REPORT
on the Free Movement of Workers in the United Kingdom in 2002 and 2003

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Introduction

The key features of the UK implementation of EU law on free movement of workers has not change dramatically over the past year. The best aspect of the system is: the very relaxed administrative approach to residence permits, registration and other formalities regarding arrival, residence and employment of nationals of the Member States. The maintenance of border controls on persons arriving from other Member States appears to be accepted by the UK administration as the compensatory measure for the very un-bureaucratic approach to movement of nationals of the Member States. This approach almost succeeded in being applied also to the new Member States (outside the scope of this report but of relevance nonetheless) but for a last minute wobble by the Government and the introduction of a dreadfully complicated and administratively nightmarish system of registration for workers from the new Member States.

The worst aspects of the system are fourfold, listed in view our assessment of their seriousness:

1. Discrimination: the adoption of the directive against discrimination on the basis (inter alia) of race, accompanied by its transposition into national law (a temporal relationship of some awkwardness) has lead to the formalisation of the grounds for discrimination on the basis of race in the practice of immigration and asylum.
2. Third country national family members: notwithstanding the relaxed approach of the UK authorities to nationals of the Member States, where they have third country national family members, the UK authorities seem to have difficulties with the EU duty of equality of treatment of those third country family members. There seems to be a high diversity of administrative approach to third country national family members depending on the country of origin of the family members (related to (1) above). Further, the attempt, albeit unintentional to apply national law regarding these family members is worrying.
3. Delay: administrative delay is the biggest headache for citizens of the Union from other Member States seeking to exercise their free movement rights in the UK. While the relaxed approach to residence documents means that most of them are not directly affected, those with third country national family members suffer considerable delay.
4. The UK authorities incomplete application of the rights of Turkish workers in the EC Turkey Agreement and subsidiary legislation and the rights of Bulgarians and Romanians (at the time under discussion in the report this group included all the CEECs) under the Europe Agreements. Clearly further assistance is needed to help the UK authorities understand their obligations under these agreements.

The implementation of free movement of workers in the UK is only partially complete. The four areas addressed above would benefit from attention to ensure the better protection of citizens of the Union and those entitled to rights under EU law to enjoy those rights.

Chapter I
Entry, Residence and Departure[1]

A. Entry

a)Texts in Force

- Immigration Act 1971, Immigration Act 1988
- Immigration and Asylum Act 1999
- Immigration (European Economic Area) Regulations 2001
- Anti-Terrorism, Crime and Security Act 2001
- Immigration (Europe in Economic Area) (Amendment) Regulations 2001
- Immigration (Swiss Free movement of Persons) (No. 3) Regulations 2002
- Nationality, Immigration and Asylum Act 2002
- Immigration (European Economic Area (Amendment) Regulations 2003
- Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003

Published statistics in respect of EEA Nationals remain extremely limited in respect of both EEA Nationals entering the United Kingdom and those applying for residence permits . The number of EEA Nationals arriving in the United Kingdom has been estimated at 14,400,000 based on information from the International Passenger Survey (not including citizens of the Republic of Ireland, who are able to travel freely within the common travel area consisting of the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland). Statistics for 2002 also show that net inflow of EEA nationals is estimated at a little over 11,000 for the year 2002. EEA Nationals continued to be admitted to the United Kingdom freely on production of a valid identity card or passport issued by an EEA State by virtue of Regulation 12(1) and (2) of the Immigration (European Economic Area) Regulations 2000.

The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003 [Annex CH1 (1)] gives effect to the Treaty between United Kingdom and France providing for the exercise of immigration control by the authorities of each State in the sea ports of the other State, the sea ports being Dover, Calais, Boulogne and Dunkirk. Powers are given within the limited areas (known as the control zone) within which the Immigration Authorities of each state can exercise immigration control. Regulation 5 of the order amends the EEA Regulations by amending Regulation 12(2) and enabling immigration officers to request authorised passports, identity cards, family permits, residence permits or documents proving family relationships (which may be required to be produced under the EEA Regulations as a condition for admission to the United Kingdom) to be produced in a control zone. The Order also amends Regulation 21(2) of the EEA Order by defining the time of "arrival" of a family member as also including the time at which the family member must be produce the required documents in a control zone.

The Order builds on the already extensive efforts of the UK Immigration Authorities to move their borders beyond the United Kingdom and to exercise immigration control ei-

1 With the collaboration of N. Rollason, Kingsley Napley.

ther at the point of the issue of a visa, at international airports and, in the context of juxtaposed controls, at ports of departure within the EU. It remains unclear whether such legislation would in particular comply with Article 2 of Council Directive 68/360 under which EEA Nationals and their families are granted the right to leave their territory in order to to exercise their rights of free movement. Were immigration control applied under the Order to an EEA national or their family member of an EEA national in France before departure, it would appear that Article 2 would be breached if that family member were prohibited from leaving French territory. While is remain unclear whether France or the UK would be responsible, what is clear is that this bilateral arrangement may in effect create an obstacle in the exercise of Community free movement rights.

We recommend that the Commission request clarification from the UK and French authorities regarding the operation of the treaty and statistics on the nationalities and free movement rights of those stopped in the control zone and prevented from leaving France.

The administrative practice instructions given to Immigration Officers at UK Ports of Entry have previously been provided in our 2001 report. These instructions remain the same and UK immigration continues to exercise "light control" on nationals of other member states, to the UK.

A right of appeal continues to exist from abroad under Regulation 30 of the 200 Regulations. This is a non-suspensive right of appeal and a suspensive right of appeal can only be invoked where an allegation that any refusal would breach the person's human rights under Regulation 30(3). In 2003, the appeal rights of EEA Nationals were restricted by the EEA amendment regulations, which amends Regulation 29 and excludes a right of appeal unless a person claiming to be an EEA National produces a valid National Identity Card or a valid passport issued by an EEA State. A similar restriction on appeal rights also applies to family members. The amendment Regulations also state that, for the purposes of the appeal regulations, a document is to be regarded as being what it purports to be provided that this is "reasonably apparent" and it is to be regarded as being related to the person using it unless it is reasonably apparent that it relates to another person. It appears that this amendment to this 2000 EEA Regulations has been introduced in order to deal with issue of forged passports and identity cards being provided by third country nationals purporting to be EEA nationals. In practice, we are aware of serious concerns raised by the Home office as to the proliferation of forged identity cards from certain countries where the security features of identity cards are limited. It appears, however, that the issue of forged identity appears not to be such a problem on entry as it is when applications are made for residence permits or residence documents.

Regulation 29(5) (as amended by Immigration (European Economic Area) (Amendment) Regulations 2003, also amends the 2000 Regulations by preventing multiple appeals, by those who claim to have rights under the EEA Regulations where the Secretary of State or Immigration Office has certified that an EEA ground in respect of an appeal was pre-

viously considered in connection with an Appeal brought under the Regulation or under Section 82(1) of the 2002 Act.

However, the 2003 Regulations also amend the 2000 Regulations by inserting new provisions on appeals to the Special Immigration Appeals Commission (SIAC) where a decision to exclude or remove a person from the United Kingdom is taken in the interests of national security or in the interests of the relationship between the United Kingdom and another country.

B. Residence

a) Texts in Force

- Immigration Act 1971, Immigration Act 1988
- Immigration and Asylum Act 1999
- Immigration (European Economic Area) Regulations 2001
- Anti-Terrorism, Crime and Security Act 2001
- Immigration (Europe in Economic Area) (Amendment) Regulations 2001
- Nationality, Immigration and Asylum Act 2002
- Immigration (Swiss Free movement of Persons) (MO.3) Regulations 2002
- Nationality, Immigration and Asylum Act 2002
- Immigration (European Economic Area (Amendment) Regulations 2003

EEA Nationals are not required to obtain residence permits and there appears little incentive for EEA nationals to do so in view of the long delays which currently exist at the Home Office in processing residence permits (see below). EEA Nationals continue to have free access to the labour market. By virtue of Section 8 of the Immigration and Nationality Act 1996, employers are required to carry out checks to ensure that all new employees are eligible to work in the United Kingdom. EEA Nationals can satisfy the requirements on simple production of their valid passport or identity card which is sufficient for the initial employment checks. The Home Office leaflet "Information about Nationals of the European Economic Area" [Annex CH1 (2)] confirms to EEA nationals that they do not need to apply for a residence permit and can stay in the United Kingdom for as long as they wish without obtaining a residence permit or registering with the Police. The Guidance confirms that EEA nationals will need to apply for a residence permit if their family members want to apply for a residence document.

EEA nationals and their family members continue to be eligible to apply for the national status of indefinite leave to remain on completion of four years exercising the rights of free movement. A new form EEC 2 was introduced in 2002 [Annex CH1 (3)] the use of which which is not mandatory but may be submitted to assist individuals applying for indefinite leave to remain. There is no right of appeal against the grant against the refusal to grant indefinite leave to remain to EEA Nationals and their family members unless the EEA Nationals family member is applying for permanent residence under the Directive Effective Provisions of Community law in relation to Regulation

12(51/70) and Directive 75/34 which are given effect by Regulation 8 of the 2000 EEA Regulations.

