REPORT
on the Free Movement of Workers
in Spain in 2005

Rapporteurs: Prof.dr. Colores Carrillo,
Prof.dr. Emiliano García Coso, Prof.dr. Cristina Gortázar,
Prof.dr. Clara Martínez, Prof.dr. Mercedes Fernández,
I. Cañueto and J. Eguren
University P. Comillas

September 2006

Chapter I
Entry, Residence, Departure

Entry

During 2005, the legal regime applicable to Community citizens and their families (who wish to enter, move, reside and work in Spain) is *Royal Decree 178/2003, of February 14,*[1] *on entry to and residence in Spain of the nationals from Member States of the EU and from other States which are parties to the Agreement on the European Economic Area* (hereinafter RD 178/2003).

It is important to we aware of the *Decision of April 14, 2005 of the EUCJ*, condemning Spain due to the previous Spanish regulation (Royal Decree 766/1992, of June 26) on the entry and permanence of nationals of the EU or of the EEA.

In the light of this Decision against Spain, the Spanish Department of Immigration of the Ministry of Employment and Social Services considered that it was advisable to issue the following *Instruction of June, 2005*, which specifically states that:

> Pursuant to what is established by the European Community Court of Justice in its decision of April 14 2005, the content of article 11.3.C) of RD 178/2003, whereby the requisite in relation to the family members of Community citizens or of nationals from other States which are parties to the Agreement on the European Economic Area, when these are not in turn Community citizens or nationals of the aforementioned States, to attach(...), the residence visa in the passport, or the request for exemption from this, which must be presented together with the request for the residence card must be considered to be inapplicable.

Nevertheles, the *Instruction of June 2005* continues:

> On the contrary, the relevant visa of stay will be required from the aforementioned family members for entry into Spain in the event that they are nationals of any of the States included in Annex I, of Regulation (EC) 539/2001, of the Council, of March 15, 2001, whereby the list of third countries whose nationals are submitted to the obligation to have a visa in order to cross the external borders are established.

Residence

As regards the residence of nationals of the Member States, those of the EEA, Swiss citizens and their families, it should be pointed out that the references to the applicable regulations of RD 178/2003 made in previous reports[2] continue to apply.

Departure

Some provisions on expulsion stipulated in articles 16[3] to 18 of RD 178/2003 are declared to be null by the Spanish Supreme Court Decision of February 9, 2005.

---

1 *Official State Gazette of February* 22, 2003, number 46, page 7397. The content of the regulations of RD 178/2003 which gives rise to doubts on its compatibility with Community Law can be seen in the Spanish Report on the Free Movement of Workers 2002-2003, pages 493 et seq. For the more important decisions of the Spanish Supreme Court on the annulment of some regulations of RD 178/2003, see The Spanish Report on the Free Movement of Workers 2004, pages 888 et seq.
On 2005, a new Decision of the Spanish Supreme Court of February 8, reafirms once again the nullity of some articles of RD 178/2003. Both in 2004 and 2005 the Spanish Supreme Court made references to the EUCJ on *MRAX* and *AKRICH* cases.

2 See especially Spanish Report on the Free Movement of Workers 2002-2003, pages 505 et seq.

The Spanish Supreme Court declared the phrase *"...or refusal to provide permits"* in article 18.2 of RD 178/2003 to be null, alleging that

> "when section 2 of article 18 categorically states that "the expulsion resolutions or the refusal to provide permits will establish the period of time in which the person concerned must leave the country", it is establishing (or granting the possibility that this be interpreted as such by the governmental authority) that the refusal to provide a residence permit, which is the mere formal support for the right to reside, entails the order for expulsion from national territory as the same law establishes that a compulsory period for leaving the country will be fixed in the same refusal resolution, despite the fact that expulsion proceedings have not been followed and such proceedings can only be grounded on reasons of public order, public safety or public health, which do not include the simple refusal to grant a residence permit, as can be concluded from ECJ Case Law (Decisions concerning Royer and MRAX against the State of Belgium)".

Thus, the Decision of February 9, 2005[4] annulled the section "*or refusal top provide cards*" in article 8.2 of RD 178/2003. Until this Decision, the Spanish authorities demanded that the persons involved in resolutions on expulsions *and* the refusals to provide cards of the Community regime had to abandon Spanish territory in a concrete period time, in application of article 18.2 of RD 178/2003. By virtue of the aforementioned decision of the Supreme Court, and as from the publication of the Decision, *the resolutions whereby a Community regime card was refused will not refer any more to a period for the compulsory exit of the person concerned*.

Regarding *expulsion of the nationals of the Member States* or of the EEA or Swiss citizens, the Decision of the Provincial Criminal Court of Huelva, of June 26, 2005 (Resolution number 74/2005) should be pointed out as relevant

The Decision deals with a case involving the possession and trafficking of drugs; a Swiss and an Israeli citizen were convicted, the latter as condemned to three years and six months imprisonment, and, as he was an alien, he was expelled from Spain for ten years in application of article 89 of the Criminal Code:

> "(...) However, RD 178/2003, of February 14, which regulates the free movement of citizens of the European Union, the Swiss Confederation and the nationals of the other States which are parties to the agreement on the European Economic Area, assimilates Swiss citizens with Community citizens as regards the residence requirements, therefore, the same treatment must be applied to them as to the citizens of the Member States of the European Union, and article 89 CP is not applicable to them as its scope is applicable to aliens".

---

3 We continue to hold, as we did in our 2004 Report, that since there has been no regulation change to *"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"*.

4 *Official State Gazette* of June 3, 2005.

Chapter II
Access to Employment

General issues

In general, it is possible to point out that Spanish legislation does not establish restrictions or discrimination as regards access to employment. The possible limitations for guaranteeing the principle of equality as concerns access to employment arise from the requirement that titles for accessing certain professions must be recognised and approved.

As regards Spanish case law on this question, reference should be made to some decisions which might give rise to doubts regarding future compatibility with the system of harmonised recognition in the European Union which is the subject of a new Directive 2005/36[5] which will simplify the system before October 20, 2007.

