REPORT
on the Free Movement of Workers in Spain in 2004

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General Remarks

As was pointed out in the previous 2002-2003 report, the legal regime applicable to European Community citizens and their families who might have wished to enter, move, reside and work in Spain before 2003 was Royal Decree 766/92, repealed by Royal Decree 178/2003, of February 14,[1] on the entry and permanence in Spain of nationals of the Member States of the EU and other states which are parties to the Agreement on the European Economic Area (hereinafter Royal Decree 178/2003). Generally speaking, this reform, which is currently in force, also entails the adoption of the Agreement of June 21 1999, between the EEC and the Swiss Confederation in Spain, thus equating the legal treatment stipulated for citizens of the EU and their families with the treatment of Swiss nationals and their families. In addition, the approval of Royal Decree 178/2003 involved the adoption in Spain of the Declaration of July 28, 2000, whereby France, Germany, Italy and Spain suppressed the obligation to possess a residence permit in certain circumstances.

One final reference to the previous Spanish legal system – represented by Royal Decree 766/199 – is required as a consequence of the fact that, in the recent conclusions of November 9, 2004 the Attorney General STIX-HACKL, proposed to declare that the Kingdom of Spain failed to comply with Community Law as Royal Decree 766/1992 imposes the obligation to obtain a residence visa in order to be issued with a residence permit as regards the nationals of a third country, members of the family of a Community national who has exercised freedom of movement and as the residence permit is not granted as soon as possible, at most, within the six months following the application for the permit.

In any case, taking into account this general view of the previous and current Spanish legal regime, in this 2003-2004 report, a study will be made, fundamentally, of the general European case law and the particular Spanish case law as regards the legality of Royal Decree 178/2003 in relation to European legislation. In order not to be repetitive, the specific legal conditions for entry, residence and work can be found in the previous report and specific mention will now be made only of the provisions which have given rise to case law controversies.

1 *Official State Gazette (BOE)*, February 22, 2003, No. 46, pages .7397.

Chapter I
Entry, Residence, Departure

With regard to entry, brief mention should be made of the considerations contained in the 2002-2003 report as regards the entry of Community nationals and their families in Spain. Thus, the three issues concerning entry as from 2003 were those stipulated in article 2, article 3.3 and article 4.3 of Royal Decree 178/2003. The first innovation as regards article 2 of Royal Decree 766/1992 was that, in order to obtain the rights included in Royal Decree 178/2003, the family members of Community citizens or those of the European Economic Area included in this provision were requested to "... *maintain a stable and permanent link involving living together with these persons*". With this requirement, the Spanish legislator intended to combat marriages of convenience involving deception.

This requirement and other questions are the subjects of an appeal in the Spanish Supreme Court which gives rise to the highly important Decision of the Supreme Court of June 10, 2004. In this Decision, the Supreme Court declared the nullity of the requirement that the family members have a link which entails a stable and permanent relationship involving living together with the citizen of the EU or of the European Economic Area. In particular, after referring to articles 10 to 12 of Regulation 1612/68, of the Decisions the European Union Court of Justice of September 17, 2002 and the Decision of the EUCJ of September 23, 2003 (Hacene Akrich), it stated the incompatibility of this reference with Community Law. This question is also debated and the Decision of June 10, 2004 referred to by the Decision of the Supreme Court of February 8, 2005, where the incompatibility of the term "living together" in article 2 and in other provisions is brought up and declared to be null.

The second relevant question within the framework of entry into Spain is stipulated in article 3.3 of Royal decree 178/2003. This provision stipulates that, except for the cases included in the Royal Decree, the Community citizens or citizens of the European Economic Area will not generally have the obligation to apply for a residence permit under the terms we will refer to below although their families must have a visa and submit the documentation stipulated in article 11 of Royal Decree 178/2003. The third question again refers to the control and maintenance of the administrative difficulties as regards the foreign family members of Community citizens or citizens of the European Economic Area. Article 4 of Royal Decree 178/2003 requires that, once it is recognised that entry to Spain will be made with passports or identity documents in force and which record the nationalities of the holders, their families must have visas or residence permits in the terms of article 8.2 of Royal Decree 178/2003. With regard to periods of time, the Spanish Government has learned from the conclusions of the Attorney General mentioned above and article 9 requires that the applications be resolved preferentially within a period of three months.

In fact, with regard to the documentation to be submitted, again the Decision of the Supreme Court of June 10, 2004 questions the requisites demanded in article 11.3º.C).4º, which required the following for the family member to obtain the visa: "*accreditation that they have lived together in Spain for at least one year*". Using relevant arguments based on Community Law and the Case Law of the EUCJ, the Spanish Supreme Court established that

> "... pursuant to the Case Law of the EUCJ, the person can only be required to accredit his conjugal relationship in order to be allowed to enter Spain since, as set forth in the decision of the EUCJ of July 25, 2002 [*MRAX*], article 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 a citizen from

> a third country entry at the border when this citizen is the spouse of a national of a Member State and endeavours to enter the territory without an identity card entry or a valid passport, or possibly a visa, and this spouse can prove his or her identity and the conjugal relationship, and if there are circumstances which make it possible to show that he or she represents a risk to public order, security or public health...".

This Decision is also referred to in the Decision of the Supreme Court of February 9, 2005 to declare the nullity of article 11.3.C).4 of Royal Decree 178/2003. Despite these Spanish decisions with reference to the Case Law of the European Union Court of justice there has been no reform or modification of Royal Decree 178/2003, thus, in principle, as the provisions cited are null, the Spanish Administration must not apply these and take these decisions into account.

Spanish Case Law also seems not to have a clear idea on the issue of Community or Spanish family members, who are nationals of third states and wish to reside in Spain. As was stated above, it can be said that Royal Decree 178/2003 only requires a Community residence permit for the foreign family member of the Community citizen or the citizen from the European Economic Area. This is stipulated in article 8 of the Royal Decree which states that residence in Spain for a period longer than three months requires that family members who are nationals of a third state have a Community residence permit. The obligatory nature of this Community residence permit for these family members can give rise to certain qualms concerning the Case Law of the EUCJ in the *MRAX* and *Akrih* cases, whose objective is to flexibilise the principle of family unity within the European area.

Thus, in the Decision of the Higher Court of Justice of the Canary Islands of September 29, 2004, when the spouse of an Italian citizen and the father of Italian children resident in Spain appealed against the rejection of a Community residence permit and the Spanish Court upheld the appeal alleging that as a family member of a Community citizen, the spouse did not require the permit, but it was in error as it mistakenly interpreted article 6, letter b) of Royal Decree 178/2003 in relation to 8.2 of the same Decree. Notwithstanding this erroneous interpretation of the applicable Spanish legislation, the result is the most coherent with the MRAX and AKRIH decisions cited.

The Decision of the Higher Court of Justice of Catalonia of October 8, 2004, is even worse, as the spouse of an Italian citizen resident in Spain was refused exemption from a consular visa for residence by the Administration (without taking the MRAX Decision into account), and it is inadmissible that, when this administrative resolution was appealed against, the Spanish Court did not apply Royal decree 178/2003, (or the previous legal regime, Royal Decree 766/1992), and directly applied Royal Decree 864/2001 which are the Implementation Rules of Organic Law 4/2000 on the rights and liberties of aliens in Spain, which in no case can be applied to a Community family member. Therefore, the Commission must demand that the Spanish State take responsibility for the incorrect application of the Spanish legislation on the transposition (Royal Decree 178/2003) of Community Directives regarding the free movement of persons and workers.

In relation to the acquisition of the right of permanent residence stipulated in article 7 of Royal Decree 178/2003, we refer to what is stated in the 2002-03 Report so as not to be repetitive, but we do remind the European Commission that the requirement of the holder and his family to reside in Spain for different periods (more than 3 years) previous to the acquisition of the right to permanent residence can be a disproportionate restriction if it is guaranteed that the beneficiary and his family are not burdens to the Spanish State. Once this requirement is complied with, any other condition required might go beyond what is allowed

by Community Law in order to guarantee the right to move, reside and work in any Member State. Finally, the procedural aspects regarding the application, processing, issue and renewal of residence permits are regulated in articles 10 to 15 of Royal Decree 178/2003, which, despite the fact that these must only be complied with by the alien family members of Community citizens or of citizens of the European Economic Area, it again refers to the steps which must be followed by the latter, although it is sufficient for them to apply for the accreditation of their situation (article 10.1), which is, undoubtedly, incongruent with regard to the elimination of the Community Residence Permit.

Finally, in relation to Spanish legal, administrative and case law practice as regards expulsion, it should be remembered that this mechanism is regulated in articles 16 to 18. However, the reference made in section 2 of article 16 of Royal Decree 178/2003 to the criteria of Organic Law 4/2000 gives rise to serious doubts concerning its compatibility, bearing in mind that the criteria included in the general regime for aliens offers little guarantee to aliens involved in expulsion proceedings, which might be urgent (24 hours) or ordinary, as well as the automatic nature of the administrative act of expulsion, and would imply discriminatory treatment of Community nationals as compared with Spanish nationals or even as compared with aliens in general.

The expulsion stipulated in these provisions of Royal Decree 178/2003 will be analysed from the general and specific viewpoint sustained in the case law of the Spanish Courts. The general perspective is given in the Decision of the Spanish Supreme Court of February 9, 2005, declaring the phrase *"...or the refusal of permits"* in article 18.2 of Royal Decree 178/2003 to be null, alleging that

> "...when section 2 of article 18 states precisely that "the resolutions on expulsions or the refusal to grant permits will establish the period within which the person concerned must leave the country", it is establishing (or authorising the possibility that this is interpreted in this way by the governmental authority) that the refusal to grant the residence permit – the mere formal support of the right of residence- entails the order for expulsion from the country since the same law establishes a peremptory period for leaving in the same resolution as the refusal, despite the fact that expulsion procedures have not been followed and these can only be grounded on reasons of public order, public security or public health, which do not include the simple refusal to grant a residence permit, as can be deduced from EUCJ Case Law (Decisions *Royer* and *MRAX* against the State of Belgium)".

From a specific point of view, Spanish case law on the possible expulsion of Community citizens raises serious doubts about its compatibility with Community Law. The case in question involves criminal proceedings against Community citizens resident in Spain and condemned for the commission of offences on Spanish territory, and it is requested that, instead of serving the sentence in Spain, they be expelled as stipulated for non-Community aliens resident illegally in Spain or those who are legally resident and commit certain offences. In the proceedings of the Provincial Court of León of March 3, 2004, against a Portuguese citizen condemned to two years' imprisonment, in the proceedings of the Provincial Court of Cadiz of march 10, 2004 against a French citizen and in the Decision of the Provincial Court of Castellón of May 19, 2004 against an Italian citizen, all of these refer to article 89.1 of the Spanish Criminal Code and allege the substitution of the sentence by expulsion from Spanish territory and in all the cases, this is rejected as they are not aliens illegally resident in Spain.

In particular and using the example of the argument of the Provincial Court of Cadiz of March 10, the Spanish judge argued that

> "... In this case, the petition must be overruled, and the arguments of the resolution appealed against upheld. After the reform made by Organic Law 11/2003, article 89 of the Criminal Code states that the exceptional criteria referred to in order to justify the refusal to expel must be based on the nature of the offence, understanding this expression in the wide sense, with reference not only to the specific offence committed but also to the circumstances of the perpetrator and the circumstances of its execution, as well as the circumstances of the criminal act which the sentence is intended to prevent. As highlighted in the resolution appealed against, the concurrent circumstance in this case is that the accused is French. Although he cannot automatically be considered to be a resident in Spain due to the need to comply with certain administrative steps, as a citizen of the European Union, it is arguable whether or not he has the status of article 89 of the Criminal Code. In any case, even with the interpretation most favourable to the accused, the appellant can return to Spanish territory without being controlled in any way given the freedom of movement and residence for the citizens of the countries belonging to the Union, in accordance with article 18 of the Treaty of Rome and its successive reforms (The Treaty of the European Union subscribed to in Maastricht, in 1992 and the Treaty modifying this and signed in Amsterdam in 1997). This would prevent the efficacy of the substitution measure, which is conditioned by the impossibility of returning to Spanish territory during the period established, thus, the impunity of the offence would practically ensured, therefore the accused has been punished. ... In short, the exceptional circumstances referred to and which prevent the accused from being expelled from Spain are present in this case and it is not in order to accept his petition for the substitution of the prison sentence."

In conclusion, it is surprising that generally non-Community aliens are expelled from Spain and, that a Community citizen has to serve the sentence for committing an offence in Spain as his request for the substitution of the sentence by expulsion is rejected. Considering this discriminatory situation regarding sentences of the Community citizens who are resident in Spain as compared with aliens, we advise the Commission that it evaluate the possibility of requesting information on this differential treatment with no justification within the framework of Community Law from the Spanish Government.