The number of EEA Nationals granted indefinite leave to remain or settlement in the United Kingdom was 2285 in 2002. The grant of indefinite leave to remain is, as we explained in our last Report, a precondition of applying for British nationality, unless permanent residence is obtained under Community law provisions. 1585 grants of British Citizenship were made to EEA Nationals in 2002.

Administrative Practice

Delay continues to be a problem with regard to the issuing of residence permits, residence documents to family members. It appears that significant efforts were made to reduce waiting times by the introduction of the "European Fast Track Unit" which was established following complaints of discrimination against EEA nationals on the basis that they did not have access to 48 hour postal service, which was available to many applicants, and which guaranteed the processing of straightforward applications within 2 days of receipt. Straightforward applications dealt with within the European Fast Track Unit were being processed within approximately four weeks where all documents were provided. The difficulty arose with applications where not all documents were submitted with the initial application (for example because the applicant needed to travel for work and could not submit their passport) or where there was a previous Home Office immigration file to which the Caseworker needed to make reference to. These "extended cases" were taking very significant periods and in some cases over six months.

The situation was affected by the introduction of charging for immigration applications by the Home Office on 1 August 2003. On that date, the Home office began charging for all applications for extensions of stay in the United Kingdom, applications for settlement and applications to transfer passport stamps and endorsements.

EEA nationals and their family members are not subject to Home Office charges when submitting applications for residence permits or residence documents. However, the Home Office has confirmed that if they apply for leave to remain under national law, charges will apply. No charges are currently made for applications for indefinite leave to remain made by EEA nationals under national law. Nationals of Bulgaria, Romania and Turkey and their dependants applying for leave to remain under the terms of the EC Association Agreements are also exempt from charges.

The introduction of charging has created a two-tier application system. The first is for postal applications, for which the fee is £155. Such applications are sent by post to the Home Office, who aim to turn 70% of applications around within three weeks if they are straightforward or a total of 13 weeks if they are not straightforward.

The second type of application are "premium service" applications which are made in person at the Public Enquiry office (PEO) at the Home Office. A fee of £ 250 is charged for these applications which are processed on the day on which they are made.

However, the Home Office have confirmed that all applications for residence permits or residence documents cannot be dealt with on the same day basis at the PEO [Annex CH1 (4) and (5)]**.** Any such applications must be made in writing by post to the

European Casework Unit at the Home Office in Croydon. The failure to provide a same day service and access to the Public Enquiry Office for EEA nationals and their family members is, in our view clear discrimination in that it fails to extend the same access to services of the Home Office to EEA nationals and their family members as is available to nationals of the EU Member States. In addition, the failure to provide a same day service when such a service is provided to all other nationalities appears to be based entirely on nationality, as applications for a residence permit are no more complicated than most applications for leave to remain in the United Kingdom.

In addition, the failure to provide a same day service clearly does not meet the requirements of Article 5 of Directive 64/221 requiring applications to be dealt with as soon as possible. The availability of a Public Enquiry of a same day service at the Home office clearly indicates that it is possible for applications to be completed on the same day were the service to be extended to EEA Nationals.

We recommend that the Commission request the UK government to confirm why such discrimination takes place and what steps will be taken to ensure that EEA nationals have the same access to services provided by the Home Office in processing applications.

The introduction of charging has also had the effect of creating further delays within the European Casework Unit by prioritising resources to be allocated to providing a service for applications for which a charge is made. This was confirmed to us in a meeting at the Home Office in March 2004 where it was indicated that meeting published target for the completion of chargeable applications were a priority and that non-chargeable applications (including EEA applications) were not being allocated significant resources because the applications do not generate an income and the targets for EEA application do not seem to be a priority.

At the end of the period for 2003, following the introduction of charging, significant delays and backlogs had accrued in the European Casework Unit and many applications which were not straightforward are now being extended up to six months and beyond. We have included a recent acknowledgement from the Home Office which confirms that applications are taking six months to complete [Annex CH1 (6)]. We are of the view that this is in breach of Directive 64/221 EEC and repeat the previous comments made with regard to the failure of the Home office to prioritise EEA applications simply on the basis that they are not producing an income for the Home Office. In addition, the acknowledgement that EEA applications are taking six months stands in stark contrast to the published timescales of a maximum of 13 weeks for other applications.

On a more positive note, it appears that a significant number of new Caseworkers were taken on in 2004 in order to deal with the anticipated increase in EEA applications following enlargement. It is unlikely, however, that these new resources will reduce backlogs as new Caseworkers will be dealing with increased volumes of work from accession nationals.

Residence of Turkish Nationals under Article 6 of Decision 1/80
The provisions of Article 6 of Decision 1/80 are not incorporated into the Immigration Rules. The provisions are mentioned in the Immigration Directorates Instructions in Chapter 5 section 10 [Annex CH1 (6)]. This remains unchanged and still makes reference to the fact that trainees, students and au pairs do not benefit from the Agreement, despite the clear jurisprudence of the ECJ in *Birden,* as reaffirmed by *Kurz*. Various attempts to rectify this by your rapportuers over the period have failed and the Home Office have failed to respond to the specific issue of excluding these categories from the benefit of Article 6, blaming insufficient time since the queries were first made in March 2002.

We recommend that the Commission seeks clarification of the UK government's policy in this area and of its failure to provide guidance to its staff which is in compliance with ECJ jurisprudence.

C. Departure/Expulsion

a) Text in Force
Immigration Act 1971, Immigration Act 1988
Immigration Restricted Right of Appeal (against Deportation) (Exemption) Order 1993
Special Immigration Appeals Commission Acts 1997
Immigration Rules HC395 (Paras 362-395)
Immigration and Asylum Act 1999
Football (Disorder) Act 2000
Immigration (European Economic Area) Regulations 2001
Anti-Terrorism, Crime and Security Act 2001
Immigration (Europe in Economic Area) (Amendment) Regulations 2001#
Immigration (Swiss Free movement of Persons) (MO.3) Regulations 2002
Nationality, Immigration and Asylum Act 2002
Immigration (European Economic Area (Amendment) Regulations 2003

In our 1999 Report we gave a comprehensive outline of the 1999 Act and its consequences for security of residence of EEA nationals. The problems which we set out there in particular relating to appeal rights continue to be matters of concern. Since the last report the Nationality Immigration and Asylum Act 2002 has been introduced and appeal rights will be governed by the provisions of part V of that Act. A breach of Community Law rights is one specific ground of appeal and appeals on these grounds will take place in the country.

The Regulations allow the Secretary of State to refuse to renew or revoke a residence permit or document on the grounds that the individual is a threat to public policy, public security or public health or has ceased to be a qualified person or the family member of a qualified person (regulation 22(1)). At Regulation 23 the grounds of exclusion or expulsion from Directive 64/221 are inserted conscientiously. The main issues

which have arisen in the UK over this period in relation to departure are deportation decisions on the grounds of criminal activity. These will be dealt with below under judicial practice.

As we have stated above (see Entry) Part VI of the 2000 EEA Regulations were amended by the Immigration (European Economic Area) (Amendment) Regulations 2003 by confirming the rights of appeal against a decision made under the 2000 Regulations.

Section 25B of the Nationality, Immigration and Asylum Act 2002, now creates a new offence of assisting the entry of EU nationals against whom a deportation order is force by doing an act which facilitates a breach of the deportation order knowing or having reasonable cause for believing that the act facilitates such a breach. In addition section 25B (2) also creates the offence of assisting an EEA national against whom an exclusion order has been made on 'conducive' grounds to arrive, enter and remain, again with knowledge being required. It appears that the offence has been inserted to deal with cases where there has been a public policy deportation or exclusion, although the section refers to exclusion being based on the basis that the persons exclusion is "conducive to the public good". The wording shows the continuing unwillingness of the UK authorities to refer to exclusions made on grounds of public policy, public health or national security.

In the last report we mentioned the Football (Disorder) Act and banning orders made under it, and also noted a case considering the legality of this legislation. The legislation remains and the case was considered by the Court of Appeal in 2002, again upholding the legality of the legislation.

The issue which we consider relevant to the question of free movement relates in particular to banning order made against persons who are considered by a chief police officer to have contributed to violence etc but where there is no conviction to which the banning order is attached as part of sentence. The limitation of free movement rights in accordance with a conviction under the criminal law of the Member States is permitted under Community law so long as it is consistent with the rights contained in the ECHR. However, we are less convinced that a restriction on leaving a Member State for the purpose of exercising a free movement right as a recipient of services where there is no criminal charge or conviction seems less clearly within the permitted limitations of the Treaty. It is by no means clear that the requirements of public policy, security and health as clarified by the ECJ are fulfilled in these circumstances of limitation of free movement rights. To our knowledge no further clarification has been forthcoming in the period 2002-2003. Statistics indicate the numbers of football banning orders increased during the year to August 2002 (from 687 to 1149) and again during the year to August 2003 (up to 1794). It is worth noting that, although these figures also include domestic banning orders, the separate statistics (only available for 2001 and 2002 years) indicate that these are a minority of orders. Some 2000 fans have been made subject to orders in connection with the Euro 2004 championships in Portugal.