Currently, the Spanish system for recognition of titles is complex, differentiating between the system of general and specific recognition for certain professions included in the different Spanish Royal Decrees whose latest *modification aimed at adapting these to Community Law* was Royal Decree 1171/2003 of September 12.[6]

In the Decision of the *High Court of Justice of Madrid*, Contentious Administrative Proceedings, of January 14, 2005 (Resolution number 27/2005), an appeal was made against the refusal of the application for recognition of a German title "Staatlich geprüfter Übersetzer in der Spanischen Sprache" in order to exercise the profession of Sworn Interpreter in Spain. Two Royal Decrees are involved in this matter, RD 1665/1991, of October 25, whereby the General System for the Recognition of Higher Academic Titles of the Member States of the European Economic Community which last for at least three years is regulated (in application of Directive 89/48/EEC), and RD 1396/1995, of August 4, on titles, certificates and competence certificates (in application of Directive 92/51/EEC).

The Court of Justice of Madrid considers that

> "the right to free establishment cannot be interpreted as an absolute right, but is conditioned to compliance with the legal requirements which guarantee the equivalence of title and professional training",

and based on this, it analyses the Order of August 23, 1999, which is developed by Royal Decree 1665/1991, which regulates the procedures for the recognition of the title of Sworn Interpreter. The title presented by the appellant was only one of translation and not that of a sworn interpreter (which has other requirements in Germany); the Order establishes that, in order to recognise the title of sworn translator the requirements are to have a title of translator and an appointment as sworn translator before a German Court (which the appellant complied with), and one year's experience as sworn translator (which the appellant lacked).

Due to this, together with the rejection of some doubtful evidence, the High Court of Madrid rejected the appeal.

---

5 The 2005/36 Directive (OJ L 255/22 of 30.09.2005) applies to all Member State nationals wishing to practise a regulated profession in a Member State other than that in which they obtained their professional qualifications, on either a self-employed or employed basis. At a legislative level, this Directive forms part of the process of legislative consolidation aimed at combining the three general system directives (Council Directives 89/48/EEC and 92/51/EEC and European Parliament and Council Directive 1999/42/EC) in a single text along with twelve sectoral directives (i.e. Council Directives 93/16/EEC, 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/432/EEC, 85/433/EEC, and 85/384/EEC) covering the seven professions of doctor, nurse, dental practitioner, veterinary surgeon, midwife, pharmacist and architect. The consolidation of these fifteen directives will lead to their repeal on expiry of the transposition deadline for the new Directive, that is, 20 October 2007. The specific directives on the provision of services and establishment of lawyers (i.e. Directives 77/249/EEC and 98/5/EC) are not covered by this exercise, since they concern the recognition not of professional qualifications but of the authorisation to practice. Recognition of lawyers' qualifications is currently governed by Directive 89/48/EEC, and is thus covered by the new Directive 2005/36/EC.

6 *Official State Gazette* of September 19, 2003.

One Decision which clearly shows how *strict the judicial system is when approving titles* is the Decision of the National Court, Contentious-Administrative Proceedings, of January 20, 2005 (appeal case number 967/2003), on an appeal against the administrative refusal to approve the Degree of Advanced Engineering in General Operative Technology (Dutch) as equivalent to Industrial Engineering. The Court pointed out the fact that the Commission of the University Board of Coordination twice considered that the Dutch degree did not cover the subjects taught in Spain, and, therefore, these two degrees are not equivalent. Approval is subject to Royal Decree 86/87, and, given the fact that "there is no agreement or pre-established tables, the judgement of equivalence must apply and, for this purpose, the two reports of the University Board of Coordination should be taken into account". Due to the insufficiencies of the Dutch studies in relation to the Spanish studies of Industrial Engineering, the appeal was rejected.

There is one appeal to the Supreme Court concerning the *recognition of titles* (Decision of October 27, 2005, Contentious –Administrative Proceedings) dealing with the approval of the Italian Degree in Ingegneria Civile as equivalent to the Spanish Degree in Civil Engineering. The reasoning of the Court is quite permissive and *breaks with the hard line* on the Decision on approval of titles we have just been: **See** *infra* an extensive comment on this case in Chapter IV on "Recognitions of Diplomas".

Captains and Chief Masters

As concerns the attempt to adapt Spanish legislation to the case law of the EUCJ and to the principle of equal treatment as regards access to maritime training, there is the latest of the legislative modifications, Royal Decree 652/2005, of June 7**,** which regulates the minimum level of training in maritime professions.[7]

In order to adapt the system of recognition of the maritime professions, this Royal Decree 652/2005 establishes that article 8 of Royal Decree 2062/1999 is to be drafted as follows:

> "Article 8. Specific regulations on the recognition of professional titles issued by Member States of the EU.
> 1. The Department of the Merchant Navy can directly recognise the professional titles issued by a Member State of the European Union in accordance with the applicable national provisions.
> 2. The citizens of the European Union who do not have Spanish nationality and have a professional title with sufficient attributions issued by a Member State, once they have passed the test on knowledge of Spanish maritime legislation, can exercise command of vessels with gross loads less than 100 GT which transport cargo or less than 100 passengers, on condition that they operate exclusively between ports or points located in zones in which Spain exercises sovereignty, sovereign rights or jurisdiction".

As can be appreciated, recognition is not automatic, but is conditioned to passing a test of Spanish maritime knowledge whose content, form and requirements are included in a Ministerial Order of June 28, 2004[8]. The condition to submit the nationals of the EU to examination is clearly established in the First Additional Provision of the Ministerial Order which states

---

7 *Official State Gazette*, June 16, 2005, number 143. The objective of this Royal Decree is to incorporate Directive 2003/103/EC of the European Parliament and of the Council, of November 17, 2003, whereby it was necessary to modify Royal Decree 2062/1999, of December 30, which is the general legislative framework for the maritime professions in Spain.

8 Order FOM/2285/2004, of June 28, regulates the tests on recognition of Spanish Maritime Law and the procedure for the issue of certificates to those holding professional titles under Agreement STWC78/95, *Official State Gazette*, July 10, 2004, No. 166. Specifically, article 2 states the following requisites for the submittal of the application for the test of knowledge of Spanish Maritime Law.
"1. The person interested in the recognition of a professional title which authorises the person to exercise the post of Captain or First Mate, or the shipping company in the peron's name, must apply to the Department of the Merchant Navy to do a test on knowledge of Spanish maritime legislation, and must provide the documentation listed below:
a) Application as per the model in annex I.
b) Professional title issued by the Maritime Administration of another country with the international certificate in accordance with Agreement STCW 78/95.