In support of these pretensions it is essential to refer to what was stated by the Court of Justice of the European Community in the ORFANOPOULOS and OLIVERI Decision of April 29, 2004, regarding the criteria for evaluating the expulsion from one Member State of a national of another Member State, the Court declared that,

> "1. It corresponds to the jurisdictional body forwarding the referral to determine on which provisions of Community Law, besides article 18 EC, section 1, a national of a Member State such as Mr Oliveri might base his case, in the circumstances of the litigation which gave rise to case C-493/01. Thus, this jurisdictional body is responsible for checking whether the person concerned comes under the application of article 39 EC, either as a worker or other type of person who has the right to free movement by virtue of the provisions of the derived Law derived adopted for the application of this article, or whether he can avail himself of other provisions of Community Law, such as Directive 90/364/EEC of the Council of June 28, 1990, regarding the right of residence, or article 49 EC, which is applied in particular to those who receive services.
> 2. Article 3 of Directive 64/221/EEC of the Council of February 25, for the coordination of special measures for aliens as regards movement and residence, justified for reasons of pub-

lic order, security and public health, is opposed to national legislation which obliges national authorities to expel the nationals from other Member States who have been condemned with definitive sentences involving the internment of minors for, at least, two years or a sentence involving the privation of liberty for an offence committed with mens rea included in the Law on Narcotics, on condition that serving the sentence has not been conditionally suspended.
3. Article 3 of Directive 64/221 is opposed to national practice according to which it is considered that, on examining the legality of the expulsion of a citizen of another Member State, the national jurisdictional bodies must not take into account the events subsequent to the latest resolution of the competent authorities which might entail the disappearance or a considerable reduction of the threat which the conduct of the person involved might entail as regards public order. Above all, this is the case when a prolonged period of time has elapsed between the date of the expulsion resolution and the date of the resolution by the competent jurisdictional body.
4. Article 39 EC is opposed to legislation or national practice whereby the expulsion of a national of a Member State who has been sentenced for certain offences is ordered despite the fact that circumstances of a family nature are taken into consideration, and the decision is based on the supposition that the person must be expelled without taking into account his personal conduct nor the danger he constitutes for public order.
5. Article 39 EC is not opposed to the expulsion of a national of on Member State who has been condemned to a determined punishment for certain offences and he is a current threat to public order and has resided in the host Member State for many years and can allege circumstances of a family nature against the expulsion on condition that the evaluation carried out by the national authorities case by case on where the just balance lies between the legitimate interests being dealt with and this is done with the respect for the general principles of Community Law and, in particular, duly taking into account respect for fundamental rights, such as the protection of family life.
6. Article 9, section 1, of Directive 64/221 is opposed to a provision of a Member State which does not include administrative or contentious- administrative appeals, and which might also involve an examination of the opportunity, against a decision of expulsion of a national of another Member State adopted by an administrative authority when no authority independent of this has bee established. It corresponds to the jurisdictional body to check whether a jurisdictional body such as the Verwaltungsgerichte can examine the opportunity of the expulsion measures."

With regard to the considerations mentioned here, the Spanish Government and Justice would have to reconsider its refusal to substitute the punishments imposed with the expulsion of Community nationals. This recommendation is even more necessary if we take into account the confusion and the misinterpretation which the Provincial Court of León made of Royal Decree 178/2003, confusing the requirements demanded of the nationals of the EU when it states that

"In this regard, it should be taken into account that the mere condition of Community citizen is not sufficient to reside legally in a country of the European Community, as, in accordance with Royal Decree 178/2003, of February 14, on entry to and permanence in Spain of nationals of Member States of the European Union and other States which are parties to the Agreement on the European Economic Area, establishes in article 8.2 that residence in Spain for a period of time longer than one year requires a renewable residence permit which will be valid for five years, in those cases which are not included in article 6 of this Royal Decree, and article 18 states that the resolutions for the concession, renewal of permits, as

> well as the expulsion orders, will be dictated by the Sub-Delegates of the Government or Delegates of the Government in the single province Autonomous Communities."

This consideration demonstrates that the Spanish criminal court judge incorrectly interprets Royal Decree 178/2003, which is the norm for Spanish transposition and, therefore, generates responsibility.

The conclusion of the analysis of Spanish Royal Decree 178/2003 from its practical and case law perspective of entry, residence and work of Community citizens, citizens of the European Economic Area and Swiss citizens, as well as their families, clearly shows that it is necessary that the Spanish legislator again draft a new legal framework which is clearly adapted to the obligations imposed by the Community legislation, the Case Law of the EUCJ and the latest decisions of the Spanish Supreme Court of June 10, 2004 and of February 9, 2005. This reform is even more necessary if the approval of Directive 2004/38, which will require a Spanish adaptation, is taken into consideration.

Chapter II
Equality of Treatment

Nationality condition to access the public sector

Despite the fact that progress is being made at legislative level as regards the reduction in the number of posts by sectors which are reserved for Spanish nationals (with a restrictive interpretation considering its exceptional or residual nature), some of these posts generate conflicts with the Administration which, logically, must be resolved through contentious-administrative jurisdiction.

One important case which has been concluded definitively is the case addressed by the *Decision of the Supreme Court of December 4, 2003 (RJ 2004/654)***,** F.D. 4º, which involved the resolution of the appeal lodged by the Association of Officials of the Merchant Navy against several precepts of Royal Decree 2062/1999 of December 30[2], whereby the minimum level of training in maritime professions is regulated. We now give a detailed analysis of these precepts of the law which are of special interest to our report.

A*rticle 7, sections 1 and 3, of Royal Decree* ("General norms on the recognition of professional titles issued by other States") is challenged. Under these norms "the professional title of captain, master, official or radio-operator issued by other States can be recognised on condition that they are part of the STCW Convention" (section 1) and it is stipulated that "the recognition of professional titles which capacitate the person to exercise as captain or first mate require that these persons pass a test on their knowledge of Spanish maritime legislation as regards the exercise of the functions of captain or first mate" (section 3).

The appellant (the Official Association of the Merchant Navy) alleges that this provision infringes the stipulations of article 77.2 of Law 27/1992 of November 24, which reserves those jobs in the crews of vessels which involve the exercise, although this be occasional, of public functions for Spanish citizens. However, the Supreme Court overruled this on two grounds:

- Firstly, because there are no impediments to the fact that the titles "recognizable" issued abroad have been issued to Spanish citizens who have acquired the training and other professional conditions in other countries;
- Secondly, the recognition and approval of the foreign title does not exclude the reservation of certain functions for Spanish nationals; neither of these implies the impossibility to immediately exercise these posts by a person who is not Spanish, even when the beneficiaries are allowed to carry out other functions which do not involve the public functions reserved to Spanish citizens who have the corresponding post as regards the on board functions.

These proceedings also challenge *Article 8 of Royal Decree 2062/1999 of December 30***,** whereby the minimum level of training in maritime professions, the "Specific norms for the

2 Royal Decree 2062/1999 addresses the need to incorporate the norms approved in 1995 by the International Maritime Organization as amendments to the annex of the International Convention on Training Norms, Titles and Guarding for Maritime Workers and those contained in Directive 98/35 of the Council of May 25 whereby Directive 94/58/CE, regarding the minimum level of training for maritime professions is regulated and founded in the aforementioned amendments to the STCW Convention.

recognition of professional titles of the citizens of the European Union with tiles issued by one of these States" (F. D. 8º).

Article 8, section 1, stipulates that the department of the Merchant Navy can directly recognise the professional titles or speciality titles issued by one of these States in accordance with the applicable national provisions once it is clear that the Department of the Merchant Navy can directly recognise the professional titles or speciality certificates issued by one of these States to the citizens of the European Union. In accordance with the applicable national provisions which are laid down in section 2 which states that this recognition "formalized through the issue of a professional merchant navy will be required to directly access the employment in crews of Spanish merchant ships, except in the exercise of posts which might imply the exercise of public functions legally attributed to Spaniards, such as the captain, master or first mate, which will be reserved for Spaniards". It adds an exception to this norm (section 3): "Notwithstanding the stipulations of the previous paragraph, the citizens of the European Union who have a title issued by a Member State can command a merchant vessel with a gross tonnage under 100 GT, which carry cargo or less than 100 passengers, which exclusively between ports or points in which Spain exercises sovereignty, operate exclusively between ports or points situated in zones in which Spain exercises sovereignty, sovereign rights or jurisdiction and when it is accredited by the person concerned that there is a right of reciprocity of the State of his nationality with regard to Spanish citizens".

In response to the question on what is termed the principle of reserve in favour of nationals of the functions of captain and first mate of vessels of the merchant navy (excepting only what is contained in section 3), in proceedings of December 4, 2001, the Supreme Court suspended the proceedings and referred several pre-judicial questions which were resolved by the Court of Justice of the European Community in a Decision of September 30, 2003, whose provisions stated that:

1) Article 39.4 must be interpreted in the sense that it only authorises a Member State to reserve to its nationals the posts of captain and first mate of vessels which fly their flags, if the prerogatives of the public power attributed to the captains and first mates are effectively exercised habitually and do not represent a very reduced part of their activities.
2) The article must be interpreted in the sense that it is opposed to the fact that a Member State submits the access of nationals from other Member States to the posts of captain and first mate on merchant vessels which fly their flags to a condition of reciprocity, such s that laid down in article 8.3 of the aforementioned Royal Decree.

Thereafter, the Supreme Court resolved that, in order to avoid conflict with Community Law, it must be understood that this reservation, despite its literal sense, is not full and allows certain exceptions, one of which is that of section 3. The "opening" which permits this section is in accord with the interpretation of Community Law made by the Court of Justice, as it supposes the recognition in certain cases of navigation characterized by the small size of the vessels and their nearness to the coast (and, regarding this, their nearness to the territory of the effective exercise of the functions assigned to the ordinary public authorities) the prerogatives of the Captain are relativised in a certain way and the occasions on which he exercises the public functions which, by delegation, are assigned to him are infrequent. Considering this, the State limits the reservation of the post of captain to Spanish nationals and permits Community nationals to hold this post. It adds that "from the time that section 3 of article 8, reduces the terms of the reservation and extends the possibilities that Community na-

tionals can carry out posts in Spain in equal conditions with Spaniards, it is implicitly admitting that in these cases the prerogatives of public power attributed to captains and first mates will hardly ever be exercised. In these cases, these prerogatives represent a very reduced part of their activities. This has the consequence that the maintenance of the reservation in such circumstances would go against article 39.4 EC, according to the interpretation made by the Court of Justice as these circumstances are not included among those which authorise a Member State to reserve to its nationals the posts of captain and first mate on vessels which fly their flags. On this point, the Supreme Court advises the legislator to modify the literal sense of article 77 of Law 27/1992 in order to adapt its content to Community Law. However, it leaves no doubts as regards the impossibility of submitting the opening up to other nationals and annuls the last part of section 3 *("when it is accredited by the person concerned that there is a right of reciprocity of the State of his nationality with regard to Spanish citizens").*

From the legislative point of view, it seems that the tendency in the above cases will be followed by the Spanish Government in the future regulation which it intends to address within the next few months in relation to the Public Function (now called Public Employment, a wider term than the previous one, which indicates the substantial change to be addressed as regards Civil Servants). A Commission has been set up made up of experts and persons holding high posts in the Ministry of Public Administrations who drafted an extensive report presented in April 2005[3], in which there are references to the question of nationality as a requirement for access to the public function. As this is a document which contains proposals for initiating a debate, the Commission of Experts propose the following:

> "With regard to nationality, the Basic Statute should obviously include the requirement that, to access the condition of civil servant, it is necessary to be a Spanish citizen or a citizen of any other State in the European Union, in the latter case, with the exceptions stipulated in the legislation in force. However, the possibility of admitting Community citizens, by law, to other types of functions which at present are forbidden to them should be taken into account. For example it does not make sense that a Community citizen could be a mayor in our country, and therefore, Head of the Local Police, while a Community citizen cannot join this force".

We believe that the progress foreseen is important and realistic with regard to what it involves concerning acceptance of Community criteria in this matter.

3 Report of the Commission of Experts, *Basic Public Employment Statute*, Ministry of Public Administrations, INAP and Centro de Nuevas Estrategias de Gobernanza Pública (Centre for new Strategies of Public Governance), Madrid, April 2005.

Chapter III
Employment in the Public Sector

Recognition of diplomas for access to the public sector

The *Decision of the National Court of March 17, 2004 (JUR 2004/190668)* addresses and resolves the problem of foreign titles formally equivalent to Spanish titles, in this case the title of Technical Engineer in Topography, as qualifying the person to exercise the same professional activity.

The Ministry of Development rejected the application of the appellant with the title of "Gradue Geometre-expert inmobilier", issued by the "Institut Reine Astrid" in Belgium in order to access the exercise of the profession of Technical Engineer in Topography in Spain.

The appellant demonstrated his four years of study, his practical training in topography by documents and provided a document issued by the competent Belgian Ministry recording the fact that he had obtained the corresponding Diploma. Based on this, he considered that the Ministry of Development had failed to comply with Community legislation (Directive 98/48/EEC, incorporated by Royal Decree 1665/1991 of October 25).

However, in the opinion of the State Lawyer, there is an important difference between the knowledge included in the Belgian title and what would be considered to be equivalent in Spain. In those cases in which the title issued by the competent authority of the country of origin includes subjects which are substantially different from those covered by the Spanish title or when the corresponding profession includes one or several activities which do not exist in this profession in the country of origin and this difference is characterised by specific training required in the applicable Spanish provisions and refer to subjects which are substantially different, in such a case, in order to have these titles recognised, it is possible to demand that the person be subjected to an exam or to a period of training.

That is to say, in the opinion of the National Court, it is not a question of comparing the number of years for each title or counting the number of subjects respectively included, but of verifying whether the subjects coincide substantially and the activities which can be carried out in the respective countries with the titles. From the documents provided by the appellant and in the spirit of Community legislation as regards the suppression of obstacles for the free movement of workers in the European area who hold titles such as the one being analysed it can be deduced that an aptitude test is not required as the Belgian title is formally equivalent to the Spanish one and qualifies the person to exercise this same professional activity.

In a subsequent decision, the Supreme Court analysed the general system for the recognition of titles and vocational training of the Member States of the European Union *(Supreme Court Decision of May 11, 2004 (RJ 2004/3948)*.

> The Spanish Professional Association of Translators and Interpreters (APETI), lodged an appeal against Royal Decree 1754/1998 of July 31 which incorporated Directives 95/43/EC and 97/38/EC to Spanish Law and modified the annexes of two Royal Decrees related to the recognition of vocational training titles of the Member States of the European Union and the other States signatories to the Agreement on the European Economic Area, which includes Sworn Interpreters as a regulated profession. The appellant wanted this to be declared null.