Administrative Practice

Guidance given to Immigration Officers on refusal of admission of EEA nationals and their family members on grounds of policy, public security or public health are set out in the Immigration Directive instructions at Annex E which states:

> "A person must present a serious threat to the fundamental interests of Society by his personal conduct. Whether or not such a threat exists is a matter for judgement in the individual circumstances of each case. However, it should be borne in mind that:
> - Previous criminal convictions would not in themselves be sufficient grounds, unless the offence(s) was particularly serious (e.g. rape, murder, drug smuggling) or it was likely that the person would re-offend.
> - Person charged with minor Customs offences should not be refused admission on this basis alone.
> - A person who was the leader of an extreme political party might present such a threat/
> - Facilitation of illegal entry may in itself be sufficient grounds to refuse admission to EEA Nationals.
> - National security can fall under this heading.
>
> It is questionable whether facilitation of illegal entry may in itself be sufficient grounds to refuse admission to EEA Nationals, as it would appear that it would not meet the requirements in the jurisprudence of the ECJ. It appears that this Guidance is given on the basis of the case of the case of ex parte *Yiadom* [1998] INLR 489 (CA), which was referred to the ECJ (case C-357/98) after the national court had found that such behaviour could justify refusal on public policy grounds.

The removal or deportation of EEA nationals remains limited in comparison to the overall numbers of those removed or deported. In 1999, 303 EEA nationals were deported from the United Kingdom on grounds of public policy, public security or public health. Figures for 2000 and 2001 are not available.

b) Judicial practice

1) Gough v. Chief Constable

This was mentioned in the last report for 2001. Since then the original judgment has been upheld by the Court of Appeal.

Wolfgang Schmelz v. Immigration Appeal Tribunal [2004] EWCA Civ 29, Court of Appeal, 15 January 2004.

The claimant, a German citizen, had come to the United Kingdom in 1979. He had been granted indefinite leave to remain in 1985. He had claimed to have worked in his uncle's business since 1979 although no records or work or payment of tax or national insurance was available. Mr. Schmelz was convicted of a serious offence of conspiracy to rob, involved with at least six others in the hijacking of an armoured Securicor van. He was later found to be the prime organiser of the crime. Mr. Schmelz was sentenced to 12 years imprisonment and on 1 March 2002 he was released on licence. Mr Schmelz had also been convicted of burglary in 1985 and had a further three convictions for offences including receipt of stolen property. The secretary of State decided to make a deportation order against him. In the appeal against this decision, he argued that he no longer

posed a danger to the interests of society as he had served his sentence, behaved in an exemplary way within that sentence and received a favourable report at the end of that sentence from the Probation Officer who had interviewed him. He also argued that the offence that he had committed was not sufficient to justify deportation in terms of Community Law either in itself or when balanced against the other considerations upon which he wished to rely. At the first instance, the Adjudicator dismissed his Appeal against deportation by stating:

> "I find therefore that there is little to weigh against the fact that this Appellant has been sentenced for a particularly serious crime – the sentence of 12 years reflects that this was an aggravated theft which was combined with the threat of violence. I note the Judgment of the Court of Appeal in "*Marchon"* and find that the facts that the risk of re-offending is not high, does not outweigh the public interest in this Appellant's deportation. He is being deported not to deter others from similar crimes but because the seriousness of the crime is such that it is in the public interest that they should be protected from even a small risk of such a crime being committed again."

The Immigration Appeal Tribunal refused permission to appeal and a challenge was brought against that decision by way of Judicial Review in the High Court. The High Court dismissed the application for Judicial review, holding that the IAT had been justified in refusing leave to appeal as the offence itself was sufficiently serious to engage one of the fundamental interests of society. While no violence had been used, "a threat of extreme violence" had been made. It was accepted that the offence was so serious that the public should be protected against even a small risk of repetition. We have also enclosed a copy of the High Court Determination. Leave to Appeal to the Court of Appeal was granted but this Appeal was dismissed as it was without merit.

M. v. Secretary of State for the Home Department [2003] EWCA C iv 146, Court of Appeal, 19 February 2003

The appellant, a Bangladeshi Citizen was granted leave to enter United Kingdom on 11 August 1994 as Imam to the Bristol Bangladeshi Community and was granted indefinite leave to remain on 19 January 1998 on the basis of his marriage to a British Citizen. M. and his wife had two children aged 5 and 3 years. On 28 June 2000, M. was convicted of three charges of indecent assault of two girls aged 11 and 12 and sentenced to 18 months imprisonment concurrent 18 month and 12 month in respect of each of the offences to be served consecutively. The Court's recommendation for deportation was quashed by the Court of Appeal on the Claimant's appeal against sentence. The Claimant was then made subject to the "double jeopardy" syndrome whereby, even where a Court quashes a recommendation for deportation, the Secretary of State can still make a decision to deport an individual under the provisions of Section 3(5)(a) of the Immigration Act 1971. On 4 July 2001, a decision to deport the appellant was made by the Secretary of State . An appeal was brought against that decision which was heard by the Court of Appeal considering inter alia the failure of the immigration courts to identify the nature and weight of the public interest in deportation in determining whether there was a pressing social need sufficient to justify the interference with family life, the failure of the appellate authorities to properly take into account of the decision of the Court of Appeal

quashing the recommendation for deportation and the failure to take into account article 8 ECHR.

This case is included in our report as, although it is not a case involving free movement of persons, it involves an argument which seeks to extend ECJ jurisprudence on public policy to domestic law cases. While the Claimant's appeal was allowed, a legal ground of appeal was also looked at which is set out in paragraph 28 of the Court of Appeal's judgment. It was argued that by force of Council Directive 64/221 and the jurisprudence of the ECJ and national jurisprudence, that where an alien is present in a state of the European Union and is enjoying rights of movement or settlement guaranteed by EU law, it will not be proportionate to any proper legitimate aim for the authorities of that state to deport him on "conducive" grounds arising out of a crime or crimes committed by him, if he himself poses no threat to the community by virtue of any significant risk that he will offend again. In such a case, therefore, the Secretary of State may not deploy section 3(5)(a) for the purpose of general deterrence. It was argued that it would be unjust for the Court not to apply this standard or "touchstone of proportionality" even in a case where the criminal immigrant is not exercising EU rights. The Court however accepted the arguments made on behalf of the Secretary of State and taking into account AG's opinion at paragraph 28 in *Manjit Kaur* ([2001] 1CMLR 507) that "the rules governing the free movement of persons apply only to a national of the Member State of the Community who seeks to establish himself in the territory of another Member State or to a national of the Member State in question who finds himself in a situation which is connected with any situations contemplated by Community Law".

F. v. Secretary of State for the Home Department SC/11/2002 29 October 2003

This case involved the detention of an Algerian national. He did however have rights under EU law through his marriage in 1998 to a French Citizen and it became clear during the appeal process that he had acquired French nationality in May 2001 – although it seems that at the time of certification, detention pending removal and appeal against this the authorities were not informed of this. He had been arrested in 1997 and a prosecution brought against him and others under terrorism legislation but this was withdrawn in 2000. He was granted an EEA residence permit on the basis of his marriage in 2000. A certification under the 2001 Anti Terrorism Crime and Security Act was made in December 2001 and a deportation order made under the Immigration (EEA) regulations on the grounds of National Security. He was detained pending removal – although at the time the Secretary of State was unaware of his French nationality and considered that he could not be deported to Algeria because of the risk that he might be subjected to inhuman or degrading treatment there. It subsequently transpired that he acquired French nationality in May 2001 and he decided in March 2002 that he could face detention no longer and he went to France. There, he was questioned on arrival but not detained and he continues to live freely in France. The result of leaving the UK was that his pending appeal to SIAC (Special Immigration Appeals Commission) was treated as abandoned but he sought to pursue a fresh appeal from abroad. The certificate revocation had after

his departure from the UK been revoked and this revocation backdated to the date of his departure.

The decision of the Special Immigration Appeals Tribunal focuses first on the question of whether the revocation of the certificate precludes the appeal, and decides that it does, and dismisses the appeal on that ground. However, it considers other matters raised by the appeal.

These matters, briefly, are

1. The power to certify under section 21 and detain under section 23 of the 2001 Act. The Commission concludes that there was no power to detain under section 23 and thus certification under section 21 was unnecessary as he could have been removed to France. (Interestingly there is no discussion of his position as the wife of a French national, of which status the authorities were aware throughout, and whether that might have enabled him to return to France with his wife). Nonetheless the Commission accepts that the certificate might properly have been issued as the Secretary of State was unaware of his French Nationality at the time.
2. The Commission then turns to the evidence on which the certificate was issued. Was there a reasonable suspicion of involvement in terrorism? Although it denies that guilt is being inferred from association and is 'conscious of the need to be careful not to assume guilt from association'. Nonetheless it does take into account the continued association with others suspected of involvement in terrorism and links to Al Qu'eda 'in the light of the reasonable suspicion that the Apellant was himself actively involved in terrorist activities for the GIA' is a matter that can properly be taken into account. The Commission accepts that 'his activities in 2000 and 2001 justify the use of the expression that he had been maintaining a low profile' but contends that this does not mean that he may not properly be regarded as an international terrorist. Ultimately, the Commission considers that the decision was not wrong.