> "The Second Additional Provision of the Order of June 21, 2001 is modified in the sense that, in order to recognise the professional titles which authorise a person to be a Captain or First Mate possessed by citizens with the nationality of a State of the European Union and issued by one of these States, besides the documentation included in the aforementioned Provision, they must submit the certificate accrediting that they have passed the test on their knowledge of Spanish maritime legislation regulated in this Order".

In addition, by the Ministerial Order of October 14, 2005, the procedure for revalidating the professional competences of the Card of the Spanish Merchant navy is regulated.[9]

c) Receipt demonstrating that the fees forb the corresponding exam have been paid.

2. Those who have the titles issued by those countries with which the Department of the Merchant navy has signed an Agreement under the stipulations of Rule 1/10 of Agreement STCW 78/95 can take this test, as well as those who have titles issued by the EU".

9 Order FOM/3302/2005, of October 14, regulates the test or the updating course required to obtain the revalidation of the Merchant Navy Cards, *Official State Gazette*, October 25, 2005, number 255.

Chapter III
Equality of treatment on the basis of nationality

General Issues

Spanish legislation appears to comply fully with the principle of equality concerning access to or the enjoyment of Spanish employment policies developed by the Spanish Government. This can be appreciated in Law 56/2003, of December 16 on *Employment*.[10]

Specifically, this Law is intended to increase the efficiency of the functioning of the employment market and to improve the opportunities to join this market in order to achieve the objective of full employment, in line with what the Heads of State and Government have agreed to at the summit meetings of the European Union, from the commencement of the Luxembourg process until its ratification at the Barcelona summit. This involves offering the unemployed preventive and personalised attention as regards public employment services, under the principles of equality of opportunities, non-discrimination, transparency, gratuity, effectiveness and quality in then provision of services, with special attention to those less favoured, among whom those who are incapacitated have preference. The employment policies must function as instruments which encourage the effective incorporation of the unemployed into the employment market, by stimulating the active search for employment, as well as geographic and functional mobility.

Specifically, as regards the guarantee of equality for the nationals of the EU, article 2. of Law 56/2003 establishes that, when establishing the objectives of the employment policy,

> "The following are the general objectives of the employment policy: a) To guarantee the effective equality of opportunities and non-discrimination, taking into account what is stipulated in *article 9.2* of the Spanish Constitution, as regards access to employment and the action taken to achieve this, as well as the free election of a profession where no discrimination may prevail, in the terms established in article *17* of the Workers' Statute *(RCL 1995, 997)*. These principles will apply to the national of Member States of the European Econmomic Area and, to the other aliens in the terms determined by the legislation on their rights and freedoms*"*.

As can be appreciated there is an express, guaranteed reference to the nationals of the EU.

Likewise and more specifically, reference must be made to article 25 of this Law 56/2003 which establishes a classification of the employment measures to be adopted and states that

> "1. The programmes and measures which make up the active employment policies will be oriented and organised through the corresponding regulation, by action which is focussed on achieving the following objectives:
> a) To inform and orientate in the active search for employment.
> b) To develop continual vocational training programmes to qualify persons for work.
> c) To facilitate professional internships.
> d) To create and encourage employment, especially stable and quality employment.
> e) To encourage self-employment, the social economy and the development of small and medium sized companies.
> f) To promote the creation of activity which generates employment.
> g) To facilitate geographical mobility.
> h) To promote policies aimed at the employment insertion of persons in risk situations or situations involving social deprivation.
> The design of these policies will actively take into account the objective of equality of treatment between men and women in order to guarantee full equality in practice as regards gender, as well as the objective to guarantee equal opportunities and non-discrimination, in the terms stipulated in paragtraph a) of article 2of this Law".

10 *Official State Gazette*, December 17, 2003.

This last reference to article 2.a) of the Law guarantees that the nationals of the EU will have the same conditions as Spanish citizens as regards the employment measures and policies adopted by the Spanish Government.

From the point of view of the social advantages or the access to social protection measures, it is also necessary to point out regulations in which the right of nationals of the EU who reside in Spain to request these advantages or measures is recognised. Thus, in *Royal Decree 1335/2005*, of November 11,[11] which regulates the family services of the Social Security in an attempt to unify in one regulation all the family services of the Spanish Social Security, it can be seen that, in accordance with article 28.3 of the Royal Decree mentioned concerning who can submit applications to receive the family services included in the regulation, the nationals of the EU who reside in Spain can do so as it is expressly established that

> "The requisite concerning residence referred to in article 10.1.a) and b) will be accredited, preferably through a certification of registration in the corresponding municipal census list, through the residence card or the certificate of residence referred to in Royal Decree 178/2003, of February 14, on the entry and permanence in Spain of nationals of the Member States of the European Union and of other States parties to the Agreement on the European Economic Area, or through the authorisation of residence or the alien identity card, established in the Regulation of the Organic Law 4/2000, of January 11, on the rights and liberties of aliens in Spain and their social integration, approved by Royal Decree 2393/2004, of December 30".

From this provision it can be deduced in general terms that they may access in the same conditions as Spanish citizens. But the reference to "certificate of residence referred to in Royal Decree 178/2003" require special attention from the point of view of Community law.

Other social measures which are stipulated by the Spanish Government concern the protection of large families, which have aid as regards studies, housing and transport through *Royal Decree 1621/2005*, of December 30,[12] whereby the Regulation of Law 40/2003, of November 18, 2003 on the protection of large families was approved. As regards the nationals of the EU, it is expressly established that, in order to be recognised as a large family, among other things, they must accredit what is stipulated in Article 2 on the recognition of the condition of large family:

> "1. The condition of large family will be accredited through the official title which is established and issued by the Autonomous Community where the applicant is resident. In the case of nationals of Member States of the European Union or those who are parties to the Agreement on the European Economic Area, who are not resident on Spanish territory, the Autonomous Community where the applicant exercises his activity as an employee or as self-employed will be competent."