The maximum jurisdictional body based its argument partly on its previous *Decision of February 10, 1999 (RJ 1999/912*), in which it stated that there was no unitary regulation of the titled professional activity of the functions attributed to Sworn Interpreters in Spain. It is a question which affects the qualification or capacitating conditions "for the exercise of what constitutes an activity not linked to the exercise of a determined profession. The establishment of the conditions of access to this activity was made through regulation norms, and there is no reason to conclude that the simple modification of the requirements to obtain the title supposes an effective, even indirect, regulation of the title. To state otherwise would be to declare a type of judicial immobility, as would be the supposition that the Ministry Foreign Affairs can in any way provide legislatively as regards the capacitating conditions to do translations between foreign languages which are considered to be authentic in our country". Of course, the fact that official character granted to the translations made by the Sworn Interpreters might suppose the exercise of authority (F. D. 3) must be discarded.

In accordance with the current regulation of this matter, the appointment of Sworn Interpreters is done by the Ministry of Foreign Affairs once the candidates have been examined by the Office for the Interpretation of Languages in the foreign languages whose written and oral translation into Spanish and vice versa the candidate wishes to be authorised to do. The exams are held once a year as determined by the Ministry, and the following requisites are necessary for the candidates:

a) To be of age.
b) To have a Spanish title: diploma, Technical Engineering, Technical Architect, or equivalent or a foreign title which has been approved as equivalent to a Spanish one.
c) To be a Spanish national or a national of another Member State of the European Economic Area.

In addition, as a consequence of the creation of the university title of Graduate in Translating and Interpreting, there is a possibility that the graduates with this degree or a foreign title which has been approved as equal to this (on condition that it meets the requirements stated above) can request the Office for the Interpretation of languages at the Ministry of Foreign Affairs to be appointed a Sworn Interpreter, without having to do exams, by accrediting that they have passed the subjects of the Degree which grant the graduates specific preparation in legal and economic translating and oral interpreting in the languages the appointment is requested for.

The Spanish legislation in force does not go against the principle of equality based on the fact that the free access of citizens of States which are signatories to the Agreement on the European Economic Area to the exercise of regulated professions must be done based on the principle of reciprocity so that Spanish citizens can access the function in the other States. In the opinion of the appellant, the problem is that, *de ipso*, the profession of Sworn Interpreter, as defined in Spain, does not exist in any of the States of the European Economic Area. In this regard, the Supreme Court puts forward three considerations.

- First: the principle of equality is not exactly equivalent to reciprocity, which can only be infringed when there is an equivalent profession in a country other than ours and Spaniards are not allowed to access this equivalent function.
- Second: in terms of the court order of the Constitutional Court of January 19, 2000, "the evident data that the exemption from the exam to access the condition of sworn interpreter is due to the possession of a determined university title is sufficient justification for the measure adopted and eliminates the possible arbitrariness and, therefore, dis-

crimination alleged by the appellant association, moreover, the evident lack of reciprocity in the titles and professions between Spain and the other States of the European Economic Area implies that there is no discrimination.

- Third: the regime of mutual recognition which is laid down in the applicable Directive tends to facilitate the exercise of the freedom to establish and provide services related to the "regulated professions"[4]. Thus, absolute identity between the professional activity which a person is qualified to carry out in his country of origin and the activity he requests to carry out in another country is not required, it is sufficient that both professions or functions are substantially equivalent. Only if there are qualitative differences between one profession and another, the host State can demand that the applicant pass an aptitude test or a training period in order to resolve possible difficulties.

Finally, with regard to the recognition of titles, there is an interesting *Decision of the Supreme Court of April 30, 2004 (RJ 2004/5015)***,** in which an analysis is made of the possible employer liability of the Public Administration for the damage caused through not transposing or the defective transposition of Directive on the free movement of medical doctors and the recognition of titles.

It is a very significant case due to its infrequency and the fact that it is very recent. The starting point of the case is the failure of Spain to transpose Directives 75/363 of June 16, 1995 and 93/16 of April 5, until the promulgation of Royal Decree 2072/1995 of December 22, as the transposition should have taken place in 1986 and was done in 1998.
However, between these two dates, a Decision of the Court of Justice of the European Community, Section 5, of may 16, 2002, declared that

> "the Kingdom of Spain has failed to comply with its obligations under Council Directive 93/16/EEC, of April 5, 1993, in order to facilitate the free movement of medical doctors and the mutual recognition of their diplomas, certificates and other titles, as it had not adapted its internal Law to the provisions of article 8 of this Directive properly, within the stated period".

The Supreme Court[5] had already pronounced on this matter in the sense that the infringement of the obligation to transpose a Directive within the period laid down constitutes *"per se"* a manifest and serious infringement, therefore, it will give rise to the obligation to indemnify if the other two requisites, namely, this is a norm whose objective is to confer rights on the persons and there is a causal nexus between the infringement and the damage are complied with.

The Supreme Court addressed the conduct of the Administration regarding the content of the Decision of the Court of Justice of the European Community of May 16, 2002, which

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4 Cf. *Decision of the Supreme Court of July 10, 2001 (RJ 2001/7745)*, cited by the Decision of the Supreme Court we mentioned, considering as such professions those whose access, exercise or any of its modalities of exercise in a Member State are subjected directly or indirectly by legal, regulation or administrative provisions to the possession of a title. A title is understood, according to the Directive 89/48/EEC, to be any title, certificate or diploma or set of these issued by a competent authority in a Member State which accredit that the holder has done a post-secondary school cycle of studies with a minimum duration of three years in a University, a higher education centre or in another centre at the same level of profession and that he has the professional qualifications required to access a profession.

5 Decision of the Supreme Court of June 12, 2003 (RJ 2003/8844), cited for what was commented on.

is also based on previous Community case law under which, when examining a request for qualifications to exercise a regulated profession is made by a national of another Member State, the authorities of a Member State are obliged to take the professional qualification of the person concerned into consideration and make a comparison of the aptitudes accredited by the diplomas, certificates and other titles, as well as the pertinent professional experience required by the national legislation for the exercise of the profession in question.

Once this was decided, it returned to the doctrine laid down in the Decision of the Supreme Court of June 12, 2003, which repeats the decision made by the EU Court from which the exact consequences can be taken as regards the case in question. In particular, There are three sufficient and necessary requisites which have to be verified in order to prove the inexcusable liability of Member State:

a) *That the judicial norm infringed is intended to confer rights on persons*.
   Evidently this requisite applies to this case.
b) *The infringement must be sufficiently characterised*.[6]
   The Supreme Court understands that the attitude of the Spanish Administration was not to refuse the recognition of the diplomas, certificates or titles which the claimants possessed but to condition their validity to compliance with the requisite to acquire additional training demanded and, once this training period was passed, it granted the full recognition required by the Directive and the Court.
c) *There must be a direct causal nexus between the infringement of the obligation of the State and the damage suffered by the person*.
   As the previous requisite is not satisfied, the causal relationship between the supposed damage undergone by the claimants and the non-transposition of the Directive which would have meant the liability of the Administration.

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

There are no specific regulations on this question nor is there case law in this regard. It will be necessary to study the content of the public announcements which might possibly stipulate this.

Recognition of professional experience and seniority acquired in another Member State

As regards the effects which the experience and seniority acquired in another State might have on the recognition of the specific conditions of work, during the previous year, several decisions were pronounced and follow the lines of the previous case law in that they clearly opt for the recognition of these circumstances in order to access the public sector or to obtain more points in a competitive process. Nevertheless, the clearest and most definitive progress has been made by the Law on Budgets of 2004 of December 30, which, in its Fiftieth Provision, introduced a new Provision into the Law on the Measures for the Reform of the Civil Service which recognises certain effects of the services rendered in the Public Administrations of any of the Member States of the European Union.

6 In the sense given to this expression by the Decision of the Court of Justice of October 8, 1996, which is partially reproduced.

In the first place, the *Decision of the Higher Court of Justice of Andalusia, (Granada), of December 1, 2003 (JUR 2004/71473)* recognises the right that the services rendered in foreign medical institutions be evaluated in accord with a scale.

Specifically, the Contracting Board of the Employment Bureau of the Provincial Delegation in Granada of the Department of Health gives points for the services rendered by the claimant in another country of the European Union in a different, inferior way to how these services are rendered in the Spanish health system in order to include this in the case of rendering services "in other Public Administrations".

This interpretation is counter to the principle of the free movement of workers enshrined in article 48 of the Treaty of the European Union as this principle prohibits not only manifest discriminations based on nationality, but also any concealed discrimination which, applying other differentiating criteria, leads to the same result[7], as happened in a case resolved by this Decision.

In the second place, the *Decision of the National Court of July 14, 2004 (RJCA 2004/813)* addresses the problem of recognition of the right to exercise general medicine in the Spanish public system by citizens who do not hold diplomas, certificates or other titles acquired in a Member State, but have obtained these in other countries.

In the specific case under analysis, Mr Tomás had the right to exercise as a General Practitioner of Medicine in the Spanish National Health System recognised by a resolution of the Under-Secretary of Health and Consumption. He had obtained his title at the Universidad Central de Las Villas, Cuba, in 1994. Despite its approval in Spain by an Order of the Ministry of Education and Science, according to the resolution challenged, this title could not be considered to be issued by a Member State. However, this could be done without it meaning the automatic recognition by the rest of the Member States of the European Community to carry out these functions within the framework of their respective national Social Security systems" (based on article 36.5 of Council Directive 93/16/EEC of April 5, 1993,[8] which was internally implemented through Royal Decree 931/1995 of June 9 and subsequently through Royal Decree 1735/1998 of July 11 on the exceptional access to the title of Specialist Doctor in Family and Community Medicine and on the exercise of Family Medicine in the National Health System). That is to say, although the title is not recognised like that of a Member State, the person is authorised for other reasons (requisites regarding nationality and the legitimate exercise of medicine previous to 1.1.1995) to exercise medicine in the Public Health System. Nevertheless, the file shows that the first of these requisites is not complied with as he did not obtain the nationality until 1999.

The National Court asks whether, despite the lack of these requisites, the right to exercise as Doctor of General Medicine could be recognised exclusively for the Spanish National

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7 The decision of the Higher Court of Justice of Andalusia (Málaga), of December 21, 2000 (2001/482) cites this as applicable that, in relation to a case identical to the one being analysed and after a meticulous study of the Community legislation and cases law, it pronounced that the interpretation of the Contracting Board "conceals discriminatory treatment of a Community citizen, in this case, Spanish, for the mere fact that he carried out part of his professional training in German medical institution (…)".

8 Council Directive of April 5, 1993, in order to facilitate the free movement of medical doctors and the mutual recognition of their diplomas, certificates and other titles (O.D. No. 165, of July 7, 1993). This article establishes that, as from January 1, 1995, each Member State will condition the exercise of medical activity as a general medical practitioner within the framework of the national regime of the Social Security to the possession of a diploma, certificate or other title which accredits specific training in general medicine, without prejudice to the provisions on acquired rights.

Health System under Directive 36.5. This possibility has not been taken further in our internal Law and, therefore, the direct effect of the Directive cannot be alleged as referral is made to the legislation of each State (F.D. 8).

According to the National Court, it is evident that, as from January 1, 1995 in order to hold a post in General Medicine in the Spanish National Health System, an essential requisite (and, thus, essential for the purposes of the fully lawful nullity of the of 62 LRJAP[9]) to have the title of Specialist Doctor in Family and Community medicine or the certificate accrediting the rights acquired on a previous date.

It cites the *Decision of the Supreme Court of May 17, 1999 (3267/1999)*, dictated in the resolution of an appeal lodged by the Official Association of Medical Doctors of Barcelona, as it includes the legislative evolution resulting from the influence of Community Law (F.D. 6).

In the second place, the *Decision of the Supreme Court of November 23, 2004 (RJ 2005/350)* addresses the problem of the consideration of professional experience acquired in another State.

Giving a considerably greater number of points to the MIR (Social Security) doctors than the points for those who have not had equivalent training although this is not a measure which directly attempts ton exclude the family doctors trained in other Member States, insofar as they have not followed the currently essential MIR training, they are excluded (as are the Spaniards who have not done this training) from obtaining a greater number of points on the scale to access a post as a family doctor. It should be remembered a this point that the Commission has pointed out that "the Member States do not have the obligation to initiate internal contracting proceedings for migrant workers on condition that that the national who do not work in the same public sector service are also not permitted to apply for these types of posts or public exams".[10]

Specifically, this judicial resolution is intended to challenge the Trade Union – Insalud Agreements in Aragon for the provision of temporary posts in Social security health institutions as, based on Council Directive 93/16/EEC of April 5, its is considered to infringe the constitutional principle of equality of access to the civil service.

In the case examined, it is evident that there is clear discrimination and damage for the General Practitioners of Medicine when the MIR title is rewarded with 21 points as compared with experience and other merits (for example, those obtained in other Member States), which makes it impossible to obtain a medical post in the employment lists and bureaus, thus there is no legal reason to enshrine a preference for the Spanish M.I.R. system with regard to Spanish graduates or those from other Community countries who access the title of Specialist Doctor in Family and Community Medicine by another channel, as to access the title, the MIR training period is an essential condition, all the Spanish doctors who have the title but have not accessed through MIR training and the doctors from the other Community countries (regardless of the system used to access) are discriminated against as there is no logical reason to benefit solely and exclusively the Family Doctors with the Spanish residence system (there are family doctors from other Community countries who may have accessed the title with even stricter requirements and are discriminated against due to the titles obtained through the MIR system).

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9 Law 30/1992 of November 26 on the Judicial Regime of the Public Administrations and Common Administrative Procedure.

10 Communication of the Commission*, The Free Movement of Workers – The full realisation of its advantages and possibilities*, COM (2002) 694 final, Brussels, 11.12.2002, p. 22.

