engineer. Technical Aeronautical Engineer. Technical Agricultural Engineer. Technical Forestry Engineer. Technical Industrial Engineer. Technical Mining Engineer. Technical Naval Engineer. Technical Public Works Engineer. Technical Telecommunications Engineer. Technical Topography Engineer. Chief Engineer in the Merchant Navy. Port Pilot. First Class Machine Officer in the Merchant Navy. Second Class Machine Officer in the Merchant Navy. First Class Radio-Electronic Officer in the Merchant Navy. Second Class Radio-Electronic Officer in the Merchant Navy. Chemist.
Cultural Sector	Primary Teacher. Secondary School Teacher. Teacher of Dramatic Art leading to an Official Title. Teacher of Plastic Arts and Design leading to an Official Title. Dance Teacher leading to an Official Title. Music Teacher leading to an Official Title. University Teacher.
Miscellaneous Sector	Diploma in Social Work.

	ANNEX II. Regulated professions regulated subject to aptitude tests if they are to be exercised
	Lawyer, Industrial Property Agent, Auditor, Graduate Social Worker, Court Attorney.

The principle governing this Royal Decree is that of an apparent automatic recognition of the titles obtained in another Member State (article 4). However, the doubts regarding the compatibility of this system with Community legislation arise due to article 5 of the Royal Decree, which provides a substantial margin so that the Spanish authorities might exercise their powers of appreciation or discretion. Thus, it has been laid down that,

“Only in the following special circumstances can a request be made for the recognition of the titles referred to in the previous article:

- a) To pass an aptitude test when the candidate wishes to exercise the professions listed in Annex II. These professions require precise knowledge of Spanish Law and a constant and essential evidence of the exercise of the profession is assessment and/or assistance as regards Spanish Law.
- b) To submit to an aptitude test or carry out a practical test at the selection of the applicant in those cases where the training received by the applicant includes material which is substantially different from the material covered by the Spanish title required, or when the corresponding profession includes one or several professional activities in Spain which do not exist in this same profession in the country of origin, and this difference is characterised by specific training required in the applicable Spanish provisions and refer to matters which are substan-

tially different from those covered by the titles presented by the applicant. In those cases where it is considered necessary to impose compensatory measures referred to in paragraphs a) and b) above, before adopting a definitive resolution, the competent authority will analyse whether the knowledge acquired applicant throughout his professional experience total or partially compensates the substantial difference stipulated in the previous paragraph.”

Specifically, letters a) and b) give rise to doubts on the practical result and suggest that the Commission inform on the application of these aptitude tests which may conceal restrictions to the freedom of establishment and the provision of services.

Spanish judicial practice as regards the recognition of titles is extensive and, in principle, although with nuances it complies with Community Law. The Decision of the Supreme Court of June 13, 2003 rejected the recognition of the title of Real Estate Agent of a Belgian citizen as the Court considered that the petitioner did not have a Belgian higher education title with a duration of more than three years and, therefore, he could not request recognition through Royal Decree 1665/91, but should apply through Royal Decree 1396/95, which recognises training periods of less than three years or just work experience.

The Decision of the Supreme Court of April 21, 2003 concerning the rejection by the Spanish authorities recognises the right of a Portuguese citizen to have his commercial pilot’s licence with IFR qualification obtained in Portugal ratified. Specifically, it stated that

“The comparison of one diploma with another was not based on objective factors nor was the substantial aspect of the qualifications of the diploma obtained in Portugal sought. The Administration only sought differences between the two types of studies, alleging the national nature of the subjects the claimant had to be examined in. Due to the nature of these subjects, they logically could not be part of the subjects required in Portugal, but the Administration did not allege substantial, objective or basic differences between the theoretical studies. Moreover, once the syllabus and the content of the subjects required in Portugal have been examined, it can be stated that they coincide with the subjects required in Spain, and the differences in content are minimal. Since the Administration did not even accredit that these differences might affect flight security, they do not justify the complementary test as requested by the appellant. ... In conclusion, it can be stated that the complementary theoretical and flight tests demanded by the Spanish Administration in the resolution challenged are not justified in accordance with the interpretation which the Court of Justice of the European Community gives regarding the concept of equivalence of studies”

2. As regards the professions of medical doctor and specialist medical doctor, the legislation in force is Royal Decree 2072/1995, which regulates the recognition of diplomas, certificates and other medical titles of the Member States of the EU regarding the effective exercise of the right of establishment and the free supply of services. This Royal Decree incorporates Directive 93/16 in Spain.