As can be appreciated, this regulation goes beyond eliminating or reducing the burden of the requirement concerning residence in order to have the advantages granted by Spanish legislation to large families, in this case, to the citizens of a Member State.

11 *Official State Gazette*, November 22, 2005, nº.279.
12 *Official State Gazette*, January 18,2006, nº. 15

Chapter IV
Employment in the public sector

Nationality condition for access to positions in the public sector

In April 2005 the *Basic Statute of the Public Employee* was presented by the Ministry of Public Administrations

This is an *extensive document* which is intended to be the starting point for the drafting of *the future parliamentary Act* in this regard,[13] that is to say, it will be the text which modifies current Spanish legislation concerning civil servants, which has been in force since 1984.[14]

The Report, drafted by a Commission of Experts,[15] was previously opened to the public so that comments considered to be advisable or appropriate might be made during a period of time although the declared intention of the administrative authorities is also to reach a consensus on the future law with organisations which have professional and social interests related to public employment, mainly the Trade Unions. In the light of this and the current data on public employment in Spain, the Commission of Experts presented its proposals for the drafting of the final legal text.

As it is intended to address a global reform of public employment (note that it no longer refers to the public function but has chosen a wider, more modern concept), a reference to nationality as a condition for accessing the public function appears although there has been no substantial doctrinal or case law debate regarding this general question.

Starting from the generic requirement to be Spanish in order to access public employment (or be a Community national, but, in this case, with the exceptions stipulated in the legislation in force), a statement commonly accepted by doctrine and case law in Spain, this is immediately clarified by the Spanish Commission of Experts which refers to the advisability of considering the possibility of admitting Community citizens, by law, to other types of functions which they are barred from at the moment[16]. In addition, the possibility that Community citizens can access posts reserved to those contracted as employees must be included although this possibility is already included in our legislation at the present time.

However, the *Experts Draft* includes an important suggestion which is in line with the requirements of Community Law in this question, as we have mentioned in previous reports,

> "The only innovation we suggest should be incorporated is that, by law, access to the condition of public employee, for certain jobs, can be opened to extra-Community citizens with no need for reciprocity, when there is the necessity or a justified reason. This innovation takes into account the possible necessities of our Public Administrations as regards this type of personnel when there is an absence of nationals or Community citizens, as shown in the case of army and navy personnel. In addition, it takes into account our present demographic reality, characterised by an advanced process involving the integration of immigrants who have a sufficiently stable situation in our society. Finally, taking into the fungible nature of employment and that of public employees as regards many jobs, it is inexplicable that citizens can work as contracted employees in some Administrations as regards some functions and others are beyond their reach as they have been reserved for public employees".

---

13 Currently this is a Draft Act , that is to say, it is at an advanced stage towards the final draft, but has not yet been approved by the Council of Ministers for subsequent passage through Parliament. The full text can be consulted in www.map.es.

14 By Law 30/1984, of August 2, on Measures for the reform of the public employment, was the last general reform addressed in relation to this matter.

15 By Order APU/3018/2004, of September 16, the Commission of Experts for the study and preparation of the basic Statute on Public Employees was constituted and the essential function entrusted to it was "to carry out the preliminary analyses and studies, as well as the drafting of a document which might server a as a basis for the subsequent drawing up of a parliamentary Act". Hereinafter, we will refer the document as the Experts Draft.

16 The incongruity which can sometimes arise is evident in the example given by the Commission of Experts: in accordance with article 13.2 of the Constitution, Community citizens can become Town Mayors, which involves being the heads of all the personnel at the service of the local corporation, however, they cannot access a post in the municipal police.

The Statement of Reasons of the *Experts Draft* states that the pretension to guarantee the application of the constitutional principles of equality, merit and capacity to a greater extent

> "is not incompatible with greater possibilities for opening up our public employment to citizens who do not have Spanish nationality, in application of Community Law or for reasons of general interest …".

In article 57.1 of this *Experts Draft*, it is stated that, as the materialisation of the above:

> "The nationals of the Member States of the European Union can access public employment in the same conditions as Spanish citizens, with the exception of those which are directly or indirectly in participating in the exercise of public power or in the functions which are intended to safeguard the interests of the State or the Public Administrations, therefore, within each territorial level: the Government of the State, the Government Council of the Autonomous Community or the Plenary/Board of Local Government of the Town Hall or the Provincial Council will determine the groups of public employees listed in article 76 which cannot be accessed by the national of other States".

It then establishes a distinction between the conditions for accessing as public employees and the requirements for being hired to work for the Public Administration:

> "The stipulations of the above section will apply, regardless of nationality, to the spouses of Spanish citizens and of the nationals of the other Member States of the European Union, on condition that they are not separated de iure, and to their descendents and those of their spouses, on condition that they are not separated de iure, and are under twenty-one years old or older and live at their expense.
> The access to public employment as a *public employee*, is also extended to the persons included within the scope of application of the International Treaties made by the European Union and ratified by Spain, in which the free movement of workers is applicable in the terms established in section 1 of this article.
> The aliens referred to in the above sections, as well as the aliens with legal residence in Spain can Access the Public Administrations, as hired personnel, in the same conditions as Spanish citizens".

Language requirement

In practice and in Spanish Case Law no cases have been found in which the knowledge of the Spanish language is a requirement that becomes an obstacle to accessing a Public Administration.

However, in several Spanish autonomous territories Spanish coexists with another language which is also statutory and legally declared to be co-official (Galicia, the Basque Country, and some territories in Navarre, Catalonia, Valencia, and the Balearic Islands). Problems have arisen in these Public Administrations concerning the knowledge of the co-official language, but not in relation to Community citizens. The Case Law found belongs to the year 2005 and refers to cases in which Spanish nationals were required to have knowledge of the co-official language, but we understand that its doctrine is applicable in identical terms to the Community citizens as the core of the problem is not the condition of the person who aspires to being a public employee being a national or not, but rather the need to know the co-official language as a requirement intrinsically linked to the post to be accessed.