Consequently, the assigning of special points for those who have totally or partially done training as resident doctors on the MIR programme constitutes an indirect way to infringe the acquired rights recognised by Community legislation and by Royal Decree 853/1993 as belonging to the Graduates in Medicinal and Surgery previous to January 1, 1995, as well as to the doctors who have obtained the title of Specialist Doctor in Family and Community Medicine in ways other than the MIR programme, by virtue of legally established channels. An objective reason justifying this discrimination cannot be detected (FD 6).

Finally, the case law tendency stated in the previous report and in this one and designed from the European Commission is seen in a very significant modification to the essential legislation as regards the civil service in Spain[11]. Specifically, the Fiftieth Additional Provision of the Law on the Budget of 2005 provides that "with effect from January 1, 2005 and with indefinite validity the new Twenty-sixth Additional Provision on Measures for the Reform of the Civil Service is added, and this reads as follows:

> "1. For the purpose of three year extra payments, the period of service in the Public Administrations of the Member States of the European Union, previous to joining or rejoining gives the corresponding Bodies and Levels, Classes or Categories of any Public Administration, except those services which obligatory.
> The calculation laid down in the previous paragraph will also apply to the services rendered in the Public Administrations of those States in which, under the International Treaties signed by the European Union and ratified by Spain, the free movement of workers applies in the terms in which this is defined in the Constitutive Treaty of the European Community.
> 2. The services which are recognised under the stipulations in the previous section will not be calculated for the purposes of dues which will be regulated by the provisions in the Community Regulations regarding Social Security".

The importance of this legislation is substantial at this time as it is the basic legislation as regards the civil service and includes the recognition of the services rendered in other Public Administrations fully and with no nuances for the purposes of the calculation of three yearly extra payments, which means that the Autonomous Communities exercising their competence as regards the development of this legislation will have to comply with the content of this new Provision.

11 This decision was dictated under what is stipulated in article 149.1.18 of the Constitution, therefore, it will be considered to be the bases of the statutory regime of civil servants (section 3 of the D.A. 26 of the LMRFP).

Chapter IV
Family Members

1. With regard to the free movement of the family members of an EU citizen, we must not forget the substantial legislative change made in Spain in 2003.

As mentioned in the *General Remarks* of the present Spanish Report for the European Network 2004, 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, were regulated by a new regulation: the 2003 Royal Decree.

Moreover, many 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*".

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 included in article 2 of the 2003 Royal Decree. These family members are 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;
- the rest of the family members of the Community citizen are subject to the Aliens Act.

The family members of EU citizens with the nationalities of third countries require an entry visa, although this is issued free of charge (see infra Chapter V of the present Spanish Report for novelties on this issue)

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

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. On this issue see Chapter V infra of this Spanish Report for the European Network 2004.

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.

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 (see Chapter V infra of this Spanish Report for the European Network 2004).

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.

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 (see Chapter I of this Spanish report for the European Network 2004)

6. 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*".

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" so that the spouse of the EU citizen might obtain the visa. 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 Memb er 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".

7. 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 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.

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.

Chapter V
Influence of Recent Judgments of the Court of Justice

1. First of all, it is necessary to mention the European Court of Justice Decision of April 14, 2005, which involved the Commission against the Kingdom of Spain.

Even though this is a 2005 European Court of Justice Decision (to be analysed at the next annual European Network), we consider it important enough to be mentioned as an introduction to the present Chapter of the Spanish Report for the 2004 European Network: On April 14, 2005, the European Court of Justice decided that the Kingdom of Spain had failed to comply with Community Law when imposing the obligation to obtain a residence visa in order to be issued a residence permit as regards the nationals of third countries who are family members of a European citizen.

As we have pointed out at this European Network from the beginning (see Spanish Report for the European Network 2002-2003), the new Spanish Royal Decree 178/2003 (a regulation that repealed the previous Royal Decree 766/1992) maintained stipulations against Community Law.

The European Court of Justice Decision arose from two claims submitted to the European Commission by Community citizens who were exercising the right to free movement authorised by Community Law and their spouses were refused residence permits residence permits by the Spanish Government on the grounds that they had not previously applied for a residence visa at the Spanish Consulate. Although these cases were submitted in 1998 and 1999, that is top say, when the previous regime was in force in Spain (Royal Decree 766/1992), it is important to stress that the Decision of April 14, 2005 of the European Court of Justice is valid since, although the new 2003 legislation (Royal Decree 178/2003) introduced certain improvements in the adaptation of Spanish legislation to Community Law, it conserved the regime involving the compulsory obtaining of a visa as regards third country nationals who are family members of a European citizen.

During the proceedings, the Spanish Government (at that time, the *Partido Popular*) held that third country nationals who are family members of a European citizen should receive the same treatment as any other extra-Community citizen! However, the Commission understood that the third country nationals who are family members of a European citizen should be treated in the same way as European citizens.

The European Court of Justice declared that the Commission was right, and this is what we have repeatedly requested from this Network (see Spanish Report for the 2002-2003 European Network and General Remarks of Spanish Report for the 2004 European Network, supra).

In the words of the European Court of Justice:

> "(…) the requirement stipulated by Spanish legislation involving the possession of a residence visa in order to obtain a residence permit, and the subsequent refusal to provide a citizen of a third country who is a family member of a Community national with such a permit (…) is contrary to the stipulations of Community Directives (…)"

Thus, as the residence permit is not granted within the shortest period of time, at the latest, within the six months following application for the permit, this is also against the stipulations of the other Community Directive, the European Court of Justice condemned Spain and also obliged Spain to pay the legal costs of the proceedings …

In the Spanish Report for the 2005 European Network, we will explain how the Spanish State has modified Royal Decree 178/2003 in order to adapt its internal legislation to Community Law and rectify an error which, has clearly entailed evident damage to the third country nationals who are family members of a European citizen.

2. As we have already seen in Chapter I of the Spanish Report for the 2004 European Network, the *MRAX* and *Akrih* decisions are clearly intended to flexibilise the principle of family unity in European Community Law.

In the opinion of those of us who are carrying out the work of the Network in Spain, regardless of the fact that the illegal practice involving the requirement of a visa from third country nationals who are family members of a European citizen has ended, we understand that the obligatory nature of the Community Residence Card (operative during the year 2004 which is the subject of the Network) for the aforementioned third country nationals who are family members of a European citizen, gives rise to doubts as regards Case Law of the *MRAX* and *Akrih* Decisions.

Perhaps the reform of Royal Decree 178/2003 will also decide to modify this practice which we question as being irregular. In the Network on 2005 we will also explain how this reform is carried out.

The *MRAX* Decision is not taken into account by the Higher Court of Justice of Catalonia in its Decision of October 8, 2004, concerning a case involving the refusal of visa exemption for the spouse of an Italian citizen resident in Spain. In its Decision, the Spanish Court considered the refusal of a visa exemption to be lawful and applied the general Spanish legislation on aliens to this third country national who is a family member of a European citizen!

3. Regarding expulsion of European Union citizens, Spanish Case Law also raises doubts about its compatibility with Community Law. In the proceedings of Provincial Court of León, March 3, 2004 (against a Portuguese citizen), the Provincial Court of Cádiz, March 10, 2004 (against a French citizen) and the Provincial Court of Castellón, May 19, 2004 (against an Italian citizen); in all these cases, the European citizens applied for the sentences to be substituted by expulsion from Spanish territory and the Spanish Courts rejected this and applied the Spanish Criminal Code which only allows this substitution for illegal immigrants in Spain.

From the point of view of this Spanish Network, the European Court of Justice Case Law in *Orfanopoulos* and *Oliveri*, April 29, 2004 has not been taken into consideration when evaluating the expulsion from one Member State of a national of another Member State (even though we do realize that the European Court decision is very recent as compared with the dates of the Spanish decisions mentioned…).

In *Orfanopoulos* and *Oliveri*, the European Court declared, *inter alia*, that:

> Article 39 EC does not oppose the expulsion of a national of a Member State who has been condemned to a determined punishment for certain offences and is a current threat to public order and has resided in the host Member State for many years and can allege circumstances of a family nature against the expulsion, on condition that the evaluation carried out by the national authorities previous to such a decision will be a case by case decision, establishing a balance between the legitimate interests in presence and especially in the full respect for the general principles of Community Law and, in particular, duly taking into account respect for fundamental rights, such as the protection of family life.

4. Chapter VI of the present Spanish Report for the 2004 European Network concludes that regarding sports, the Spanish administrative and judicial authorities continue to infringe Community Law. Thus, the sentence of the European Court of Justice in *Simutenkov against the Spanish Ministry of Education and Culture and the Royal Spanish Football Federation* of April 12, 2005 implies that all the claims put forward by this Spanish Network against some Spanish sports regulations (see Spanish Report for the 2002-2003 European Network and Chapter VI of the Spanish Report for the European Network 2004) were fair, and that Spanish sports regulations must be modified as soon as possible in order to comply with Community Law. We will return to this issue at the 2005 European Network.

5. As regards questions related to the Social security, some Decisions of the European Court of Justice (2004) ought to be mentioned. We refer to Decision *K.B.* of January 7, 2004 on the exclusion of a transsexual from receiving a widow's pension reserved to the surviving spouse, due to the fact that British legislation, in this case counter to the opinion of the European Court, prevented compliance with one of the requirements to access the benefit: to have the capacity required to marry. In contrast, in similar cases in Spain the judicial remedy was favourable to the transsexual. Among the reasons was the fact that the judicial recognition of a sex change is possible in Spain, unlike the United Kingdom, as well as the fact that the Spanish Judge in this case (the Higher Court of Justice of the Canary islands, November 7, 2003, see below Chapter IX of this Spanish Report for the 2004 European Network) made a flexible interpretation of the law as the legislation in force concerning widowhood requires not only living together but marriage.

In the Decision of the European Court of Justice of March 18, 2004 in the *Merino Gómez* case concerning the overlapping of maternity leave with the holidays of the employee, the European Court is opposed to the Spanish Case Law on the matter based on Directives 94/104/EC; 92/85/EEC and 76/207/ EEC. Thus, the European Court resolved that every employee must have annual holidays in a period other than maternity leave even though these and there is a period fixed for simultaneous holidays for all the staff by Collective Agreement.

Finally, the Decision of the European Court of Justice de September 14, 2004 establishes that Spain has failed to comply with Directive 89/6555/EC on the minimum safety and health provisions for the use of the work equipment by the employees. The Decision of the European Court of Justice is based on the inadequate transposition of the aforementioned Directive by Spain.

Chapter VI
Policies and Practices with Repercussions on Free Movement of Workers

The Association Agreements with the Eastern countries and the latest advances in Spanish and EU case law concerning sportspersons and workers in general

The 2002-2003 report denounced the situation of sports workers from the countries with Association Agreements regarding subsequent adhesion or not to the European Commission and Spain is clearly infringing the Association Agreements signed by the EU and also the Case Law of the EUCJ of the last few years, interpreting the efficacy and direct applicability of some provisions of these agreements with regard to the principle of equal treatment if the legal requirements laid down by the respective national laws on aliens are complied with.

In this report, this denouncement is maintained and emphasised even more taking into account the Decisions given during 2004. However, before this, it is necessary to remember the situation of these players in Spain. Some agreements were achieved between players, teams and sports federations, supported by the Consejo Superior de Deporte (the body which controls sport in Spain in accordance with Law 10/1990, of October 15, on sport and depends on the Spanish Ministry of Education, Culture and Sport), which involved a change in the initial liberalisation made by some sports federations, such as the basketball Federation, and ratified by the Spanish Employment Courts, allowing professionals to play in all sports areas as assimilated or Community citizens in the case of nationals from these countries and including those from States other than those involved in the enlargement with which an agreement had been made.

Specifically, after several attempts had been made in Spanish Courts, the Consejo Superior de Deportes achieved that the Spanish Employment Courts, which until then had declared the "B Community citizens" to be right, refrained in favour of the contentious-administrative jurisdiction. The result could not have been worse for the "B Community citizens", as several Decisions[12] meant that they were again being treated as aliens and would have to play as being signed as an alien. To do this, they used the argument that the signing

12 In the *Decision of the Central Contentious – Administrative Court of October 29, 2002*, the Spanish judge analysed the Agreement and whether the possibility of having the permit of assimilated to Community citizen is or is not a requirement submitted to the principle of equality of treatment in the following terms, "We must now determine whether the federation permit 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 it would not be contrary to the scope of equality established in the Agreement. As regards the federation regulations concerning the issue of permits, the only consequence which derives from the non-Community foreign nationality of the player is that the club can only have and line up a limited number of these players in state competitions. The question specifically involves determining whether the limitation of the number of players, which is the sole consequence derived from the type of permit issued by the Federation, constitutes a condition of work and, therefore, infringes the right of equality of the Russian citizens, as stated in article 23 of the Agreement... we continue to hold that this is not the scope which is to be given to the relevant articles of the Agreements or Accords subscribed to by the Union and those countries which intend to join in the future"*. With this approach, the Decision analysed finally states that "*the limitation of the number of non-Community players is in accordance with Community and internal legislation in force today, does not infringe the fundamental right of equality legally structured by these laws and the administrative act challenged in conformity and in application of this legislation, is in accord with Law and must be confirmed*".

of aliens is not a component of an employment nature, but is administrative and, therefore, cannot be decided buy Spanish Employment Courts which, until then, had been favourable to admitting the players who were nationals of States with association or cooperation agreements to play without being signed as aliens. It should again be remembered that the Commission acts against Spain for failing to comply with Community Law, more so when the Spanish Constitutional Court participates in this failure to comply by alleging procedural questions and forgetting about the substantive aspects.