S v. Secretary of State for the Home Department, [2003] UKIATOO 159, Immigration Appeal Tribunal, 26 November 2003

The appellant, a citizen of Angola, first came to the United Kingdom on 16 February 1999 and claimed asylum shortly thereafter. He married a Portuguese national on 22 September 1999 and was the father of twins born on 17 May 2001. On 23 January 2001 he was convicted of rape at Middlesex Crown Court and sentenced to 6 years' imprisonment. The appellant's wife had been granted a residence permit as an EEA national exercising a community right but on 6 November 2003, the Secretary of State issued a decision to make a Deportation Order on the basis that the appellant's removal would be "conducive to the public good." In the initial appeal, the adjudicator erroneously found that the Appellant would not qualify for a residence permit and failed to consider the Appellant's position and the appellant's rights of residence under EU law.

The decision of the Immigration Tribunal is in itself surprising, as it appears to sidestep the issue of whether or not any decision to deport would in fact be justified on the grounds of public policy. Only very cursory consideration was given by the Tribunal as to whether or not the seriousness of the crime and any propensity to reoffend jus-

tified expulsion on public policy grounds. The tribunal concluded that it did and then went on to find that the removal would be proportionate with the UK's obligation under Article 8 ECHR. No reference was made to the jurisprudence of the ECJ on article 8 set out clearly in the case of *Carpenter*.

Chapter II
Equality of Treatment[2]

a) Text(s) in force

- Race Relations (Amendment) Act 2000
- Race Relations (Immigration and Asylum) (No 1) Authorisation 2001
- Race Relations (Immigration and Asylum) (No 2) Authorisation 2001
- Race Relations (Immigration and Asylum) (No 3) Authorisation 2001
- Race Relations (Immigration and Asylum) Authorisation 2002
- Nationality, Immigration and Asylum Act 2002
- Race Relations (Immigration and Asylum) (Employment under the Sectors-Based Scheme) Authorisation 2003
- Race Relations (Immigration and Asylum) Authorisation 2003
- Race Relations Act 1976 (Amendment) Regulations 2003
- Immigration (Provision of Physical Data) Regulations 2003
- Immigration (Provision of Physical Data) (Amendment) Regulations 2004
- Race Relations (Immigration and Asylum) Authorisation 2004

1. Implementation of Race Discrimination Directive (2000/43)

We have dealt in the 2000/2001 Report with the Race Relations (Amendment) Act 2000 ('RRAA') which came into force on 2 April 2001. The RRAA extended the scope of the Race Relations Act 1976 to public functions (new section 19B), and imposed a general duty to promote equality (section 71(1)). Specific duties are set out in subsidiary legislation. In the period under review, further amendments to the Race Relations Act were required to implement the Race Discrimination Directive 2000/43.

The Race Relations Act 1976 (Amendment) Regulations 2003, which are made under section 2(2)(a) and (b) of the European Communities Act 1972, came into force on 19th July 2003. They implement (in Great Britain) Council Directive 2000/43 EC of 29th June 2000 and include provision for matters arising out of or relating to such implementation. The Directive is concerned with the principle of equal treatment between persons, irrespective of racial or ethnic origin, in the areas of employment (and related matters), social protection, social advantage, education and access to and supply of, goods and services which are available to the public, including housing.

The Regulations amend the Race Relations Act 1976, in particular to reflect the provisions of the Directive which deal with the definition of indirect discrimination, harassment, genuine and determining occupational requirements, the burden of proof in proceedings, and abolition of statutory provisions which are contrary to the principle of equal treatment.

We have included substantial detail in this section as we consider that this is an important aspect of the development of UK immigration law which impacts on free movement of workers directly through the question of treatment of third country national family members, but also because of the importance of perspective which it reveals.

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2 With the collaboration of A. Baldaccini, Justice.

2. The Race Relations Authorisations

As reported previously, the Race Relations (Amendment) Act 2000 outlaws discrimination by bodies carrying out public functions, including immigration functions, and complaints of race discrimination can be raised in immigration appeals along with human rights complaints. However, section 19D of the Act does not make it unlawful for immigration officers to discriminate on grounds of nationality or ethnic or national origin where this is authorised by a Minister. The Minister must act personally and cannot delegate the power to authorise to an immigration officer. The authorisations provide the right to discriminate in respect of any person who is subject to Schedule 2 powers in the Immigration Act 1971, which includes British citizens and nationals of other EU Member States. Schedule 2 powers may be used where further inquiries are deemed necessary before a substantive decision is reached on the passenger's case and may, amongst others, involve a person's detention pending examination. Section 19E of the Act establishes the post of Independent Race Monitor to determine the likely effect of Ministerial authorisations and how they operate in practice. The first Race Monitor, Mary Coussey, was appointed in April 2002. The Monitor's first annual report was submitted to the Secretary of State and laid before Parliament in June 2003 [ANNEX 2(1)].

Several Ministerial authorisations have been made under section 19D of the Race Relations (Amendment) Act 2000. They permit discrimination in the examination of passengers and the setting of removal directions on the grounds of nationality; in prioritising asylum casework on the basis of nationality or ethnic or national origin; in singling out persons of listed nationalities for language analysis testing; and in setting a reserved quota for accession countries nationals in relation to a new sector-based employment scheme. More recent ones are targeted particularly at people of Somali origin and other listed nationals who are deemed to have some form of immigration status in another EU Member State and claim asylum in the UK. These latter authorisations, as well as the biometric visa initiative referred to further below, may be critical of equality of treatment in Community free movement law as they appear to allow to discriminate on the basis of inferred nationality, such as between EU/EEA nationals of Somali origin and other persons of the same nationality.

3. Examination of passengers and removals

The most wide-ranging authorisation (No. 1), which allowed discrimination in the examination of passengers, and in removals, was made in April 2001. The format of this authorisation was revised in 2002, following a judicial review (*Tamil Information Centre v. Secretary of State for the Home Department*, October 2002). Another authorisation (No 2), made in April 2001, allowed discrimination in respect of specific national and ethnic groups (these were Tamils, Kurds, Pontic Greeks, Roma, Somalis, Albanians, Afghans and ethnic Chinese presenting a Malaysian or Japanese passport or other travel document issued by Malaysia or Japan). This also generated considerable controversy and was revoked in June 2002.

Discrimination in the examination of passengers of a listed nationality is allowed where this is justified by statistical evidence or specified intelligence showing a pattern

of abuse, refusals or negative decisions above a particular threshold. The conditions for inclusion of a nationality on the list have been repeatedly amended, lastly in February 2004. Under this authorisation, nationalities will be prioritised if adverse decisions and immigration breaches reach more than 50 in total and 5 of every 1,000 admitted persons of a particular nationality [ANNEX 2(3)]. The inclusion on the list of relevant nationalities is approved each month by the Minister. In January 2003, the list comprised less than 60 nationalities.[3] The nationalities on the list are not publicised.

The authorisation also applies to cases covered by the Immigration (Leave to Enter and Remain) Order 2000 where passengers are granted leave to enter before their arrival by an immigration officer in the UK, and to the setting of removal directions, where the same conditions are met.

Given that the nationalities being prioritised are not publicised, it is not possible to know whether the list includes EU/EEA countries. It appears that in respect of EU/EEA nationals the basis for more careful checks is intelligence about stolen documents and impersonations. The authorisations ostensibly cover such checks although, according to official guidance, this is based on objective evidence and is not discrimination based on nationality.[4]

4. Asylum work streaming

The asylum streaming provision enables Immigration officers to prioritise consideration of claims for asylum on the basis of nationality (or ethnic or national origin) if there are a significant number of claims from persons of that nationality (or ethnic or national origin) which are unfounded or raise similar issues in relation to the Refugee Convention or the European Convention on Human Rights.

5. Language analysis testing

Authorisation No. 3 of 26 October 2001, allows immigration officers to submit asylum seekers from Afghanistan, Somalia, Sri Lanka and Iraq to language analysis testing, where there are doubts about their nationality, and take account of their refusal when establishing the facts of their case. The authorisation of language analysis was amended in March 2003 to include those claiming to be from Iraq.

6. Sector-based employment scheme

The 2003 Sector-based scheme authorisation allows for a proportion of employment documents available for issue in respect of persons coming to work in the food preparation and hospitality sectors to be set aside for nationals of countries acceding the EU in 2004.

7. Prioritisation of persons of Somali origin

In the period under review, people of Somali origin have become the target of particular checks at ports to establish a better evidence base about routes and methods of entry to the UK. An authorisation made in February 2004 enables immigration officers to examine more rigorously passengers who arrive in the UK using travel documents which

3 Home Office letter to ILPA, 16 January 2003.
4 Race Monitor Annual Report April 2002-March 2003, para.11.

show their place of birth to have been in Somalia. The purpose of this measure is to enable immigration service to obtain information on the number and profiles of Somali-born passengers entering the UK. These arrangements are meant to identify Somalis with permission to live elsewhere in the EU and have been taken on the basis of evidence that some Somalis with permission to live in other EU countries are then also claiming asylum in the UK [see ANNEX 2(2)].

8. Measures targeting top five nationalities of asylum seekers

An authorisation, also made in February 2004, covers the top five nationalities (Iraq, Turkey, Iran, Somalia and Sudan) of asylum claimants in the UK and is targeted at individuals from those countries who have claimed asylum, are failed asylum seekers or absconders, or enjoy some for of status in another country who subsequently claim asylum in the UK. Immigration officers can compare fingerprints of asylum seekers of these five nationalities against other EU countries fingerprint databases of asylum seekers, failed asylum seekers and those granted some form of leave to remain. This change also allows immigration officials to compare details of asylum seekers from the five prioritised nationalities with the details of individuals originally from those countries but now holding a form of immigration status elsewhere who have been granted a visa to travel to the UK. The Home Office alleges that significant numbers of asylum applicants from these five nationalities are entering the country on legitimate EU or other Western countries' documents and subsequently claim asylum [see ANNEX 2(3)].