Decision 196/2005, of March 16, of the High Court of Justice of Galicia[17] is especially interesting as it narrates the case law evolution of Spanish Supreme Court and the Constitutional Court as regards the evaluation of the autonomous co-official languages in tests for accessing public employment[18]. In general, and without prejudice to other clarifications, Case Law states the compatibility of

17 RJCA 2005/485.

18 Other decisions to be quoted are: Decision of the National Court of February 16, 2005 (Contentious-Administrative Proceedings, Section 4), which includes, among others, the legal doctrine of the Decision of the

the requirement to know the co-official language with the principles of equality, merit and capacity included in articles 23.2 and 103 of the Spanish Constitution although each specific case must be examined to determine the scope of this requirement.

Substantially, this evolution started from the initial position contrary to the evaluation of the autonomous languages in selection processes for public employees. Later, in 1986, there was a change consisting in accepting the language as an ordinary merit although in no case could it be capacity requirement excluding a person from the selections tests and, as from 1989, a position favourable to the fact that

> "in justified cases, the knowledge of the autonomous language may be an obligatory test of capacity and may eliminate the person although the level of knowledge required must be in proportion with the foreseeable use of the languages in the job in question, and this position is in accord with the Decision of November 28, 1989 (ECJ 1990, 65) of the European Court of Justice in the case of Anita Groener. Influenced by the doctrine of the Constitutional Court, this last criteria has been subsequently refined and deepened, while all its parameters were specified in the Decision of the Supreme Court of June 16, 1997 (RJ 5264) in which (…) is stated "to have accepted, with certain limitations, the language requirement in the Autonomous Communities which have a language other than Spanish, in the access tests for their respective Administrations".

Neither the Spanish Constitutional Court nor the Spanish Supreme Court explain what these limitations are, although they seem to refer to the proportionality which must exist in the notice of access to exam as regards the essential or non-essential character of the knowledge of this language as regards the post in question.

Recognition of professional experience for access to public sector

Decision 322/2005, of April 13, of the High Court of Justice of the Basque Country[19] contains a pronouncement on the evaluation of the period of experience or professional exercise abroad.

Specifically, in the case of Specialist Medical Doctors regulated by Royal Decree 1497/1999, of September 24, for specialised training abroad, it is the Court which must evaluate this. Thus, it should be taken into account that the training system for specialist medical doctors allows the possibility that residents and students in training can participate in an exchange period for up to one year in a foreign health centre, so that, if this time limit is not exceeded, the activities carried out outside Spain can be taken into account when calculating professional practice. The root of the problem is what justified the promulgation of the aforementioned Royal Decree: "the existence of doctors who do not have the title of specialist and have practised in our country in the area of specialised health care". Consequently,

> "it would not make sense to take into account the professional practice carried out in a country alien to the area of application of the Royal Decree. This was also the criteria constantly held as regards the procedures for accessing the Spanish title of Specialist Medical Doctor which are included in our legislation, and Royal substitute penalty for those who are aliens and entered Spain for a stay which is no longer than 90 days and commit an offence. But Royal Decree 178/2003, of February 14, which regulates the free movement of citizens of the European Union, of the Swiss Confederation and of the nationals of other States which are parties to the Agreement on the European Economic Area, assimilates Swiss citizens to Community nationals as regards residence requirements and, therefore, they must be treated in the same way as citizens of the Member States of the European Union, and article 89 of the Criminal Code cannot be applied to them as its scope is restricted to aliens".

Supreme Court of January 18, 2000 (RJ 208865/2005); Decision 538/2005, of June 3, of the High Court of Justice of Catalonia (RJ 182039/2005).

19 RJ 213977/2005.

Recognition of diplomas

Decision 451/2005, of June 1, of the High Court de Justice of the Basque Country,[20] resolves a case in which the appellant, a Spanish woman, submitted the credential of a title obtained in Italy which qualifies her to work as a Secondary School teacher of English and Italian in private centres and top participate in the selection processes to teach in public non-university centres on condition that she has the requirements set out in each notice of access exam "not referring to academic titles nor the teaching specialisation title" (for example, the knowledge of Basque). The appellant was formally excluded from a list of substitutions despite the fact that she has a title approved as the equivalent to a degree. This approval was given by the Ministry of Education, Cultural and Sport (today the Ministry of Education and Science), which is competent for these approvals, and the Autonomous Community Administration (in this case that of the Basque Country) is bound by this approval, and cannot ignore that the appellant has an officially recognised title, which qualifies her to participate in selection processes for public employment. Consequently, she is also qualified to participate in a list of substitutions even though, like the former, it is also an access procedure for public employment but its scope is different from that of selection or access to public employment: "through the selection process it is intended that the candidate access public employment if the person passes", while

> "the list of substitutions evidently does not have the same effects, but only the possibility to substitute a public employee teacher in stipulated cases and temporarily or provisionally. To hold that the title qualifies a person to access public employment and does not qualify the same person to be placed on a list of substitutions is contrary to the principle that whoever can achieve the maximum can achieve the minimum. It is contradictory to consider that the meets the requirement regarding the title for selection processes and not to be included in a list of substitutions".

A case similar to those included in the Spanish 2004 report is the case resolved by the *Supreme Court in its Decision of October 27, 2005* (RJ 8151)[21].

In this case, articles 4 and 5 of Royal Decree 1665/1991, of October 25, on the recognition of higher education titles of nationals of Member States which require training for more than three years were challenged in relation to Royal Decree 1425/1991, of August 30, whereby the University Degree of Civil Engineering is established.

For the purposes of exercising the profession of Civil Engineering in Spain the appellant obtained a Resolution of the Ministry of Development of November 13, 1999 whereby the degree of "*Laurea de Dottore in Ingegneria Civile (Ind. Hidráulica)*" issued by the *Politecnico de Milano* (Italy) was recognised. This Resolution has been challenged in successive instances by the Association of Civil Engineers until it reached the Supreme Court. The appellant sustained that the degree obtained in Italy had essential differences as regards the Spanish degree it was to be equated with (as regards the number of subjects and the years of duration of the studies, both greater in the case of the Spanish degree, and the substantially different subjects in the opinion of the appellant), therefore, the person presenting the application for recognition which was being challenged should have been subjected to an aptitude test or a practice period.