In the *Decision of the Spanish Constitutional Court of March 22, 2004*, the Russian citizen, Oleg Grebnev, a Russian player in the Ciudad Real Handball Club, sought to have his sports registration as an alien modified through his club on January 11, 2001, in accordance with the European Association Agreement made by the European Community and its Member States and the Russian Federation, and signed in Corfu on June 24, 1994 (*Official State Gazette* of January 30, 1998) so that he could play as a national or Community player by virtue of article 23 of this Agreement. The application was sent to the Association of Handball Clubs, which requested the *Real Federación Española de Balonmano* (Spanish Royal Handball Federation) to inform on the processing of this application. The application was rejected. Thus, Grebnev lodged an appeal and the Number 2 Employment Court of Ciudad Real upheld the claim through Decision of February 16, 2001, declaring the right of the claimant to provide his services on Spanish territory in conditions of equality with the Spanish and Community handball players, as well as the nullity of the decisions adopted by ASOBAL and the RFEBM, both of January 12, 2001, refusing the concession of the modification of the permit in favour of the claimant in a condition similar to that of a Spanish or a Community player.

Subsequently, the Handball Federation put in a claim for conflict of competence which gave rise to the Order of the Central No. 5 Contentious – Administrative Court of April 21, 2001, dictated in the 26-2001 procedure, whereby a request for prevention was made to the Employment Court of the Higher Court of Justice of Castilla La Mancha. By an Order of October 23, 2001, the Employment Court of the Higher Court of Justice of Castilla La Mancha agreed to the prevention order. From that time, the Club Balonmano Ciudad Real, notified the claimant for protection on October 31, 2001 that the Decision of the Number 2 Employment Court had been annulled by the Higher Court of Castilla La Mancha and since the quota of foreigners was covered, it could not effectively provide him with work as it could not line him up in any game as it could not process the signing with ASOBAL since it already had two foreign players. On November 9 of the same year, this club sent the appellant a letter of dismissal.

As a result of this dismissal, Grebnev lodged an appeal for legal protection with the Spanish Constitutional Court and, despite the evident damage and erroneous interpretation of the agreements, the Constitutional Court quashed the appeal owing to procedural questions which Grebnev had failed to comply with.

Despite this, if we take the facts into account, the set of Decisions included in last year's report (especially *Stjce Kolpak*), we can conclude the need for the European Commission to file an action against Spain for non-compliance with Community Law due to the action of the *Consejo Superior de Deportes* and the Spanish federations which condition the registration of aliens and this influences the work conditions of these nationals, as well as the ratification received from the contentious-administrative jurisdiction which has maintained this infringement.

In support of this recommendation to file an action against the Spanish Government, *Seucj Simutenkov against the Spanish Ministry of Education and Culture and the Royal Spanish Football Federation* of April 12, 2005 was published recently. This discusses the legality of the Spanish sports legislation, especially the compatibility with the Association Agreement with Russia, and the Agreement of May 28, 1999 in the Spanish Football League on the number of players who are not nationals of the Member States who could form part of the line up simultaneously was restricted to three in the First Division for the 2000/2001 to 2004/2005 seasons and in Second Division to three for the 2000/2001 and 2001/2002 seasons and two for the three following seasons. This agreement is clearly contrary to the principle of equal treatment which is included in the respective Association Agreements.

The *Stjce Simutenkove* case has the same approach as the *Grebnev*, apart from the sport, which is football (now what is discussed is the compatibility of articles 173 and 176 1 of the Regulations of the Spanish Football Federation[13] while in the other case it was article 46 of the Basketball Federation) instead of handball, but with totally different results in both cases.

This is so due to the fact that the EUCJ concludes, also following the Conclusions of the Attorney General, *STIX-HACKL* that article 23, section 1, of the Agreement of collaboration and cooperation whereby collaboration between the European Community and its Member States and on the one hand and the Russian Federation on the other is established and signed in Corfu on June 24, 1994 and approved on behalf of the Community through Decision 97/800/CECA, EC, Euratom of the Council and of the Commission, of October 30, 1997, must be interpreted in the sense that it is opposed to the application to a professional sportsperson with Russian nationality, contracted lawfully by a Member State club of a regulation adopted by a sports federation of the same State under which clubs can only line up a limited number of players from third States which are not parties to the Agreement on the European Economic Space in competitions at State level.

Decentralisation regarding the autonomous communities in relation to immigration and its possible effect on Community workers

The requirement to know one of the co-official languages in the Autonomous Communities which have their own languages and Spanish can give rise to problems concerning access to jobs for Community citizens with the required professional qualifications but who only know Spanish. Only Spanish is the official language in the European Union, therefore, this can be considered to be discrimination. This is discussed in the Decision of the Higher Court of Justice of Navarre of May 20, 2004, on the access to a job as Treasurer of the Town Hall of

13 According to article 129 of the General Regulations of the RFEF (Royal Spanish Football Federation), the permit of a professional football player is the document issued by this Federation which allows the person to play as a member of the Federation and to line up in official games and competitions as a player of a specific club. Article 173 of these General Regulations sets out the following, "A general requirement which football players must comply with in order to register and obtain a permit as professionals, without prejudice to the exceptions stipulated in this Book, is that they have Spanish nationality or the nationality of any of the countries of the European Union or of the European Economic Area." Article 176, section 1, of the aforementioned General Regulations establishes the following: 1. The clubs ascribed to official competitions at state level and of a professional nature can register alien non-Community players in the numbers established in the agreements adopted in this regard between the RFEF, the Professional Football League and the Spanish Football Players Association, which also regulate the number of football players of this type who can play simultaneously.

Pamplona, which evaluates knowledge of Basque at between 5% and 10% more, which supposes a competitive advantage and is not justified in this case, and could be discriminatory against a citizen of the EU.

To sum up, the annulment of the following local regulations in Navarre is requested:

- Article 21.1, concerning the Basque speaking area establishes that, "In the cases in which knowledge of Basque must be evaluated as a qualified merit among others in the Basque speaking area, the percentage increase which this evaluation entails in relation to the merit points which are applied as regards knowledge of French, English or German, working languages of the European Union, can in no case be greater than 10% of the evaluation and the specific figure will be stated in the corresponding announcement".
- Article 23.1, concerning the mixed area determines, "The evaluation of the knowledge of Basque as a merit in the mixed area, when it is taken into consideration, in no case will be greater than 5% of the merit points which are applied as regards knowledge of French, English or German, working languages of the European Union and the specific figure will be stated in the corresponding announcement". What must be analysed is whether the content of these regulations goes beyond what constitutes the subject of an executive regulation, when it possibly equates Basque with certain European languages, which could go beyond the ranking and the protection which is granted to Basque in the Local Law 18/1986, of December 15. Although languages are the competence of the Member States, the requirement or additional points entail a restrictive component to the free movement of Community workers as, a priori, only Spanish is an official EU language, thus the requirement of internal languages can go against the objectives of the TEC.

Chapter VII
Regime for Entry, Permanence and Work in Spain of Nationals from the New Member States of the EU and the Case Law on the Association Agreements

On May 1, 2004, ten new Member States joined the European Union: Cyprus, Malta, Slovakia, Slovenia, Estonia, Hungary, Latvia, Lithuania, Poland and the Czech Republic. However, in the negotiation phase for joining, due to the objections put forward by Germany and Austria, the annexes to the Act containing the conditions of accession of eight of these States (Slovakia, Slovenia, Estonia, Hungary, Latvia, Lithuania, Poland and the Czech Republic) established the possibility of applying a safeguard clause concerning the free movement of salaried workers who are nationals of these States, which meant a limitation to this freedom for a total of seven years, which could be distributed in three stages. At this time, Germany and Austria have chosen the maximum number of years.

Due to their demographic impact, Cyprus and Malta are excluded from the scope of application of this transitory period, therefore, from May 1, 2004, the regime laid down in Royal Decree 178/2003, of February 14, on the entry to and permanence in Spain of the nationals of the Member States of the European Union and of other States which are parties to the Agreement on the European Economic Area fully applies to their citizens.

In Spain, previous to the full effectiveness of the regime of free movement of salaried workers who are nationals of the eight countries mentioned (the ten new countries minus Cyprus and Malta), a transitory period of two years was established and this is planned to end on May 1, 2006 unless it is extended. This limitation implies that, during these first two years, the nationals of the new Member States of the EU who move to Spain as salaried workers will be subject to the general regime stipulated in Organic Law 4/2000, of January 11 on the rights and liberties of aliens in Spain and their social integration, as well as its Implementation Rules approved through Royal Decree 2393/2004 of July 20. Obviously this entails a regime of residence and work authorisations and permits which is much more demanding than the legal regime set out in Royal Decree 178/2003 concerning the citizens from the Member States of the European Union, from other States which are parties to the Agreement on the European Economic Area and from the Swiss Confederation.

Unless there are subsequent instructions or modifications, it seems that the Spanish Government in the Memorandum of the Interior Ministry of April 14, 2004 has chosen the legal option which stipulates that, once the first two years of the transitory period end and the circumstances advise otherwise, the regime laid down Royal Decree 178/2003 will apply automatically and totally to the salaried workers who are nationals of the eight countries referred to.

This future treatment for the nationals of the eight new Member States affected is progressing in some areas as shown in the agreement of the Council of Ministers of December 19, 2003, which stipulates that a visa is not required by the workers who are nationals of the recently incorporated countries as from May 1, 2004[14], on condition that they are contracted for periods which are no longer than 180 days.

With this situation, it can be pointed out that, as from May 1, 2004, the regime for the nationals of the ten new Member States entering Spain must be adjusted to the following conditions:

14 This agreement was published in the Official State Gazette of December 31, 2003

- The presentation of a valid travel document so that the nationals of the new Member States of the European Union can enter Spanish territory, and which they must have at the time of entry. This valid document will be a passport or, possibly, the identity card in force, which must record the nationality.
- The corresponding visa of transit or stay will be required for the family members, who are beneficiaries of the Community regime, and are not nationals of the Member States of the a European Union, the European Economic Area or the Swiss Confederation unless they are exempt from this obligation due to their nationalities.
- An entry or exit stamp on the passport be required for the nationals of the *new* Member States of the European Union, but this will be required from their family members mentioned in the previous paragraph.
- Unless there are indications that the nationals and the family members mentioned in the previous paragraphs represent a threat to public order, public security or public health, they can only be subjected to a meticulous check at the border, in accordance with what is set out in the Common Manual of Schengen. These nationals and their family members can use the queues indicated for the citizens of the Member States of the European Union.

Application of the current legislation on aliens to the nationals of the new Member States during the transitory period

Depending on the general considerations established, the national of the new Member States affected by the transitory regime can incur four cases when entering, staying and working in Spain. These cases determine solutions which must be analysed.

The legal regime of the workers from the new Member States

The first case would be that of the workers who are nationals of Slovakia, Slovenia, Estonia, Hungary, Latvia, Lithuania, Poland and the Czech Republic not resident in Spain at the time of accession (May 1, 2004) and who try to work as employees in Spain for a period of time equal to or greater than one year, through a work permit with a duration of, at least, one year.

The regime contained in Organic Law 4/2000, of January 11, on the rights and liberties of aliens in Spain and their social integration, and its Implementation Rules in the current Royal Decree 2393/2004 will apply to these workers. The issue of the work and residence permit will be free of charge, it will be applied for and withdrawn personally by the person concerned and this will be done in the country of origin or last residence of the worker. Within a period of one month from his entry to Spain, the worker must personally request the alien identity card. This card will become invalid at the end of the period of one year from its issue and, in any case, when the transitory period ends.

Legal Regime applicable to the workers of the new Member States already resident in Spain

The regime contained in Organic Law 4/2000 and its Implementation Rules will apply to the same employed workers as in section 1, resident in Spain at the time of the accession, as well as those who acquire residence during the transitory period when they attempt to work as employed persons, and the national employment situation will not be taken into consideration.

Within a period of one month from notification of the work authorisation, the worker must personally apply for the alien identity card, which will be valid for one year. This card will become invalid at the end of the period of one year from its issue and, in any case, when the transitory period ends unless this is extended.

The second practical case is that of the nationals of the eight States referred to and who have been granted work permits as employed persons for one year or more previous to May 1, 2004, and who are, therefore, residing legally in Spain. This second possibility includes the workers resident in Spain at the time of the accession and those who have been granted work permits for one or more years, to whom the regime contained in Royal Decree 178/2003 will apply. They are thus equated with the employed workers who are nationals of the Member States previous to the enlargement, that is to say, equal and preferential treatment. With these measures, the Spanish Government seems to give priority to the fact of being resident previous to the accession and establishes the presumption of settlement.

Legal Regime of temporary workers from the new Member States training or studying

The third case involves the nationals of the eight States mentioned who have been authorised since May 1, 2004 to work as employed persons temporarily, do professional training or, in the case of students, these are authorised to carry out activities as employed persons compatible with their studies, or are exempt from a work permit. In these cases such workers will not be required to have a visa on condition that they are contracted for periods of time no longer than 180 days, as from the date of accession.

From a practical point of view, and taking into account the application of the general regime for aliens, the processing of the applications for work permits for activities of a temporary nature will be done in accordance with the content of the Fifth Instruction of those dictated on December 23, 2003, in the development of the Agreement of the Council of Ministers of December 19, 2003 whereby the contingent of alien workers not under the Community regime was determined for Spain in 2004 and for temporary work amounted to 20,070 temporary jobs and 10,908 stable jobs .

As regards the processing of the applications, the following particularities will be taken into account:

a) The work contracts will be filled in accordance with the forms included in Annexes I and II, for the specific use of the nationals from the eight new Member States.
b) The contracts signed by the workers in the country of origin must be processed by the Diplomatic Representation or Consular Office in the country of origin. In the event of generic offers or offers to workers hired in previous campaigns, if there is a bilateral agreement concerning the regulation and organisation of migratory flows, as is the case of Poland,[15] the contracts can be processed by the body responsible for selection. In the case of Poland, the body responsible is the Department of International Foreign Cooperation, dependent on the Ministry of Employment and Social Policy.
c) When the offers are by name, the period for the submittal of the work contracts for signing and processing will be one month from the notification of the authorization to work, sent to the entrepreneur.