9. Use of fast-track and admissibility procedures on nationality grounds

In the period under review, the tendency to increasingly make use of admissibility and fast-track asylum procedures has directly affected the priority given to particular nationalities, the depth of any checks made, and the frequency of detention pending examination, and of removal. Many countries are now designed as safe countries whose nationals are denied suspensive rights of appeal if their asylum applications are refused. All Accession State individuals are subject to the non-suspensive appeals procedure, introduced by the Nationality, Immigration and Asylum Act 2002. Very few asylum applicants from these countries, many of which are Roma, were successful in being granted asylum.[5] Refused and certified applicants are removed after service of the decision and may pursue any appeal from abroad. It must further be noted that Accession countries that become EU Member States will be covered by the 1998 Protocol on asylum for national of Member States of the European Union (the so-called 'Aznar Protocol') which states that all EU Member States constitute safe countries of origin. Thus, an asylum application from Accession countries nationals should normally be declared inadmissible by the receiving Member State.

The biometric visa initiative

Another development in the period under review is the biometric visa initiative piloted in 2003 in Sri Lanka. The Immigration (Provision of Physical Data) Regulations 2003 required provision of a record of fingerprints by entry clearance applicants in Colombo.

5 For 2003 data see Home Office, *Asylum Statistics: 4th Quarter 2003 United Kingdom*.

Since the initial six-month project started in July 2003, it has led to the identification of seven undocumented asylum applicants who destroyed their passports after entering the UK, and further two people have been prosecuted. The initiative was extended in March 2004 by the Immigration (Provision of Physical Data) (Amendment) Regulations 2004 to visitors to the UK from five east African countries. Applicants from Djibouti, Ethiopia, Eritrea, Tanzania and Uganda are required to provide fingerprints with any applications for entry clearance for any persons aged five or over. A further amendment to the 2003 Regulations provides that those travelling on refugee documents issued by other countries have to provide fingerprint data before they enter the UK. Failure to provide fingerprints will lead to applications being refused if they are from persons with a UN convention travel document (other than one issued by the UK) with an entry clearance from 27 February on, or treated as invalid in any other case. This move is part of a Government action plan to tackle unfounded asylum claims from Somali nationals and fraudulent claims by individuals claiming to be Somalis [see ANNEX 2(2)].

Pre-entry clearance schemes

Another significant development, initially proposed in the 2002 White Paper, is the adoption of pre-clearance schemes.[6] These allow British immigration officers based at airports abroad to carry out checks on passengers seeking to fly to the UK. Such a scheme had been introduced at Prague airport, following agreement with the Czech government, with the prime aim of addressing the problem of large numbers of "inadmissible Czech citizens arriving in the UK, many of which applied for asylum".[7] The scheme was, in fact, targeted at the Roma who are perceived as serial abusers of the asylum system and the only alternative would have been the introduction of visas for all Czech nationals. Pre-entry clearance operated at Prague for most of 2002 until 26 February 2003. There has been a significant drop in asylum claims from Czech nationals. In May 2003, the Court of Appeal dismissed an appeal against the decision that the pre-entry clearance practices at Prague were unlawful, but gave leave to appeal to the House of Lords (*European Roma Rights Centre v. The Immigration Officer at Prague Airport and the Secretary of State for the Home Department* [2003] EWCA Civ 666).

Similar pre-clearance schemes were subsequently deployed at some 20 locations that the Home Office has identified as important ports of origin or transit for improperly documented passengers travelling to the UK and work is under way to expand this network to further ports. It is reported that during 2002, 30,000 passengers were prevented from travelling to the UK.[8] As the numbers of overseas controls are growing, the Race Monitor considered it essential that the provisions of the Race Relations Act are included in arrangements that allow the immigration rules to operate extra-territorially.[9]

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6 Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain,* Cm 5387 (2002), para.6.8.

7 *Idem*.

8 Home Office Press Notice 036/2003 of 7 February 2003, Driving forward asylum reform: further measures to cut abuse

9 Race Monitor Annual Report para.41.

c) Judicial Practice

Tamil Information Centre v. Secretary of State for the Home Department, [2002] EWHC2155 (Admin), 18 October 2002
The proceedings concerned the Tamil Information Centre's challenge to the lawfulness of the first authorisation made in 2001. The Court held that statistical patterns or trends of breaches of control were unlawfully vague conditions and not objectively justified. Neither enabled the immigration officer concerned properly to identify the nationalities against which he/she is authorised to discriminate. To be valid an authorisation under section 19D must be given by the Minister acting personally and in respect of a particular case or class of case.

European Roma Rights Centre v. The Immigration Officer at Prague Airport and the Secretary of State for the Home Department [2003] EWCA Civ 666, 20 May 2003
The applicants challenged the presence and control exercise by UK immigration officers at Prague Airport as both discriminatory against Roma and an implicit breach of the Geneva Convention as preventing Roma Czech nationals from leaving their country of origin and seeking asylum in the UK. The application was rejected primarily on the ground of the Geneva Convention. The UK government submitted that it was not applying the authorisation in respect of the Roma at Prague Airport but rather only checking whether persons seeking to get on flight bound for the UK fulfilled the criteria in the immigration rules for admission to the UK. The Judge accepted the argument of the UK government that the Roma Czech nationals did not meet the immigration rules regarding admission of visitors while the other Czech nationals did, thus the discrimination was not based on national or ethnic origin but on objective criteria.

Bibliography

Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, Cm 5387 (2002)
Independent Race Monitor, *Annual Report April 2002-March 2003*
Home Office, *Asylum Statistics: 4th Quarter 2003 United Kingdom*

Chapter III
The Derogations Article 39(3)[10]

a) Text(s) in force

- Aliens Restriction Act (Amendment) Act 1919
- Ireland Act 1949
- Alien's Employment Act 1955
- Race Relations Act 1976
- European Communities (Employment in the Civil Service) Order 1991
- Diplomatic Service Order in Council 5 February 1991
- European Economic Area Act 1993
- Civil Service Order in Council 15 March 1995
- Civil Service Nationality Rules Section 1.1 Annex B of the Civil service Management Code.

b) Judicial practice

In our 1999 Report we set out in some detail the existing rules on access to jobs in the Civil Service in the UK. We would refer you to that report for a fuller outline. According to information provided to us from the UK Cabinet Office, about 25% of posts in the UK Civil Service currently fall within the definition of Article 39(4). The term used in the note is that these jobs are excluded because they "require special allegiance to the state". We would refer you to the 2001 report for a fuller discussion of this. The guidelines to the Civil Service administrative officers responsible for employment (attached in Annexe) includes "The Treaty provides no definition of 'public service' but the term has been defined by the European Court of Justice to mean broadly those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in duties whose purpose is to safeguard the general interest of the State or other public bodies and which therefore require a special allegiance to the State on the part of the persons occupying them." This appears to fulfil the requirements of Article 39(4).

In our 2001 report we noted that the Civil Service nationality rules are protected from claims of nationality discrimination under the Race Relations Act by section 75(5) of that Act, but that according to the Cabinet Office the UK authorities "would like to open up more posts to people from other countries. But this will require primary legislation. At present, there is no slot in the legislative programme". This legislative slot has now been found and there is legislation pending before Parliament – see the Crown Employment (Nationality) Bill, the Civil Service Bill and the Civil Service (No 2) Bill. We attach this legislation, together with the explanatory notes, for completeness although at this stage it has yet to receive Parliamentary approval.

We are not aware of any court decisions in the UK over the relevant period which relate to Article 39(4) or the admission of EEA nationals to the Civil Service in the UK.

10 With the collaboration of H. Toner, Oxford University.

Chapter IV
Family Members[11]

a) Text(s) in force

- Immigration Act 1971
- Immigration Act 1988
- Immigration and Asylum Act 1999
- Immigration (European Economic Area) Regulations 2000
- The Immigration (European Economic Area) (Amendment) Regulations 2001
- Nationality Immigration and Asylum Act 2002
- The Immigration (Swiss Free Movement of Persons) No3 Regulations 2003
- Immigration (European Economic Area) (Amendment) Regulations 2003
- Immigration (European Economic Area) (Amendment No2) Regulations 2003

b) Administrative Practice

As set out in previous editions, under the Immigration (European Economic Area) Regulations 2000, third country national family members of EC Nationals exercising Treaty Rights in the UK are required to obtain an EEA family permit before travelling to the United Kingdom to join the EEA principal. Guidance given to British Consular posts states that priority should be given to applications for family permits.

Swiss nationals now benefit from the same rules as other EEA nationals and are therefore able to bring their family members to the United Kingdom if exercising the equivalent of a Treaty right. This has been included in the Immigration (Swiss Free Movement of Persons) No. 3 Regulations 2003.