In the opinion of the Court, however, it was not a question of checking the aforementioned differences but to analyse whether the subjects of the training and the activities which can be carried out with the corresponding titles in each of the countries coincide substantially and it is true that, when the degree of "Ingegneria Civile Idraulica" and that of "Civil Engineering" are analysed separately, it must be concluded that

> "it must be concluded that the former has a duration greater than three years, which qualifies the holder to practise the same profession corresponding to Civil Engineering in Italy, and that the studies accredited are equivalent to the core subjects listed in the general guidelines of the Engineering degree in question, even though there are deficiencies in the training at origin as, logically, there is not a total equivalence of subjects and this can be overcome".

20 RJ 208000/2005.

21 Already mention in Chapter II: Access to Employment, Gereral Issues.

Therefore, the requirements laid down in Royal Decree 1665/1991 (cited above) are complied with as these are titles issued by a competent authority in a Member State of the European Union. The Statement of Reasons of this general provision states that

> "it is intended to suppress the obstacles to the free movement within the Community area of the citizens of the countries who hold titles – such as the one in question – and encourages mobility in accordance with the stipulations in the Constituent Treaty of the European Economic Community, thus – *in the opinion of the Court* – the requirement to do practice or supplementary tests will only apply when there is effectively a substantial difference between the subjects covered by the Spanish title and by the European one for which recognition has been applied".

Chapter V
Family reunification

General issues

In relation to the measures adopted by the Spanish authorities concerning family reunification, although it is reiterative, mention should be made of the stipulation in the *Instruction of June 6, 2005*, referred to in Chapter I.

Specifically, it is established that

> "the content of article 11.3.C) of RD 178/2003, whereby the requisite in relation to the family members of Community citizens or of nationals from other States which are parties to the Agreement on the European Economic Area, when these are not in turn Community citizens or nationals of the aforementioned States, to attach the corresponding request for the card of a family member of a Community resident together with other documentation, "the residence visa in the passport, or the request for exemption from this, which must be presented together with the request for the residence card" must be considered to be inapplicable."
>
> On the contrary, the relevant visa of stay will be required from the aforementioned family members for entry into Spain in the event that they are nationals of any of the States included in Annex I, of Regulation (EC) 539/2001, of the Council, of March 15, 2001, whereby the list of third countries whose nationals are submitted to the obligation to have a visa in order to cross the external borders are established".

The Decision of the *High Court of Justice of Madrid, Contentious Administrative Proceedings, of October 6, 2005* (Resolution number 1071/2005) deals with another controversial issue: *the situation of family members (nationals of third countries) of EU Member citizens*.

In this case, an endeavour is made to determine whether living together in a stable fashion is a situation which can be equated with marriage for the purposes of being considered to be a "family member" in order to obtain the Community Residence Permit. In fact, the requirement to be a spouse (an extra-Community national) of the Community national is established in article 2 of Royal Decree 178/2003, of February 14, on the entry and residence in Spain of nationals of EU Member States and those from other States which are parties to the Agreement on the European Economic Area. The appellant, a Mexican citizen, was living with a British citizen, and were registered in the Registry of De Facto Marriages in the Autonomous Community of Madrid[22]. The Court refers to article 3.1 of the Civil Code on the interpretation of the norms, and considers that the term "spouse" in the Royal Decree only refers to the existence of a marriage bond, and, since this Royal Decree dates from 2003, it cannot be considered that "*it is out of context or beyond normal social reality*"; if the legislator had wished to include de facto marriages, this would have been mentioned. Therefore, the granting of a Community Residence Permit is rejected.[23]

22 Law 11/2001, of December 19, on De facto marriages in the Autonomous Community of Madrid. Official Gazette of the Community of Madrid 2, of January 3, 2002.

23 This entails an infringement of Community Law and Community Case Law.

Chapter VI
Recent Court of Justice Judgements

Community nationals of new Member States

As we know, the nationals of the new Member States (A8 nationals) *during 2005 and up to May 1, 2006, are under the transitory period* approved by the Instruction of the Ministry of Employment and Social Affairs of April 14, 2004.

Regarding proffesional sports, the A8 nationals were incorporated as extra-Community aliens and were, *de facto*, subjected to the *Resolution of the Ministry of Employment and Social Affairs of August 12, 2005*, whereby the *Agreement of the Spanish Council of Ministers of July 15, 2005* was published. This Resolution stated the procedure for authorising the residence and the professional sports work of aliens and was stipulated for aliens in general submitting them to the requisites and conditions of the law on Aliens 4/2000: the professional sports nationals of the new Member States were included, despite the case law of the EUCJ in the decisions on KOLPAK and SIMUNTEKOV (which was an indication of the need to guarantee them the principle of equality of treatment as regards access to employment if they complied with the requisites concerning residence and work in each Member State).

Under this paragraph reference needs to be done to Decision of the *EUCJ of April 12, 2005* (C-265/03). The case is the following: a Russian national lives in Spain with a residence permit and a work permit and he is a football player, with a federation licence as a non-Community player. As there are a maximum number of extra-Community players who can take part at the same time in State competitions, he requests the Spanish Royal Football Federation to change this licence to a Community one, and this is refused as this requires that he have the nationality of a Member State or of the European Economic Area. On appeal, the National Court brought up a *pre-judicial question on the Cooperation Agreement made by the EU and Russia in which it was established that there would be would be no discrimination on the grounds of nationality concerning employment conditions, remuneration or dismissal* although this would not prevent the application of national legislation on entry and stay, employment, employment, the establishment and provision of services on condition that the benefits for each party arising from the Agreement are not reduced.

The EUCJ considers that the Cooperation Agreement can take direct effect if it has a clear and precise obligation which is not subjected to the adoption of an ulterior act as regards its execution or effects. Thus, the Agreement establishes the prohibition regarding discriminatory treatment due to the nationality of Russian citizens, and as this is clear and precise and is not subjected to any ulterior act, it has direct effect. *This would mean that the limit which is applied to extra-Community players with no Cooperation Agreement cannot be applied to him*.