15 Provisional application of the Agreement made between the Kingdom of Spain and the Republic of Poland on the Regulation and Organisation of the migratory flows, signed in Warsaw on May 21, 2002, Official State Gazette of September 20, 2002.

d) In the case of generic offers, the signing and processing of the contract will be done once it has been checked that the persons have no criminal records or there are other reasons which prevent the worker from entering Spanish territory, in accordance with the stipulations in Second Instruction, 6, of those dictated on December 23, 2003 and mentioned above.

When it is a question of authorisation to work in seasonal or campaign activities, the worker must accredit the obligation to return before the competent body which has processed the work contract, within a period of one month from the expiry of the period of validity of the work permit in accord with the stipulations of Regulation 2393/2004 implementing Organic Law 4/2000.

The notification to the workers who have accredited return will be sent by the Spanish Consular Office to the Department of Consular Affairs and the Protection of Spanish Citizens Abroad (Spanish Foreign Office) and this Department will transfer it to the Department of Migration Organisation (Ministry of Employment and Social Affairs).

In the cases of students or workers doing training, these will be regulated by the stipulations of Organic Law 4/2000, and its Implementation Rules. The national employment situation will not be taken into account in either of the cases nor will the criteria of reciprocity be taken into account in order to do professional training.

In the case of workers doing professional training, the issue of the work and residence permit is free of charge, it will be applied for and withdrawn personally by the person concerned and this will be done in the country of origin or last residence of the worker. Within a period of one month from his entry to Spain, the worker doping professional training must personally request the alien identity card. This card will become invalid at the end of the period of one year from its issue and, in any case, when the transitory period ends.

The stipulations of Organic Law 4/2000A and its Implementation Rules will apply to those workers who, from the date of accession, (May 1, 2004) attempt to work as employees except for the obligation to obtain a work permit. However, the regime contained in Royal Decree 178/2003 will apply to the workers excepted from the obligation to obtain a work permit and resident in Spain at the time of accession and those who have been granted this exception for a period equal to or greater than one year.

Legal regime of the family members of the nationals of the new Member States

The first question of interest is the delimitation of the concept of family which differs in the Member States. Therefore, in order to take into account the content of family, it is necessary to consult the stipulations in article 2 of Royal Decree 178/2003.[16] The regime for the application for and granting of the authorisation for the family members to reside in the country will be regulated by what is stipulated in Royal Decree 178/2003, which is evidently preferential treatment as regards the restrictive regulation laid down for family regrouping included in Organic Law 4/2000, which is the legal regime applicable to the holder or person regrouping the family when this person did not legally reside in Spain before May 1.

16 Article 2 "...the spouse on condition that they are not separated de iure, the descendents and those of the spouse who are less than twenty-one years old or older and live at the expense of the parents; the relatives in the ascending line and those of the spouse on the condition that they are not separated de iure and live at their expense with the exception of relatives in the ascending line of students and of their spouses".

As regards their access to the job market, the regime contained in Royal Decree 178/2003, second section of article 3, will apply to those family members legally resident in Spain previous to the date of accession on condition that the worker had been granted a work permit as an employee for one or more years previous to the date of accession.

Otherwise**,** the stipulations of Organic Law 4/2000 and its Implementation Rules will apply to the family members who do not reside in Spain at the time of accession. The national employment situation cannot be taken into account on condition that the worker accredits one year of legal residence and employed work in Spain before or after the date of accession.

Finally, all the cases taken into consideration, a more benevolent sanctioning regime has been laid down as the regime contained in Royal Decree 178/2003 will be applied. It will be possible to prevent entry to Spain, order expulsion, refuse the issue of the Alien Identity Card or the corresponding permit when this is advisable due to reasons of public order, public security or public health. The omission or delay in applying for the Alien Identity Card, as well as the failure to notify variations in the circumstances which gave rise to its issue can only be sanctioned with a fine, in accordance with the criteria of proportionality contained in Organic Law 4/2000.

The conclusion which can be drawn from the legal framework stipulated for the nationals of the new Member States is whether the different treatment, based on their legal presence in Spain before May 1, 2004, and subjection to two different legal regimes (Organic Law 4/2000 for aliens in general and Royal Decree 178/2003 for the nationals of the EU and the European Economic Area, including Switzerland), is justified in the light of Community Law and the respective Agreements of Association which require the principle of equality of treatment.

Spanish case law regarding the nationals of the new Member States

The first of the Case Law references which may be of interest is the Decision of the Higher Court of Justice of the Basque Country of July 2, 2004, regarding a Slovakian citizen who appealed against the refusal of an application for exemption from a visa for study stays formulated in 2002. After rejecting the appeal due to the reason, the Court referred specifically to the appellant being a citizen of Slovakia, a new Member State, which meant that the warning to leave the country was no longer effective.

Briefly, the Spanish Court argues that

> "The effect of the accession of Slovakia to the European Union as a full Member State with regard to the warning to leave Spanish territory which is included in the resolutions appealed against. The obligation to leave Spanish territory which the appellant was warned of in the resolutions appealed against in application of the stipulations of article 28.3.c) of Organic Law 4/2000, modified by Organic Law 8/2000, has lost its judicial validity from May 1, 2004 when the accession of Slovakia to the European Union as a full Member State became effective.
>
> For this reason. It must be remembered that, since Mat 1, 2004, due to their condition as citizens of the European Union, the regime for the entry of the nationals of the ten new Member States of the European Union to Spain (Slovakia, Slovenia, Estonia, Cyprus, Hungary, Latvia, Lithuania, Malta, Poland and the Czech Republic) has been modified. To this end, the Agreement of the Council of Ministers of December 19, 2003, published in the Official State Gazette of December 31, 2003, and the Instructions and the Memorandum of the

> Department of Migration Organisation of December 23, 2003 and April 14, 2004 were adopted.
> The valid travel document which allows the nationals of the new Member States of the European Union to enter Spanish territory and which they must have at the time of entry will be the passport or, possibly, the identity document in force, which must record his nationality; and a transit or visa of stay will not be required, nor will an entry or exit stamp on the passport be required. And, unless there are indications that the person in question represents a threat to public order, public security or public health, they can only be subjected to a minimum control at the border, in accordance with the stipulations of the Common Manual of Schengen, and these nationals and their family members can use the queues indicated for the citizens of Member States of the European Union. Likewise, by a Decision of the Council of Ministers of December 19, 2003, published in the Official State Gazette of December 31, 2003, it was agreed not to demand a visa from workers hired for periods no greater than 180 days and who are nationals of the countries which will join shortly as from May 1, 2004.
> This is without prejudice to the fact that, with regard to the free movement of salaried workers who are citizens of the States of Slovakia, Slovenia, Estonia, Hungary, Latvia, Lithuania, Poland and the Czech Republic, by virtue of the stipulations of the annexes of the Act regarding the conditions of accession, the possibility of applying a safeguard clause until a total period of seven years has elapsed has been stipulated; and a transitory period of two years has been fixed for the Kingdom of Spain, which will expire on May 1, 2006 unless it is extended. This regime is also applicable to students in the event that they authorised to work as employees in jobs compatible with their studies, in which case, this will be regulated by the stipulations in Organic Law 4/2000 and its Implementation Rules, although the domestic employment situation nor the criteria of reciprocity as regards carrying out professional practice are not taken into consideration.

While the regime stipulated in Royal Decree 178/2003 of February 14, on the entry to and permanence in Spain of nationals of the Member States of the European Union and of other States which are parties to the Agreement on the European Economic Area is fully applicable to the States of Cyprus and Malta as from May 1, 2004. Consequently, the new judicial regime applicable to the situation of the alien appealing in this case, due to the fact that he is a Slovakian national, does not affect the legal validity of the administrative resolutions appealed against. But it does affect the development of the judicial effects of these administrative resolutions as they have lost efficacy due to the warning of the duty to leave Spanish territory which is contained in the resolutions.

> In the Decision of the Higher Court of Justice of the Autonomous Community of Valencia of December 3, 2004, the appeal lodged against the expulsion order against a Lithuanian citizen was quashed with the prohibition to enter the country for a period of five years. As regards this position, there are two votes of the judges who understand that the sense of the Decision would go against the new legal regime of the nationals of the new Member States and proposes the substitution of expulsion by the sanction of a fine.

The Decision retains the expulsion alleging that

> "From this point of view and taking into account the fact that there are no reasons regarding settlement or any other which might determine the appropriateness of the sanction of a fine, other than the nationality of the appellant, and which has already been analysed, the response of the Court could be none other than that which it had maintained and it concluded

> that it did not infringe the principle of proportionality invoked. It is true that the accessory sanction prohibiting entry to Spain could be for a longer period of time than the transitory regime which is established for the nationals of the countries mentioned above, but the question (apart from what has been stated concerning the obligation to comply with the conditions for the Community citizens) leads to the analysis of the execution of the sanction and the possible modification, but it cannot be considered that it affects the legality of the act which is the question submitted to this Court".

Evidently, this Decision infringes the new legal situation of the Lithuanian citizen and we understand it to be disproportionate not only as regards the Spanish principle of proportionality, but also in relation to Community legislation. Thus, it is necessary to defend the position of the judges who voted for the proportionality of the sanction of a fine rather than expulsion.

Chapter VIII
Statistics

Introduction

1. The national statistical sources from the Ministry of Interior do not allow the distinction between workers of the European Economic Area (E.E.A.) and their families. The reason is mostly legal: these residents get a communitarian residence permit in order to work and reside. The communitarian residence card does not specify if it is only to reside or if they are allowed to work, as it does with nationals from third countries.

2. As we can see, we have access to data from the Extended European Union only since 2004. Because of this fact, in this work we handle national figures from the E.E.A. up to 2003, and since 2004 we add data regarding the Extended European Union.

3. However, statistics from Social Security provide us with figures of nationals of the E.E.A. who are working and paying Social Security taxes. According to this data 179,771 people were registered as paying Social Security taxes in 2002, this represents 49.5% of the residents of the E.E.A. in the same year. This figures are much lower than the figures of nationals of third countries, 67.8% of them were working legally and paying taxes.

E.E.A. Countries and Third Countries

COUNTRY OF ORIGIN	1993	2000	2001	2002	2003	2004
E.E.A.	**230,038**	**306,203**	**325,511**	**362,858**	**398,150**	**480,468****
THIRD COUNTRIES	254,304	589,517	783,549	961,143	1,240,812	1,496,823

Source: Anuarios Estadísticos de Extranjería, años 2000, 2001 y 2002. Ministry of Interior.

* Data of 2000, 2001,2002, y 2003 correspond to the European Union comprised of 15 members.

** Correspond to the Extended European Union (including the 10 new members), we do not have data of the E.E.A. (15 members) anymore.

In a period of ten years, from 1993 to 2004, immigration from countries member of the European Economic Area has grown 117%, while immigration from third countries has increased 489%, almost five times. In the last 3 years, from 2002 to 2004, according to the table no. 1, the growth of nationals of E.E.A. has been only 42.4%, lower than the growth of third countries which is 58%. Comparing such increase with the period of 200-2002, we find that the E.E.A. has grown 24% more in the last period.

In 2002, nationals from E.E.A. represent 27,4% of the foreign population. And in 2004 the E.E.A. represents 32%, while in 2002 it represented 27.4%. Ten years before they represented 47.5%. Despite the growth over these years, the increase of nationals from third countries has inverted the relation between both groups of countries, being that at this time the group of third countries represents the majority.

Sex

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
2003	50.9	49.04	57.85	42.15
2004*	52.55	47.45	56.92	43.08

Source: Anuarios Estadísticos de Extranjerías from those years.
*EU extended, including the 10 new member states.

Distribution by sex of the members of the E.E.A. is quite similar; there is, however, a slight increase of men (2.25%) between 1998 and 2004. Comparing these figures with the ones from third countries, the difference of sex in these countries has experimented a 14 points increase in favour of men. Five years ago, in 1998, such disparity was of 6 points.[17]

Age

		0 to 15 years	**16 to 64 years**	**More than 64 yeas**	**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
2003	European Economic Area	25,857	307,965	64,323	398,150
	Third Countries	175,010	1,040,112	25,488	1,240,812

Source: Anuarios Estadísticos de Extranjería from those years. Ministry of Interior.

17 This issue can be explained by Spanish labour market peculiarities: most of works are offered in agriculture and construction and are traditionally held by men.

Distribution by Age, Extended European Union

		0 to 15 years	16 to 64 years	More than 64 years	Total
2004	European Union	22,539	427,046	30,883	480,468
	Third Countries	237,831	1,225,832	33,643	1,497,306

Source: Anuarios Estadísticos de Extranjería from that year. Ministry Labor and Social Issues.

In 2002, 77.2% of the residents of the EEA go from 16 to 64 years old. In other words, based only on their age, they would be able to perform any productive activity. Three years later, that figure reaches the 88.9%. While 16.4% of them were older than 64 years, three years later this figure decreased reaching only 6%. The proportion of people younger than 16 years decreased from 6% to 4%. Comparing this figures with the ones from third countries, we observe that these ones had a higher percentage of people old enough in order to work (85%) in 2002, decreasing three points (82%) in 2004. People younger than 16 years from third countries doubled the ones from the E.E.A. (13%) in 2002.[18] Three years later that difference increases, reaching 16%. On the other hand, in 2002 the population older than 64 decreased and was 15 points below the E.E.A. In 2004 such disparity decreased to only 2 points of difference.

Country of origin

The founder countries of the European Union represent, in 2002, 51.8% of the immigration from the EEA. If we add the UK, all these countries constitute 3 fourths, 76.3%.

Such countries can be classified in four groups due to their different speeds of growth. 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, Luxemburg, 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 a notorious growth, are Greece, Norway and Italy, the latter is the most outstanding.