As already highlighted a number of times before, the Immigration (European Economic Area) Regulations 2000 specifically exclude from the meaning of spouses in the Regulations "a party to a marriage of convenience". This exclusion is not self evident in Article 39 EC and its subsidiary legislation. The meaning of the term "marriage of convenience" is not defined, although in the diplomatic service procedures it states that "a marriage of convenience is, for these purposes, a sham marriage entered into solely for immigration purposes, where the parties have no intention from the outset of living with the other as man and wife in a genuine and settled relationship". It then goes on to state that an entry clearance officer should "normally confine [his] enquiries to establishing that there exists a marriage valid in law, the couple have lived together (not necessarily on a continuous basis), since the marriage, and intend to continue to live together in the UK" (Chapter 21.5.8). This guidance and current practice by the Home Office appears not to have led to substantial problems, as the UK authorities do not appear to be challenging the nature of marriages.

There continue to be substantial delays in issuing EEA family permits. Since the introduction of fees for most applications made to the Home Office under domestic immigration laws (not under European law), caseworkers have had strict targets to meet in relation to taking decisions and informing the applicant. (The Home Office aims to complete 70% of applications within 3 weeks and within 13 weeks at most). This appears

11 With the collaboration of A. Hunter, Gryk & Co.

to have led to resources being shifted away from the European Directorate and straightforward applications for residence permits for example, are taking between six to eight weeks to be dealt with. Applications where a document (such as the passport) was not initially submitted with the application can take up to six months.

Evidence from practitioners and family members of EEA nationals show that a considerable number of family members are also routinely questioned on entry to the United Kingdom and are made to wait for substantial periods of time before being admitted.

Consequences of references to the European Court of Justice

At the end of 2002 and 2003 there were various references to the Court of Justice by courts in the United Kingdom. The decision in *Carpenter* has not led to changes in the Immigration Rules or EEA Regulations and nor did the case of *Kaba* in which the ECJ agreed with the United Kingdom government that it could make applicants chose whether they wanted to pursue an application under national provisions or the Community regime and need not allow them to pick what was more favourable to them depending on what application they were making at the time.

The *Baumbast* case has however had a significant impact, leading to the Immigration (European Economic Area) (Amendment) Regulations 2003 and the Immigration (European Economic Area) (Amendment No2) Regulations 2003. The Regulations now state that the following are to be considered to be family members:

1. a non EEA national who is divorced from an EEA national provided she is the primary carer of their dependent child who is under 19 and attending an educational course in the United Kingdom.
2. if the EEA national has ceased to be a qualified person on ceasing to reside in the United Kingdom the persons are:
   a) his spouse or divorced spouse, provided she is the primary carer of their dependent child who is under 19 and attending an educational course in the Untied Kingdom; and
   b) descendants of his or his spouse who are under 21 or are their dependants, provided that were attending an educational course in the United Kingdom when the qualified person was residing in the United Kingdom and are continuing to attend such course.

The guidance in the Immigration Directorate instructions underline the fact that a parent can only rely on the *Baumbast* judgment and the new Regulations if the child is under 19 but do not clearly reflect the latest amendment in the Immigration (European Economic Area)(Amendment No2) Regulations. The Immigration Directorates Instructions state that "given the reasoning behind *Baumbast's* judgment that a child may be prevented from exercising its treaty rights to attend education if their primary carer was not allowed to remain in the Member State with them we consider that once a child is 19 years old they no longer require their parent carer to be with them in the United Kingdom in order to exercise these rights". This is clearly not the only time the United Kingdom would allow a parent to remain as the situation in 2b above sets out. It is also not

clear if the United Kingdom has interpreted *Baumbast* widely enough in relation to the age until which a child can have his non EEA carer in the United Kingdom, as the matter was not considered by the European Court of Justice and remains open. The United Kingdom has however dropped the requirement which was in the initial Amendment Regulations of 2003 that the child who is over 19 can only remain in the United Kingdom if s/he is not able to attend an equivalent course outside the United Kingdom.

In the reference by the Immigration Appeal Tribunal in the case of *Nani Givane* the question, whether the two year period of continuous residence set out in Article 3(2) Regulation (EEC) 1251/70 allowing family members to gain permanent residence after the death of an EEA national, had to be established in the period immediately prior to the worker's death or whether it may be established by a period of continuous residence which occurs at an earlier point in the worker's life, was referred to the ECJ. The Court agreed with the United Kingdom government by stating that the period must have been immediately preceding the worker's death, leaving third country nationals in the position that they would need to leave the United Kingdom if they had spent time abroad with the EEA national in the two years preceding his death.

The *Akrich* case has, as yet, not had repercussions in the United Kingdom. *Akrich* is still pending in the UK court and it is not clear whether it will in fact be heard in full as Mr Akrich has now been granted the right to stay in the United Kingdom. How the Home Office will draft its instructions to its officers or make amendments to the EEA Regulations has yet to be dealt with. Currently, the *Surinder Singh* rule, i.e. where British nationals who go to another Member State and exercise economic rights of family reunion at the same time and then seek to come back to the UK with their family members under community law, appears still to be effective and remains in the Regulations. However it remains to be seen whether in practice returning British nationals who have been exercising Treaty rights in another member state will need to show that their spouses were there legally to be able to return to the United Kingdom and show that their spouse has a right to reside in the United Kingdom based on European free movement law. We are concerned at a possible narrow interpretation of *Akrich* and the limitations it would place on free movement and recommends that the Commission follows developments carefully.

Unmarried partners

Provision for unmarried partners to be permitted to join their UK residence partner is included in the Immigration Rules at paragraph 295d. The requirements are that one party must be resident in the UK, the non-EEA partner must be lawfully present (or else the application must be made from abroad), they can support and accommodate themselves without recourse to public funds, and they intend to live together permanently. The requirement for there to be a legal impediment to marriage (otherwise than for a blood relationship) has now been dropped. The non-EEA national partner is normally given 24 months' leave to remain with no restriction on employment or self-employment. However, unlike the unmarried partners of British nationals, those of EEA nationals are not eligible after the 24 months period for indefinite leave to remain. Instead he or she must wait until the EEA national is eligible for settlement after four

years' residence. Further, non-EEA national partners who have lived with their British partner for four years and return to the United Kingdom are eligible to be granted indefinite leave to remain. A non-EEA national partner joining an EEA national exercising treaty rights would not benefit from settlement but would be granted leave in line with the EEA partner.

Adoption of Children

In a case at adjudicator level (*Elena Lacramiora Druhora-Annies v. The Secretary of State for the Home Department*), an appeal against a refusal of an EEA resident permit was allowed and the Home Office, although initially appealing to the Immigration Appeal Tribunal, then withdrew the appeal. The facts were as follows: a dual national (Irish and British) who had always been resident in Northern Ireland adopted, with her husband, a 17 year old Romanian girl under Romanian law. The Home Office initially argued that this was an internal situation and that the wife could not rely on her Treaty rights as she had never moved from Northern Ireland. In the grounds to the Immigration Appeal Tribunal, the Home Office also argued that the adoption was not recognised by the United Kingdom authorities and therefore no resident permit needed to be issued. As the appeal was withdrawn it appears that the Home Office did not believe it could pursue either argument successfully.

Access to indefinite leave to remain

This has been dealt with in Chapter 1 as regards community nationals. Third country national family members suffer the same problems as the principal with regard to acquiring permanent residents rights. Discrimination continues as outlined in the report for 1999, i.e. that third country national family members of third country nationals in the UK are, in many circumstances privileged over and above third country national family members of community nationals as regards the acquisition of permanent residence rights. Discrimination also continues for the non-EEA spouses of EEA nationals, as challenged in *Kaba* (see above), in relation to them obtaining indefinite leave to remain.

Chapter V
ECJ Follow Up[12]

In this chapter we examine the implementation in the UK of the ECJ decisions. Those cases which are relevant to other sections of this report are not included here.

Avello, Case C-148/02, 2 October 2003: In this judgment the ECJ examined the situation of dual Spanish and Belgian national children who were born and lived all their lives in Belgium. They sought to bring an action in the Belgium courts for the authorities' failure to allow to alter their surnames in accordance with Spanish practices. The ECJ equally found that they were entitled to benefit from Community law basing its decision on the fact that the children were nationals of one Member State residing in another Member State, regardless of where they were born. The ECJ made clear that by refusing to treat the children as Spanish nationals the Belgium authorities would be in effect adding additional conditions for the recognition of that nationality. There is no reference in UK legislation to EU national children being capable of exercising Treaty rights in the UK. Furthermore we are aware of a number of cases where the Home Office has sought to argue before the UK courts that in the case of dual nationals with UK citizenship who were born in the UK such person cannot be said to be exercising Treaty rights as the situation is purely internal. We are not aware of any UK court decision upholding this argument however.

Baumbast, Case C-413/99, 17/09/2002. See Family Members Chapter.

Carpenter, Case C-60/00 11 July 2000. The ECJ found that notwithstanding that a family member had infringed the immigration laws of the United Kingdom, in that case a spouse of a provider of services, she was entitled to reside in the territory with the provider. In doing so, the ECJ read Article 49 EC Treaty in light of the fundamental right to respect for family life so as to infer a right of residence for the family member. The UK immigration legislation does not provide specifically for the situation of a British national providing services in other Member States and therefore there is no recognition that the situation of their spouse is covered by EU law. The Immigration Appeal Authority and Immigration Appeal Tribunal are making increasingly harsh decisions in relation to the failure of third country nationals to obtain entry clearance. The requirement that a third country national spouse leaves the UK to obtain this entry clearance is rarely seen as disproportionate.