Free provision of services

One Decision on the free provision of services is the Decision of the *EUCJ of October 27, 2005* (C-158/03), which resolves an appeal regarding non-compliance against the Kingdom of Spain. This deals with a tender for the provision of respiratory therapy services. The tender sets out criteria for admission, evaluation and deciding on draw between two bidders with the same number of points and refers to the fact that, at the time the bids are submitted, the bidders must have certain installations on Spanish territory or within a radius of 1,000 kilometres from the province in which the service is to be provided, as well as previously having offices for attending to the public in certain localities, and be managing the same service at the time.

According to the EUCJ,

> "the national measures which can hinder or make the exercise of the fundamental liberties guaranteed by the Treaty less attractive must comply with four requirements in order to observe articles 43 EC and 49 EC: they must be applied in a manner which is non-discriminatory, they must be justified by pressing needs of general interest, they must be adapted to guaranteeing the carrying out of the objective they seek and must not go beyond what is necessary to achieve this objective".

By applying these criteria, the Court finds that, as regards having an office open in the province, this is out of proportion with regard to the objective of guaranteeing the health of patients; as concerns having production installations in Spain, given that this requires a much more substantial investment than installing offices, this would be discriminatory; as concerns having production installations within a radius of 1,000 kilometres from the province where the service is to be provided, this requirement is out of proportion and inadequate as regards guaranteeing the objective of having a regular, ensured supply; with regard to increasing the points due to production capacity, this is not related to the objective of the contract as maximum points are given to those who have production which is much greater than the foreseeable consumption; as regards the decision on a draw, this is discriminatory as it automatically chooses the company which is already present in the market in question. Due to these reasons, it is understood that Spain has failed to comply with article 49 TEC (free provision of services).

There is a very important Decision concerning access to health protection for workers who move within the EU is the *Decision of the EUCJ of April 13, 2005*.This Decision is comment *infra* in Chapter IX of this Spanish Report regarding

Nationals of third countries who are family members of a EU citizen

The Decision of the *EUCJ of April 14, 2005* (C-157/03), which resolves an appeal for non-compliance, deals with the requirement imposed by Spain on the nationals of a third country, who are family members of a Community national, to *obtain a residence visa* for the issue of the residence permit, which is counter to the stipulations in Directives 68/360/EEC, [24] 73/148/EEC, [25] and 90/365/EEC,[26] and not granting the residence permit as soon as possible, at the latest, within the six months following application, which is counter to the stipulations in Directive 64/221/EEC.[27] This failure to comply arose in Royal Decree 766/1992,[28] which requires a visa for "*the family members who do not have the nationality of a Member State of the European Community, and, as well as the previous documents, the residence visa on the passport, whose submittal may be dispensed with for exceptional reasons*".

Article 2 of Directive 90/365 establishes that "*the applicant is only required to present an identity document or a valid passport"* for the granting of a residence permit.

With regard to the failure to comply with Directive 64/221/EEC,

> "it is accredited that Mrs Rote Ventura, a national of a third country and the wife of a Community national who exercised her right to free movement, obtained her residence permit after ten months of formalities, which is counter to the obligations imposed by this Directive."

In response to the Spanish allegation that it was an isolated case and that the person concerned could stay in Spain while she was waiting for the resilience permit to be issued, the Court stated that it is irrelevant that the failure to comply with the period constitutes an obstacle to residence or to the exercise of an activity or not. Thus, Spain failed to comply with the aforementioned Directives.

---

24 68/360/EEC of the Council, of October 15, 1968 (LCEur 1968\ 85) , on the suppression of restrictions on the movement and the stay of workers of the Member States and their families within the Community (DO L 257, p. 13; EE 05/01, p. 88)

25 73/148/EEC of the Council, of May 21,1973 (LCEur 1973\ 105) , relative to the suppression of the restrictions on movement and stays of nationals of the Member States within the Community with regard to the establishment and the provision of service (DO L 172, p. 14; EE 06/01, p. 132)

26 90/365/EEC of the Council, of June 28,1990 (LCEur 1990\ 729) , relative to the right of residence of salaried employees or self-employed persons who have ceased to exercise their professional activity (DO L 180, p. 28)

27 64/221/EEC of the Council, of February 25, 1964 (LCEur 1964\ 4) , for the coordination of special measures for aliens as regards movement and residence justified by treasons of public order, security and public health (DO 1964,56, p. 850; EE 05/01, p. 36).

28 Royal Decree 766/199228, of June 26 (RCL 1992\ 1469, 2450) , on the entry and stay in Spain of the nationals of Member States of the European Communities (*Official State Gazette* No. 156, of June 30, 1992, p. 22275), in its version modified by Royal Decree 737/1995, of May 5 (RCL 1995\ 1675) (*Official State Gazette* No. 133, of June 5, 1995, p. 16547), and 1710/1997, of November 14 (RCL 1997\ 2723) (*Official State Gazette* No. 274, of November 15, 1997, p. 33549).

Chapter VII
General dispositions with repercussions on free movement of workers

The Spanish legal provisions more relevant during 2005 and with repercussion on free movements of workers has been the following:

- the *Instruction of June, 2005* of Spanish Department of Immigration of the Ministry of Employment and Social Services considering inapplicable to the family member of EC and EEA the requisite established in art.11.3.C) of RD 178/2003.
- the attempt to adapt Spanish legislation to the case law of the EUCJ and to the principle of equal treatment as regards access to maritime training, there is the latest of the legislative modifications, *Royal Decree 652/2005, of June 7***,** which regulates the minimum level of training in maritime professions. In addition, by the *Ministerial Order of October 14, 2005*, the procedure for revalidating the professional competences of the Card of the Spanish Merchant navy is regulated.
- *Royal Decree 1335/2005, of November 11***,** which regulates the family services of the Social Security in an attempt to unify in one regulation all the family services of the Spanish Social Security including the EC workers and its families.
- the *Royal Decree 1621/2005, of December 30*, on protection of large families, which have aid as regards studies, housing and transport.
- *Resolution of the Ministry of Employment and Social Affairs of August 12, 2005*, whereby the *Agreement of the Spanish Council of Ministers of July 15, 2005* was published, with effect on A8 workers.
- *Law 22/2005 of November 18* incorporates several Community Directives regarding the taxation of energy and electricity products and the common fiscal regime applicable to the parent companies and affiliates of different Member States.
- *Royal Decree 1612/2005, of December 30*, which modifies Royal Decree 728/1993, of May 14, whereby assistance pensions for the elderly are established for Spanish emigrants is approved and facilitates free movement.
- *Law 14/2005, of July 1*, which again incorporates Additional Provision 10 to the Workers' Statute, which is in favour of the collective agreements establishing the compulsory retirement of those workers who reach a specific age and who can obtain a pension within the Spanish Social Security system.