18 Rise in children seems to be obvious as the third countries nationals' family reunification processes are (and have been) taking place.

Residents of EEA by country of origin

COUNTRY OF ORIGIN	1993*	1996	1998	2000	2001	2002	2003	2004
EEA*	**230,038**	**252,034**	**295,259**	**306,203**	**325,511**	**368,858**	**406,199**	**498,871**
European Union								**480,468**
Germany	38,736	45,898	58,089	60,575	62,506	65,823	67,963	67,719
Austria	1,775	2,566	3,521	3,503	3,711	3,931	4,172	4,290
Belgium	8,460	9,847	11,997	12,968	13,541	14,631	15,736	15,798
Denmark	4,835	5,107	5,686	5,538	5,818	6,167	6,568	6,910
Slovakia	----	----	----	----	----	----	1,419	1,988
Finland	2,177	3,131	4,303	4,680	5,186	5,672	5,906	6,041
France	30,007	33,134	39,504	42,316	44,798	46,986	49,196	49,918
Greece	614	688	769	939	1,033	1,183	1,367	1,613
Hungary	----	----	----	----	----	----	940	1,255
Ireland	2,719	2,870	3,293	3,542	3,779	4,208	4,882	5,381
Italy	18,636	21,362	26,514	30,862	35,647	45,236	59,745	72,032
Latvia	----	----	----	----	----	----	256	499
Lithuania	----	----	----	----	----	----	2,796	6,338
Luxemburg	159	171	219	230	235	246	---	---
Netherlands	12,344	13,925	16,144	16,711	17,488	18,722	20,551	21,397
Poland	----	----	----	----	----	----	15,814	23,617
Portugal	36,717	38,316	42,310	41,997	42,634	43,309	45,614	50,955
United Kingdom	64,703	68,359	74,419	73,983	80,183	90,091	105,479	128,283
Czech Republic	----	----	----	----	----	----	1,800	2,166
Sweden	5,424	6,545	8,941	8,359	8,952	9,652	10,415	10,751
Island	----	----	----	206	231	264	----	----
Lichenstein	----	----	----	20	23	20	----	----
Norway	2,732	802	4,241	4,790	5,587	6,717	----	----
Others EU	---	----	---	----	----	---	1,101	1,071

* 1993. Austria, Finland and Sweden were not part of the EU, yet.

** Before 2000 Island and Liechtenstein were not counted independently.

*** The 2004 European Union figure corresponds to the Extended European Union.

Sources: Anuarios de Migraciones from the Minitry of Labor and Social Issues and Anuarios Estadísticos de Extranjería from the Ministry of Interior.

Distribution by Autonomous Communities

Autonomous Communities	2001	2002	2003	2004*
Andalucía	61,981	70,036	78,360	96,034
Baleares	33,714	34,018	36,340	41,818
Canarias	44,696	47,387	51,818	61,186
Cataluña	51,350	57,594	62,366	71,835
Comunidad Valenciana	48,673	56,504	67,291	90,734
Galicia	11,841	12,252	18,825	14,154
Madrid	39,967	43,229	44,899	64,570
Otros	39,130 (11.8%)	41,838 (11.5%)	38,251 (9.6)	58,544 (11.7%)

*Data from 2004 correspond to the Extended European Union, including the 10 new members.

The geographic distribution of nationals of the European Economic Area in 2001, 2002 and 2004 reveals that 88% of the residents live mostly in tourist areas. These figures are similar to the figures of nationals registered in the Social Security working in the same Autonomous Communities (87.8%), and to the figures of the service industry, where most of the nationals work. On the other hand, an important portion of nationals of the E.E.A. (16.4%) are retired workers who decide to reside temporally or definitively in such tourist regions.

Foreign workers paying Social Security taxes

Foreigners paying Social Security taxes, 2002-2004

Foreigners paying Social Security taxes December 2002	2002	%	2003	%	2004	%
E.E.A:	179,771	21.62	208,135	22.5	251,350	23.34
European Union 15 countries	178,226		206,396	22.3		
Extended European Union *					249,489	23.17
Rest of Europe	94,427	11.35	107,924	11.6	116,234	10.79
Africa	200,301	24.08	216,542	23.4	238,368	22.14
North America	5,044	0.6	5,245	0.6	5,593	0.52
Central and South America	288,028	34.63	320,519	34.6	384,434	35.70
Asia	60,901	7.32	65,644	7.0	77,431	7.19
Oceania, people with no country of citizenship, people without proof of citizenship	3,186	0.4	3,010	0.3	3,334	0.31
Total	831,658	100.00	925,280	100.00	1,076,744	100.00

Source: Ministry of Labour and Social Issues 2004

* Until 2004 there are no specific data in order to establish the actual countries of the Extended European Union.

Employment distribution by industry, by large nationality groups, and employed population younger than 50 years, 2003

Industry	Spaniards	European Union	Eastern European	Africans	Latin Americans
Housekeeping	1.9	2.0	17.7	4.3	26.2
Hostelry	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.

The analysis of data from the survey on active population (EPA, in Spanish) from the first three quarters of 2003 reveals that:

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

Chapter IX
Social Security

Texts in Force

The entry into force of certain provisions in Spanish legislation has generated questions of several types to be taken into account as regards Social Security and the free movement of workers.

In the first place, when *Law 52/2003 of December 10, on specific measures regarding social security* came into force on January 1, 2004, this disclosed several questions which might affect the free movement of workers.

The first is related to the issue arising in previous years and apparently resolved by the decision of the Constitutional Court in *239/2002 of December 11*, on the Autonomous Community norms which were normally conferred as additions to income due to the insufficient payments of the Social Security system.

The Spanish Constitutional Court classified these as social assistance, and apparently it could be concluded that these were excluded from the scope of application of Regulation 1408/71. However, in the interpretation of the objective scope of application of this regulation in accordance with the Decisions of the *Giletti* Case (C-20/96) and *Jauch* Case (C-215/99), a dual classification could be made: social assistance when the finality lies in ensuring a minimum subsistence for persons who are outside the Social Security system; and Social security when the goal is to ensure an additional income due to the insufficient payments of the Social Security system.

The benefits which have given rise to the controversy are related more to this second classification as they are received by those who already have the right to the payments of the Social Security system by increasing the amounts, and Law 52/2003 limited the capacities of the Autonomous Communities to confer these "Social Security" payments, by reducing their capacities to those of social assistance as a guarantee of subsistence minimums and demanding that the regulations have several subjective and objective requirements other than those of the Social Security benefits.

This attempt to limit the Autonomous Community legislation will be carried out through the modification of article 2 of the Revised Text of the General Law on the Social Security of 1994, in the following terms:

> "Article 2. Principles and objectives of the Social Security:
> 1. The Social Security system is structured as regards its protective action into contributory and non-contributory modalities and is based on the principles of universality, unity, solidarity and equality.
> 2. Through the Social Security, the State guarantees adequate protection concerning the contingencies and situations laid down in the Law to the persons included within the field of its application who comply with the requirements stipulated in the contributory and non-contributory modalities, as well as to the relatives or similar persons they might be responsible for."

Furthermore, a new section 4 is added to article 38 of the Revised Text of the General Law on the Social Security approved by Legislative Royal Decree 1/1994 of June 20, in the following terms:

> "4. Any benefit of a public nature which is intended to complement, extend, or modify the payments of the Social Security, in its contributory and non-contributory modalities, is part of the Social Security system and is subject to the principles regulated in article 2 of this Law".

The entry into force of Law 52/2003 revealed a second question which might affect the free movement of workers and their entitlement to the benefits of the Social Security in equal conditions. This regulation text *modifies the judicial regime of the Social Security payments for each child under the person's charge.* On modifying article 182.1 of the General Law on the Social Security, it introduces a new requisite: the residence of the child under the person's charge, which leads to its conformity with the Community Regulations on Social Security being questioned and whether this new regime is contrary to the free movement of workers.

Until January 1, 2004, the family benefits per child under the person's charge granted payments in the contributory and non-contributory modality which, in practice, required the child involved and the beneficiary of the benefit to be resident, and, through case law, flexibilized the requirement that the child and the person live together. Financial dependence is sufficient.

With the reform, the contributory modality for the protection of the child will be limited to non financial benefits which considers the period of leave of absence to take care of the child as a period with contributions. As regards the payments, these are unified by putting them all on the non-contributory level. Among the modifications introduced by the reform, one of the requirements demanded of the children under the person's charge is that they be resident on Spanish territory, a requirement which the law only required from the beneficiary until then.

As all the payments per child are treated under non-contributory benefits, it would seem logical to consider that article 10 bis of Regulation 1408/71 would apply to these. Under this Regulation, the States can establish residence clauses referring to the beneficiary of the benefits, without incurring discrimination, in order to restrict their exportability, and this is not against the free movement of workers on condition that these benefits are those contained in Annex II bis.

In this Annex, among other points, Spain includes "the benefits per child under the person's charge in the non-contributory modality", towards which we must logically redirect the totality of the new previous financial measures after Law 52/2003.

However, if we follow the literal meaning of article 10 bis of the Regulations, the limitations which can be imposed on the reception of these benefits due to the residence requirement seem to be restricted only to the residence of the beneficiary, and the Community law at no time refers to any other person, and from this point of view, the fact that the Spanish norm introduces a new requirement involving the residence of the child under the person's charge as well as the residence of the beneficiary, which did not appear in the previous norm, this may not be in conformity with Community Law as it infringes articles 39 and 42 of the Treaty, and constitutes an obstacle to free movement.

As regards the two questions raised up to this time with the entry into force of Law 52/2003, we should bear in mind the decision of the European Court of Justice of April 29, 2004, in the case of *Mr Skalka* and the Austrian "*Sozialversicherungsanstalt*", concerning his right to receive a compensatory supplement for the retirement pension which required that he be resident. This constitutes an important pronouncement as regards the proper interpretation of article 10. bis of Community Regulation 1408/71, and the finality and justification of the

residence requirement in each case. In addition, the decision also refers to special, non-contributory benefits, consisting of supplements to the benefits of the Social Security system, and classified by the European Court as a benefit of a mixed nature.

Judicial Practice

The Spanish Courts continue to address the question of the *calculation of the fictitious contributions made* by migrant workers to the Spanish Social Security (Employment Mutuality) *previous to January 1, 1967 and this is taken into consideration in order to access the retirement pension.*

This also occurs in the decision of the *Supreme Court regarding the unification of doctrine, of April 27, 2004***,** on deciding whether the years of allowances for age reached on January 1, 1967, which is established by the Second Transitory Provision of the Ministerial Order of January 18, 1967, must enter the calculation.

In order to solve the question, the Spanish Supreme Court unified doctrine which resolves the differences between the employment sections of the higher courts of justice in the Autonomous Communities and did not hesitate to have recourse to the *Barreira Pérez* case against the National Institute of the Social Security and the General Treasury of the Social Security, (C-347-00)

The Court of Justice of the European Community maintains that the fictitious allowance periods established by the Ministerial Order of January 18, 1967 must be considered as insurance periods of insurance in the sense of article 1 r) of the Regulations and must be taken into account for the effective calculation of the pension, and this will be followed by the Spanish Supreme Court. For the Court, if the Regulations are interpreted otherwise, a damaging result would arise for the emigrant worker which would penalise precisely the free movement of workers in comparison with those other workers who work their full career under the legislation of a single Member State.

Following this doctrine, the Higher Courts of Justice, such as the Higher Court of Justice of *Galicia in the Decision of May 7, 2004*, a case in which, together with the contributions previous to January 1, 1967, the problem of the *integration of gaps in the contributions with the minimum bases when it is a question of quotas paid in States of the EU* arises, in the specific case of the Decision, these States were Spain and France. Following the doctrine of the Supreme Court of February 25, 2000, the Decision laid down that the totality of the contributions made in both countries must be calculated and the principle of the integration of gaps in the contributions would apply, in the same way as the person would have had the right if he had worked only on Spanish territory, as the contrary would constitute a difference of treatment which is contrary to Community legislation, which supposes the non-discrimination of the worker due to fact that he has exercised the basic freedom of intra-Community movement. Such Discrimination would occur if the contributions are evaluated in another fashion which is not the Spanish General and Common Regime, when they are made under the French common regime, even when these same services in Spain would have been categorised in a regime such as household employees, which does not have the gaps integrated.

The Decision of the Supreme Court of May 15, 2004 will again pronounce on the *theoretical contributions and the allowances for age*, this time for *migrant workers under the maritime regime*. The actual case refers to a Spanish worker who had worked on Spanish and

Dutch vessels and was applying for a retirement pension. This decision gives rise to two questions:

- the inclusion in the "*pro rata temporis*" calculation where the payment of days of contribution depending on the age which the insured person had on August 1, 1970, the date of entry into force of the Special Regime of the Social Security for Maritime Workers corresponds to the Spanish Social Security.
- the exclusion of the compensatory contributions of the reductions of the retirement age in the Maritime Regime, which constitute fictitious contributions.

The Higher Court of justice of Galicia pronounced on the same question in its Decision of June 4, 2004.

The migrant maritime workers are again the subject of decisions on *June 16, 2004 of the Supreme Court*, although in a case of the application of *bilateral agreements between Member States of the Union*, specifically the Hispano-Dutch Agreement, and the preferential application of the bilateral convention on Regulation EC 1408/71, in the version of Regulation 1248/1992, when the bilateral convention is more beneficial for the worker than the Community norm. This was established by the European Court in the *Röndfedlt Case (C-227/89)* and was repeated recently in the Hervein and Lorthiois Cases (C-393/99 and C-394-99) of March 19, 2002 and the *Kaske C*ase (C-277/99) of February 5, 2002.

Finally, mention should be made of some *Pronouncements of the Court of Justice of the European Community* and their repercussions on Spanish regulations and Case Law. Some of these do not refer directly to the Social Security, but they may affect it indirectly as they affect the free movement of workers and the right to work and health and safety at work.