D'Hoop, Case C-245/98, 11 July 2002 and *Grzelczyk*, Case C-184/99, 20 September 2001. See section on students.

KB - Case C-117/01 7 January 2004 concerned a British citizen who worked for the National Health Service (NHS) for twenty years, during which time she paid contributions to the NHS pension scheme. The scheme provided for a survivor's pension to be payable to a member's surviving spouse. "Spouse" meant the person to whom the scheme member had been married. KB argued that her partner, R, who had undergone female-to-male gender reassignment surgery, should be entitled to receive the widower's pension. United Kingdom legislation, however, prevented transsexuals from marrying on the basis of their acquired gender. The ECJ found that there was an inequality of treat-

12 With the collaboration of Nicola Rogers, 2 Garden Court.

ment which related to the couple's inability to marry. The ECJ relied on the ECHR decision in *Goodwin v. the UK* ([2002] 35 EHRR 18 to conclude that the legislation making it impossible for transsexuals to marry on the basis of their acquired gender was incompatible with the Treaty. In *Goodwin* the European Court of Human Rights had held that since it was impossible for a transsexual to marry a person of the sex to which he or she belonged prior to gender reassignment surgery, the UK was in breach of Article 12. Thus the pensions legislation was incompatible with the Treaty. This decision has not been given effect in UK law despite the fact that Goodwin was decided in 2002.

Kurz, Case C-188/00, 19/11/02: Another decision of the ECJ concerning Decision 1/80 of the EC-Turkey Association Council. Where vocational training involved practical training "on the job", the apprentice was to be considered as a worker if the work carried out was genuine and effective. It was contrary to Community law for Germany to adopt legislation which interfered with those rights directly conferred by the Decision. To date no specific measure has been taken to give effect to this decision. Indeed, we are concerned that the UK has failed to include any reference to Decision 1/80 of the EC Turkey Agreement in the UK immigration rules. Although rights pertaining to workers under that Decision are directly effective, the failure to include these rights in UK law means that Turkish nationals are often not advised of their rights under the Agreement.

MRAX, Case C-459/00, 25 July 2002: A judgment of the ECJ concerning the requirement that third country national spouses of EU nationals obtain visas or residence permits and whether they can be expelled for unlawfully entering the territory of the Member State. The ECJ concluded that failure to obtain a visa or residence permit is a formality and the right to family life ensures that such third country nationals spouse should not be expelled. During the period of reporting we are not aware of any cases where the spouse of an EU national was expelled simply for failing to obtain residence documents. The imposition of strict carriers' liabilities sanctions means that third country nationals are extremely unlikely to reach the UK border without having obtained the necessary visas in advance.

Chapter VI
Immigration and Employment and its Effects for Movement of EU Citizens[13]

a) Texts in force

Immigration Rules (HC 395 of 1993-1994, as amended), Parts 4 and 5.
Immigration Employment Document (Fees) Regulations 2003, SI 2003 No. 541 (as amended)
Asylum and Immigration Act 1996, section 8 (as amended)
Immigration (Restrictions on Employment) Order 2004, SI 2004 No. 755.

Introduction

The period under review saw significant changes to public policy concerning migration for employment. This was partly because of economic factors, with a combination of low unemployment and economic growth leading to vacancies for many categories of highly-skilled and low-paid work. The comparatively benign approach to economic migration also reflected the political choices of post-1997 governments, as articulated in particular in the White Paper on migration policy of February 2002, *Secure Borders, Safe Haven*. That set out the ambition to provide "rational and credible legal routes for men and women who want to live and work in the UK, helping them to contribute to our economy."[14]

The comparative openness to economic migration in recent years has been reflected in a steady increase in the total number of persons accepted into the labour force. According to official figures, successful work permit applications doubled between 1993 (29,329) and 1999 (58,245), and then more than doubled again by 2002 (129,041).[15] To these may be added the increasing number of persons admitted under special schemes in recent years.

Another indicator of the greater openness of public policy is the liberalisation of the rules and schemes relating to economic migration. The main developments in that area are now considered in turn.

Highly Skilled Migrants

The Highly Skilled Migrants Programme (HSMP) began in January 2002. It permits highly-qualified persons to come to Britain without first obtaining a work permit or providing a detailed business plan.[16] The Government's explanation of the scheme has focused on its potential contribution to the competitive position of British economy:

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13 With the collaboration of B. Ryan, University of Kent.

14 Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, Cm 5387 (2002), para 3.6.

15 For figures up to 1997, see J. Dobson, K. Koser, G. Maclaughlan and J. Salt, *International Migration and the United Kingdom: Recent Patterns and Trends* (2001), Table 14.1; for 1995-2002, see J. Clarke and J. Salt, 'Work Permits and Foreign Labour in the UK: A Statistical Review,' *Labour Market Trends*, November 2003, 563, Table 1.

16 For the announcement of the programme, see statement by Home Office Minister, Lord Rooker, *HL Debates*, 13 December 2001, written answers, cols 227-228. See too the explanation of the HSMP in *Secure Borders, Safe Haven* (2002), paras 3.15-3.20.

> "The UK is competing for highly skilled workers with other countries keen to strengthen and enrich their economies by attracting highly skilled migrants … This represents a further step in developing our immigration system to maximise the benefits to the UK of high human capital individuals, who have the qualifications and skills required by UK businesses to compete in the global marketplace."[17]

Following the approach of Australia and Canada, the HSMP is a points-based system. Points are awarded for educational attainment (up to 30 points), previous employment (up to 50), previous earnings (up to 50) and the degree of achievement in the field (up to 25). Initially, the HSMP required that 75 points be attained overall, but that was reduced to 65 points as part of a reform of the scheme which took effect on 31 October 2003. Other changes to the scheme in October 2003 made it easier for those under 28 to obtain points, and allowed up to 10 points for a partner's qualifications and experience.[18]

Between 28 January 2002 and 30 November 2003, there were 8628 applications under the HSMP, of which 5058 (59%) had been successful.[19] The most common nationalities of *applicants* up to 30 November 2003 were: India (832), USA (751), Nigeria (454) Pakistan (381), South Africa (319), Australia (307), Zimbabwe (176), Canada (153), China (126), Russia (123).[20] The main occupations for *approved applications* were finance, business management, information and communication technology and medicine, with research, engineering and marketing also significantly represented.[21]

Working holidaymakers

The working holidaymaker scheme is a long-standing arrangement whereby citizens of Commonwealth states can be admitted to Britain on a two-year visa. The number of working holidaymaker visas has tended to increase over recent years. Over the decade 1993-2002, the number of visas issued is as set out in the table which follows.[22]

Recognising that the working holidaymaker scheme "provides an additional, temporary, flexible workforce", the 2002 White Paper announced a review of the scheme.[23] The review took place during 2002, changes based upon it were announced in June 2003, and the changes then took effect in August 2003.[24]

year	number	year	number
1993	21,600	1998	40,800
1994	31,600	1999	45,800
1995	36,000	2000	38,500

17 *Secure Borders, Safe Haven* (2002), paras 3.18.
18 *Highly Skilled Migrant Programme: Revised Programme Effective from 31 October 2003* (Home Office, 2003).
19 Immigration Minister, Beverley Hughes, *HC Debates*, 5 January 2004, written answers, cols 11-12.
20 *Ibid*. There appears to be no public information about the nationality of *successful* applicants.
21 Clarke and Salt, 2003, pp 572-573, for the period to 31 July 2003.
22 See *Working Holidaymakers Scheme: Consultation Document* (Home Office, May 2002), Table 1 and J. Salt, *International Migration and the United Kingdom: SOPEMI Report* (OECD, 2003), Table 6.1.
23 *Secure Borders, Safe Haven* (2002), paras 3.26 to 3.29.
24 *Working Holidaymakers Scheme: Consultation Document* (Home Office, May 2002) and 'Announcement on the Review of the Working Holidaymakers', Home Office press release, 20 June 2003.

1996	33,000	2001	35,775
1997	33,300	2002	41,700

One change was the relaxation of the conditions for eligibility, by allowing those between the ages of 17 and 30 to apply, instead of those between 17 and 27. More importantly, the 2003 reform removed all restrictions on the employment which could be undertaken. Previously, any employment was required be "incidental", it was not permissible to work for more than 25 hours a week for more than 50% of the holiday, and those on working holidaymaker visas were precluded from working in sport or entertainment or otherwise pursuing a career in Britain. There is also a new possibility for a working holidaymaker to apply to switch to work permit employment after 1 year - previously, the formal position was that they needed to return home before making such an application. The combination of the relaxation of the work which can be done, and the express possibility of an in-country work permit application, mean that the working holidaymaker visa is more likely to be a route to longer-term economic migration to Britain.

The working holidaymaker scheme has been criticised for its bias towards Commonwealth citizens who are white, and from the 'Old' Commonwealth. In 2002, for example, of the 41700 visas issued, 92% were issued to citizens of Australia (17175, 41%), South Africa (13235, 32%), New Zealand (4935, 12%) and Canada (3205, 8%).[25] One of the stated objectives of the 2002 review was that it be made "as inclusive as possible", and it was suggested that the removal of the employment restrictions might make it more accessible to less affluent individuals, because it would make it easier for them to show they could maintain themselves in Britain.[26] It is far from clear however that, on their own, the changes announced in 2003 will make any significant difference to the uneven distribution of the beneficiaries of the scheme.