Chapter VIII
EU enlargement

In 2005, which is the subject of this Report, there are no innovations as regards the legislation applicable to A8 in Spain as it continues to be the same as that which was analysed and commented on in the previous report[29].

The only innovation in 2006 and, therefore, outside this report, is that the Spanish Government has decided not to extend the initial transitory period of two years so that, as from May 1, 2006, all the nationals of the new Member States and their families are subject to the regime of the Royal Decree 178/2003 mentioned in Chapter I.

However, in 2005, some of the pronouncements of the Spanish Courts can be mentioned.

One interesting decision in relation to the maintenance of the residence permit is the *Decision of the High Court of Justice of the Autonomous Community of Valencia*, Contentious-Administrative Proceedings, of *April 23, 2005* (resolution number 733/2005), which deals with a Lithuanian citizen (thus belonging to the new Member States, the so-called CEC's). He was an alien with no work or residence permit and no means of support; therefore, he failed to comply with article 53 of Spanish Aliens Act (4/2000 of 11 January). Article 55 of the same Aliens Act establishes the sanction of a fine and article 57 establishes expulsion from Spain in this situation. The appellant alleged that, as he was Lithuanian, and, therefore, European citizen, he could not be expelled, *and the Court responded that full free movement of persons is not applicable to the nationals of the new Member States (except for Malta and Cyprus)* during that period time. In fact, a transitory period has been stipulated (which in the case of Spain will last for two years), during which time he would require a work permit to access the employment market.

29 Spanish Report on the Free Movement of Workers within the EU, 2004, pages 917 et seq.

Chapter IX
Statistics

Introduction

The national statistical sources of 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 mainly legal: these residents obtain a Community residence permit in order to work and reside. The Community residence permit does not specify whether this is only to reside or whether they are allowed to work as it does with nationals from third countries.

As we can see, we have had access to data from the Extended European Union only since 2004. Because of this, in this paper we use data from 2004 related to the Extended European Union.

However, statistics from Social Security provide us with figures for nationals of the E.E.A. who are working and paying Social Security contributions.

E.E.A. Countries and Third Countries

Country of origin	1993	2000	2001	2002	2003	2004	2005
E.E.A.	230,038	306,203	325,511	362,858	398,150	498.871**	569.284**
Third countries	254,304	589,517	783,549	961,143	1,240,812	1,496,823	2.738.932

Source: Statistical Yearbook on Aliens, 2000, 2001 and 2002. Ministry of the Interior.
* Data from 2000, 2001, 2002, and 2003 corresponding to the European Union comprised of 15 members.
** Data from 2004 and 2005 corresponding to the E.E.A (including 25 members).

In a period of ten years, from 1993 to 2004, immigration from Member States of the European Economic Area has grown 146%, while immigration from third countries has increased 577%, almost five times as much. In the last 3 years, from 2003 to 2005, according to table No. 1, the growth of nationals of E.E.A. was only 42.4%, lower than the growth of third countries which is 75%. Comparing this increase with the period of 2000-2002, we find that the E.E.A. has grown 24% more in the last period.

In 2002, nationals from the E.E.A. represented 27,4% of the foreign population. While in 2005 the E.E.A. decreased to 20,8%. Ten years previously they had represented 47.5%. Despite the growth over these years, the increase of nationals from third countries has inverted the relationship between both groups of countries, thus at the present time the group of third countries represents the majority.

Gender

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
2005 *	52,98	47,02	55,5	45,5

Source: Statistical Yearbooks on Aliens from those years.
*Data from the E.E.A. including the 10 new member states.

Distribution of the members of the E.E.A. by gender is quite similar; there is, however, a slight increase in men (2.96%) between 1998 and 2005. Comparing these figures with the ones from third countries, the difference of gender in these countries underwent a 14 point increase in men until 2004,

with a substantial decrease of 4 points in 2005 when it reached 10%. Seven years ago, in 1998, this disparity amounted to 6 points.

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: Statistical Yearbooks on Aliens for those years. Ministry of the Interior.

Distribution by age Extended European Union

		0 to 15 years	16 to 64 years	More than 64 years	Total
2004*	European Economic Area	29,208	389,652	80,015	498,875
	Third Countries	237,831	1,225,832	33,643	1,497,306
2005*	European Economic Area	34,969	444,306	90,007	569,284
	Third Countries	277,446	1,861,012	31,009	2,169,648

Source: Statistical Yearbooks on Aliens for that year. Ministry of Employment and Social Affairs.
* Including the 10 new member states

In 2002, 77.2% of the residents of the E.E.A. were in the 16 to 64 age range. In other words, based only on their age, they would be able to perform any productive activity. Three years later, in 2005, that figure continues to be stable at 78,0%. The population under 16 also continues to stand at 6%. Comparing these figures with the ones from third countries, we can see that the latter had a higher percentage of people old enough to work (85%) in 2002, decreasing three points (82%) in 2004, but returning to 85.7% in 2005. On the other hand the population under 16 from third countries was double the same age range from the E.E.A. (13%) in 2002, three years later that difference continues to stand at 12,7%. Regarding the population older than 64, we can observe a very unusual fact: while in 2002 they represented 16.3%, the absolute numbers tripled in 2005 (90,007), but the percentage decreased to 15.8%. In fact, this part of the population was the one with the biggest growth in 2005. This fact seems to confirm the attraction which Spain has for the retired population from the countries of northern Europe. As concerns third countries, the difference decreased even more visibly from 2.3%

in 2002 to a very low 1.4% in 2005. In addition, in absolute numbers, the population older than 64 decreased.