- In the first place, the decision of the Court of Justice of the European Community of January 7, 2004, *K.B. Case*. (C-117/01) which addresses the *exclusion of a transsexual from receiving a widow's pension* reserved for the surviving spouse, as British legislation prevents compliance with one of the requirements for accessing the benefit; the capacity to marry, which is against the opinion of the European Court. In Spain, decisions have been dictated in similar cases although the solution of the Court was favourable to the transsexual, such as the decision of the Employment Section of the Higher Court of Justice of the Canary Islands of November 7, 2003, which recognised the right of a de facto transsexual partner to receive a widow's pension as he himself had arranged for his operation and had applied for judicial recognition of the sex change, which is possible under Spanish legislation but not under British legislation. Once 18 days had elapsed from the favourable decision, recognising the sex change, the partner died and the Section recognised the right to the pension with a flexible interpretation of the legislation in force. "Flexible interpretation" should be stressed as the current legislation on widowhood requires not only that the partners live together but that they are married in order to recognise the pension.
- In the second place, the Decision of the Court of Justice of the European Community of March 30, the *Alabaster Case* (C-147/02), which addressed the *maternity benefit and the exclusion of a salary increase from the calculation of this benefit* which occurred once the period of reference used for the calculation of the normal salary on the basis of which the benefit is calculated had elapsed.

  If the claim that the salary increase is included for the calculation of the benefit is presented to the Spanish Social Security, it would not have been accepted as it would have

been determined by taking the contribution base previous to the leave with the salary corresponding to this base unless there are salary increases which had retroactive effects and increase the salary which is taken as a reference, but not the increases which occur during the leave.

For the Court of Justice of the European Community, however, when the remuneration received by the worker during the period of maternity leave is established, at least in part, based on the salary received before the commencement of the period, any salary increase which occurs between the commencement covered by the salary of reference and the finalization of the leave must be integrated into the salary items which are used for the calculation of this remuneration.

- Related to this question involving the *maternity benefit***,** although in a case of employment law and non-discrimination, the Court of Justice of the European Community pronounced on March 18, 2004, in the *Merino Gómez case*, which involved Spanish legislation and the *regulation of the time of work* and its interpretation by the Spanish Courts when the periods for maternity leave and the holidays of the worker overlap. The Court of Justice of the European Community resolved by opposing Spanish Case Law based on Directives 94/104/EC, on the regulation of the time of work, 92/85/EEC regarding the improvement in the health and safety of the pregnant worker at work and 76/207/EEC, concerning the application of the principle of equality of treatment of men and women as regards employment. The Court of Justice of the European Community resolved that a worker must have annual holidays during a period other than the period of her maternity leave, even in the event that the maternity leave coincides with the general period fixed, through a collective agreement for the annual holidays of the entire staff.
- The Decision of the European Court of Justice of September 9, 2004 directly responds to a contentious case brought by the Government of Spain and shows the difficulty involved in *legislating self-employed work* and the need to provide it with certain minimum legal guarantees as regards its effect on third parties or on social or general interests, and to specifically provide it with rules on health and safety at work. In this specific decision on the pace of work and rest periods in transport work, an attempt is made to preserve the legitimate expectations of the user or customer and road safety.
- The Decision of the European Court of Justice of September 14, 2004, which stated that Spain had failed to comply with its obligations under article 4, section 1, letter b) of Directive 89/6555/EC of the Council, concerning the *minimum provisions on health and safety as regards the use of work equipment by the employees at work*, as it included the transposition norm, Royal Decree 1215/1997 of July 18, a transitory provision which increases the period of adaptation to the minimum provisions on work equipment.

Recent literature

Fernández López, M.F., *El reintegro de los gastos sanitarios en el Derecho Comunitario y en la Doctrina del TJCE*, Ed. Bomarzo, 2004.

Fotinopoulou Basurko, O., Derecho social comunitario y jornada del personal sanitario. La revisión de la Directiva 93/104/CE sobre determinados aspectos de la ordenación del tiempo de trabajo, *Aranzadi Social*, No. 16/2004, Pamplona, 2004.

García Murcia, J., Jurisprudencia comunitaria y ordenamiento laboral español: comentario a seis ejemplos y algunas reflexiones, *Revista General de Derecho del Trabajo y de la Social Security*, No. 8, April, 2005.

Quintero Lima, G., Las prestaciones familiares por hijo a cargo y la doble cláusula de residencia de la nueva redacción del art. 182.1 LGSS: obstáculo a la libre circulación de trabajadores y otros problemas, in *Las últimas reformas 2004 y el futuro de la Social Security*, Ed. Bomarzo, 2005.

Madrid Yagüe, P., Comentario a la Ley 52/2003, de 10 de diciembre, de Disposiciones Específicas en materia de Social Security, *Revista General de Derecho del Trabajo y de la Social Security*, No. 6, 2004.

Rojo Torrecilla, E., *Aspectos laborales y de Social Security de la regulación jurídica de las parejas de hecho*, Ponencia a las XIII Jornadas de Derecho Catalán, Tossa, 2004.

Chapter X
Establishment, Provision of Services, Students

In this Chapter, we will focus on the problems generated by Spanish legislation in relation to the recognition of academic titles in general, which may constitute direct or indirect obstacles to exercising the liberty of establishment or, to a lesser extent, the free provision of services guaranteed by articles 43 and 49 of the del TEC and the Case Law of the EUCJ on these matters.

As was stated in the previous Report, in this Report we focus on the Royal Decree 285/2004, of February 20,[19] whereby the conditions for the approval and accreditation of foreign titles and higher education studies. It should be stressed that this law includes in its stated purpose that it 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 in Organic law 6/2001, of December 21, on Universities. This Royal Decree incorporates the innovative components of both processes which makes it possible to speed up the procedure for the approval of foreign higher education titles. However, there are still complaints regarding the periods of time required to process the approval, which takes more than a year and entails an indirect restriction to the free provision of services, establishment and employment of professionals.

In the decision of the *EUCJ against Spain of September 9, 2004 regarding the recognition of the driving licences issued by other Member States*, the EUCJ,

> *"*Declared that the Kingdom of Spain failed to comply with its obligations under articles 1, sections 2, and 7, section 1, letter a), as well as annex I, point 4, of Directive 91/439/EEC of the Council, of July 29, 1991 (LCEur 1991\ 1041), on the driving licence, in the version modified by Directive 96/47/CE of the Council, of July 23, 1996".

In order to register to practise as a lawyer in Spain, the candidates must comply with the following requirements:

- Collection of the documentation: the envelopes with the information and the registration form are available in the Secretary's Office of the Madrid Bar Association. The Secretary will also be available for any information needed regarding registration and the Bar Association itself.
- Documentation delivery and payment of the enrolment fee: once all the documentation has been collected (see next paragraph, Required Documentation) this documentation is to be delivered to the Caja de Abogados (c/ Recoletos, 11) together with the first quarterly receipt of payment as well as the registration fee. Payment can be made in cash or by cheque. It is compulsory to pay the membership fee by banker's order.

Registration in the Incorporation book: three days after payment it will be possible to sign the incorporation book. This book is available in the Secretary's Office and from the time it is signed, the person is considered to be Member of Madrid Bar Association.

- Membership Identification: a few days after payment and signing the registration book, the identity card from the Bar Association will be delivered by post at the home address. The identity card certifies registration as a member of the Madrid Bar Association.

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

The following documents are required:
In all cases:

- Nationality Exemption from the Ministry of Justice, C/ San Bernardo, 45 - 28015 Madrid Tel.: 91 390 45 00.
- Approval of the University Degree by the Ministry of Education (Royal Decree 86/1987, of January 16, Order ECD/272/2000, 11 February 11) Tel.: 91 701 80 00
- (These two proceedings must be done simultaneously)
- Form (included in the registration envelope to be collected from the Secretary's Office of the Madrid Bar Association)
- Birth Certificate (original and photocopy)
- "Criminal Certification": certificate demonstrating that the person has no criminal record of convictions which may disqualify him from practising law.
- Presentation sheet signed by two registered members of the Madrid Bar Association (included in the registration envelope)
- Certification of the payment of the fee for new registration (available at the Consejo General de la Abogacía Española- Pº de Recoletos, 13) (180 Euro)
- Registration form for registration in the Mutualidad de la Abogacía (Lawyers' Mutuality)
- 1 passport card sized photograph.

Registration as practising lawyer:

- Photocopy of the registration of the Tax on Economic Activity, made by the lawyer himself at the Inland Revenue Office.
- In case of registration as a full-time practising lawyer, it is necessary to provide the original Firm Certification of Exclusivity.
- Incorporation fee: €850.00
- Bar yearly fee €2,005
- (monthly):
- Non practising lawyers: €15.33
- First Year of incorporation: €12.32 (Non residents: €11.77)
- Second Year of incorporation: €15.40 (Non residents: €14.80)
- Third Year of incorporation: €19.39 (Non residents: €17.65)
- Fourth Year of incorporation: €22.65 (Non residents: .€20.69)
- From the 4th Year onward: €31.36 (Non residents: €23.54)
- At the time the incorporation fee is paid, the quarterly fee must also be paid (by cheque or in cash).

Important note

All new registered lawyers will have Medical Service free of charge during the first year of registration the. Those who may want to deregister from the Medical Service must communicate this in writing.

The registered members of the Medical Service who may want to register in the medical service some beneficiaries must enclose the family book and a passport size photograph of each beneficiary.

Chapter XI
Miscellaneous

Books

Serrano García, J., *Trabajadores comunitarios y seguridad social*, Albacete: Altaban, 2005.
This work analyses the European Union's regulations on the coordination of the Social Security System from the perspective of the free circulation of workers and people. It concludes with an overview of the material scope of application of the communitarian regulation on social security.

Viñuelas Zahínos, Mª T, *La libre circulación del abogado en la Unión Europea*, Cizur: Aranzadi, 2005.
The goal of this work is to study the free circulation of lawyers in the European Union. This book contains two different parts: an introduction on three rights of all workers which are the basis of the free circulation of lawyers, free circulation of workers, right of establishment, and freedom to offer professional services; the second part is focused on the specifics of such profession.

Book chapters

Viñas, A.: La ampliación de la Unión Europea: percepciones desde la UE, VV.AA., *Anuario Cidob 1998*, Barcelona: CIDOB, 1998
This text points out the necessity to negotiate a transition period in order to overcome the concerns from part of some countries members of the European Union regarding a massive wave of immigrant workers from the new member states as a consequence of the application of the principle of free circulation of workers.

Journal articles

Adrián Arnáiz, A.J., La libre circulación de trabajadores después de la ampliación de la Unión Europea a diez nuevos Estados miembros, *Información Laboral*, 2003, nº 27, pp. 2-21.

Olesti Rayo, A., La ampliación de la Unión Europea y la libre circulación de trabajadores, *Revista de Derecho Comunitario Europeo*, 2004, nº 19, pp. 709-749.

Quirós Fons, A., Refundición de la libre circulación de trabajadores en la Unión Europea: Propuesta de Directiva de 2003, *Aranzadi Social*, 2003, nº 20
The derivative communitarian right proposed in order to regulate the free circulation of citizens of the European Union and their families follows the Spanish legal regulation on such matter.

Quirós Fons, A., Entrada y residencia de trabajadores comunitarios y asimilados en España, *Sentencias de TSJ y AP y otros Tribunales*, 2004, nº 2, pp. 17.
The internal legal regulations in Spain regarding communitarian and assimilated people end up being more advantageous of what is permitted in the communitarian legal system. The author calls the immigrants who take advantage of this situation as "privileged immigrants".

Seoane Osa, J.J., La ampliación de la Unión Europea y los deportistas nacionales de los nuevos socios comunitarios, *Revista Jurídica del Deporte*, 2005, nº 13.

Valverde, J.L.: "La libre circulación de farmacéuticos y el Espacio Europeo de educación". *Revista de Derecho Comunitario Europeo*. 2004 nº 18, pp. 401-432.

Divulgative articles

Cámara de Industria, Comercio y Navegación de Cartagena, *Libre circulación de trabajadores* (http://www.cocin-cartagena.es/pdf)

Spain will restrict, at least for two years, the free circulation of workers from eight of the last countries accepted in the European Union (Slovakia, Slovenia, Estonia, Hungary, Latvia, Lithuania, Poland and Czech Republic). The other communitarian states will adopt similar measures in order to protect their labour markets.

Linde Paniagua, E., La libre circulación de los enseñantes en la Unión Europea, *T.E.* 2003, nº 247.

The Treaty of the Economic European Community (TCEE, in Spanish) instituted the free circulation of workers. Professors at all levels must be included among those workers, as one of the basis to build a common market.

Work documents

Torreblanca, J.I., La ampliación de la UE: éxito colectivo, peligro de autocomplacencia, *Documento de análisis ARI* nº 85/2004; Real Instituto Elcano
http://www.realinstitutoelcano.org/analisis/499.asp

Most of the European Union's member states have adopted temporal restrictions to the free circulation and establishment of workers coming from the new members states, of up to seven years. According to the author, these restrictions to legal immigration could cause an increment of irregular immigration.

Other documents

Ministerio de Trabajo y Asuntos Sociales: Memorando sobre la posición española en lo relativo a la aplicación de la libre circulación de los trabajadores de ocho de los diez estados adherentes (Eslovaquia, Eslovenia, Estonia, Hungría, Letonia, Lituania, Polonia y República Checa), 1/1/2005,
http://www.es-ue.org/ Documents/040225memorandum%20LCT%20final%20es.doc

This document advocates a cautious attitude regarding the ampliation of member states, arguing that Spain has the highest unemployment rate in the European Union-15. It is required to adopt additional measures in order to avoid a saturation of the labour market due to new employment applications which cannot be satisfied immediately.