It is necessary to remember that this last Royal Decree was questioned by the Decision of the Court of Justice of the European Community of May 16, 2002 when it understood that Spain had failed to comply with the adaptation of article 8 of the Directive 93/16 despite the fact that this is mentioned in the preamble of the Royal Decree. Until now, there are no innovations regarding compliance of this Decision by Spain, which implies judicial insecurity for the doctors from other Member States who wish to

exercise in Spain and these will have to directly invoke article 8 of the aforementioned Directive.

We must point out that, in fact, article 8 of the Directive is expressly included in article 12 bis of Royal Decree 2072/1995, which *a priori*, unless there is other counter proof, exempts Spain from its responsibility in this area. However, these considerations were invoked before the Court and rejected in the Decision.

Thus, it seems that, in the area concerning the recognition of titles of the medical professions the Decision of the Court of Justice of the European Community of May 16, 2002 has not been taken into account by the Spanish Courts.

This omission in the case law of the Court of Justice of the European Community is accredited in the Decision of the Supreme Court of October 6, 2002, against the interests of an Italian doctor who wished to practise in Spain, invoking article 8 of Directive 93/16, by virtue of which, Spain was condemned by the Court of Justice of the European Community. Notwithstanding this Community decision, the Spanish Supreme Court dictated against the Italian doctor, alleging the legislation contrary to the Directive and pointing out that

“what Mr Alexander requested cannot be granted as he does not comply with the requirements of 6 or those of 8 of this judicial text. The Decision thoroughly analyses the sense of each of these precepts and reaches the conclusion that it is essential to provide an official title in order to benefit from this last precept. Therefore, there has been no deviation from the question posed by the appellant by applying the legislation unduly. As regards the sense which must be given to the expression «diploma, certificates or other titles», the Instance Court is right when it considers that this refers to documents which can be considered to be titles and these must be official. This is deduced from the terms of the Directive and the argument included in article 12 bis which Royal Decree 2072/1995 ( RCL 1996, 220) adds to Royal Decree 1691/1989 ( RCL 1990, 61) confirms this when it specifies that the training we are talking about will be evaluated depending on its official character, also states that the title obtained by those who follow and comply with the requirements needed to receive this training must be of the same nature. Therefore, these titles required by article 8 of the Directive are administrative documents issued by the competent authority which publicly and officially accredit having completed a training process. It is evident that those documents presented by Mr Alexander lack these characteristics.”

In the light of this Spanish Decision, a suggestion could be made to the Commission so that it might adopt measures for Spain to adapt its legislation to the considerations made by the Court of Justice of the European Community, guaranteeing the standard of recognition proper to a Single European Area.

3. Finally, it should be pointed out for study in the 2004 Report that Royal Decree 285/2004 of February 2004 has been approved, whereby the conditions for the approval and validation of foreign higher education titles and studies are regulated. It should be stressed that this legislation, as stated in its preamble, intends to respond to the context of the modification of the legislation which affects higher education within the framework of the Declaration of Bologna and Organic Law 6/2001 of December 21 on Universities. This Royal Decree incorporates those innovations from both processes

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48 *Official State Gazette* of March 4, 2004.

which allow the speeding up of the procedure for the approval of foreign higher education titles.

## Chapter XI

### Miscellaneous

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#### *Reports:*

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of the flows of people in Europe as a result of the elimination of the barriers to the free movement of citizens from countries recently added to the European Union.

*Other Documents:*

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