Seasonal Agricultural Workers

The Seasonal Agricultural Workers' Scheme (SAWS) was also the subject of a review in 2002.[27] This is a scheme through which students from outside the EEA are recruited for seasonal labour in agriculture. It operates on the basis of a quota, which is administered by designated operators. While in theory the scheme has a significant cultural dimension, it appears to be treated by farmers and growers as primarily concerned with the supply of labour which would not be available from the resident population.

As a result of the 2002 review, changes to the details of scheme were announced in November 2002.[28] One change was that the previous upper age limit of 25 was removed. The more important change was the decision that all seasonal agricultural work would be eligible to be covered by the scheme - previously, the season was restricted to May to November, and there were restrictions on the kinds of agricultural work which could be

25 Salt, 2003, Table 6.1.

26 *Working Holidaymakers Scheme: Consultation Document*, para 4.3.

27 The review was announced in *Secure Borders, Safe Haven*, para 3.25. The key document is *Review of the Seasonal Agricultural Workers' Scheme* (Home Office, May 2002).

28 The changes were announced by Home Secretary, David Blunkett, 27 November 2002, *HC Debates*, written statements, cols 22-24.

done. In addition, the detailed terms of the scheme for the operators, which had previously been contained in a code of practice, have with effect from 2004 been written into a contract between Home Office and operators.[29]

The size of the scheme has also increased in recent years. The quota had already been raised increased prior to the 2002 review: it was set at 5500 a year up to 1996, 10000 a year in 1997-2000, 15200 in 2001 and 18700 in 2002.[30] The 2002 review then led to a further increase in the quota to 25000 for 2003.[31] At the same time, the number of operators has increased, from seven in previous years to nine for 2004. [32]

In practice, the workers who come to Britain under SAWS are almost exclusively from Central and Eastern Europe. Of the 14870 who came in 2001, the most represented nationalities were: Poland (4040), Ukraine (2980), Bulgaria (1779), Lithuania (1708), the Slovak Republic (728), Belarus (683), Latvia (635) and the Czech Republic (575).[33] There is no evidence of substantial numbers from any other region. The future of the SAWS is therefore bound up with labour market developments in agriculture after the EU enlargement of 1 May 2004. That has already been reflected in the announcement on 19 May 2004 that, in order to take account of EU enlargement, the SAWS quota would be reduced to 16250 in 2005.[34]

Sectors Based Scheme

A further innovation in relation to economic migration saw the introduction of the 'Sectors Based Scheme' with effect from May 2003.[35] This is a quota scheme, applicable in the first instance to two sectors - food processing and hospitality (that is, hotels and catering). The scheme is in effect an exception to the standard requirement concerning the qualifications of a person for whom a work permit is required.[36] The scheme is however subject to important restrictions: the work permits can only be obtained where there is no suitable resident or EEA labour, and can only be sought for workers between 18-30 who are outside the UK. The permit itself is limited to one year – though a subsequent application is allowed after a two-month absence - and does not lead to a right of admission for dependants.

Initially, 20,000 work permits were made available for the period 30 May 2003 to 31 January 2004, with 10,000 for each of the two sectors covered. The scheme was designed to favour persons from the 10 states acceding to the EU in 2004, with 7500 of

29 Information from: http://www.workingintheuk.gov.uk.
30 *Review of the Seasonal Agricultural Workers' Scheme*, Annex C.
31 Statement by David Blunkett, 27 November 2002.
32 Information from: http://www.workingintheuk.gov.uk.
33 *Review of the Seasonal Agricultural Workers' Scheme*, Table 2. There was a similar pattern among the 19,372 workers who came to Britain under the scheme in 2002: Clarke and Salt, 2003, p 573. They record that 25% were from Poland, 20% from the Ukraine, and 18% from the three Baltic states. More precise figures do not appear to have been published for 2002 or 2003.
34 Immigration Minister, Des Browne, *HC Debates*, 19 May 2004, written statements, cols 49-51.
35 Details of the scheme can be found in *Guidance Notes for Employers on How to Apply for a Work Permit under the Sectors Based Scheme Arrangements* (Work Permits UK, 1 April 2004 version), available from http://www.workingintheuk.gov.uk.
36 The standard requirement is that the individual have a degree, a Higher National Diploma, or three years' employment with specialist skills equivalent to level 3 in the National Vocational Qualification framework.

the initial quota reserved to them. In the initial months of the scheme (up to August 2003), this was reflected in the pattern of applications, with 18% coming from Poland, 13% from Slovakia and 11% from the Czech Republic.[37] Even at that point in time, however, the most represented state was the Ukraine, with 24% of applications. It is likely too that the pattern of applications changed in subsequent periods.

There were further developments with the sectors based scheme in the first half of 2004. In January 2004, it was announced that the period for the take up of the initial quota was to be extended to 31 May 2004.[38] Then, in March 2004, it was announced that the *initial* quota in hospitality had been reached, and that further applications would not be considered in that sector.[39] The continuation of the SBS after May 2004 had also been announced in January 2004. On 19 May 2004, it was then announced that the quota for the period starting on 1 June 2004 would be 15000, with a quota of 9000 for the hospitality sector and 6000 for food processing.[40] The reason given for a lower SBS quota than in 2003-2004 is the anticipated effects of EU enlargement.

Shortage occupations

The was also been one significant change to the operation of the main work permit system during the period. Within the work permit system, it is unnecessary to do a recruitment search for those on designated 'shortage occupations'. In September 2002, information technology occupations were removed from the list.[41] The result was that, in that sector, a work permit application again required evidence of advertisements aimed at recruiting suitably qualified resident or EEA labour.[42]

Procedures

In addition to these various changes to the rules on migration for employment, the years under review saw three significant sets of developments in the procedures to followed.

The first set of development was the introduction of fees for what are termed "immigration employment documents" – that is, work permits and similar documents. Fees for these documents were authorised by section 122 of the Nationality Immigration and Asylum Act 2002. Starting on 1 April 2003, the following charges were introduced: £ 150 for a Highly Skilled Migrant Programme application, £ 95 for a standard work permit, £ 74 for the sectors based scheme, and £ 12 for the Seasonal Agricultural Workers Scheme.[43] There are however no fees for nationals of other signatory states of the European Social Charter 1961, or of the revised European Social Charter 1996, because of the terms of Article 18 of the Charter.[44] As of May 2004, this exception was of bene-

37 Clarke and Salt, 2003, p 573.
38 'Extension to the Sectors Based Scheme', from http://www.workingintheuk.gov.uk.
39 'Suspension of the SBS Hospitality Quota', Work Permits UK announcement, 30 March 2004.
40 Statement by Des Browne, 19 May 2004.
41 'Changes to Work Permit Arrangements for the IT Sector," Home Office press release, 29 August 2002.
42 The remaining 'shortage occupations' including medical practitioners, veterinary surgeons, engineers, actuaries and teachers: see http://www.workingintheuk.gov.uk.
43 Immigration Employment Document (Fees) Regulations 2003, SI 2003 No. 541, and amendments (SI 2003 No. 1277, SI 2003 No. 2447, SI 2003 No. 2626 and SI 2004 No. 1044).
44 Article 18 of each of the European Social Charter and the revised Social Charter sets out the "right to engage in a occupational occupation in the territory of other parties." Under paragraph 2 of the Ar-

fit to nationals of seven non-EEA states: Albania, Armenia, Bulgaria, Croatia, Moldova, Romania and Turkey. Special provision has also been made for teachers in England, by allowing the payment of any fees relating to them to be the subject of an arrangement between the Home Office and the Department for Education and Skills. It may be added that the Government proposed in January 2004 that the fee for work permits and the sector based scheme be increased to between £ 155 and £ 180.[45]

A second development has been the introduction of a charge of £ 121 for employment-related applications for the extension of leave to remain.[46] This charge arises where an individual applies to remain in the United Kingdom, and is covered by a work permit, the HSMP, SAWS, the sector-based scheme, etc. The introduction of a charge was proposed in July 2003, and came into force on 1 April 2004.[47] The nationals of states which are party to the European Social Charter 1961 or the revised European Social Charter 1996 are again exempt from this charge.

A final development was the introduction, with effect from 13 November 2003, of a requirement for those on work permits of six months or more to obtain 'mandatory entry clearance' before coming to the United Kingdom.[48] In practice, this is of relevance to non-visa nationals, since visa nationals already required entry clearance. One consequence is that persons in that category have become subject to the fee (which varies from place to place) for entry clearance.

Asylum applicants

The policy on the taking of employment by asylum applicants was the subject of a significant change in the period under review. Since 1986, asylum applicants had been permitted to take employment from six months after their application for asylum had been made, if they had not had an initial determination of their application. With effect from 23 July 2002, however, this 'employment concession' was ended.[49] There remains a discretion to allow employment in individual cases, although that discretion appears to be used only rarely.[50]

The official reason given by the Government for the July 2002 change in policy was that the vast majority of asylum applications were being resolved within six months, so that the concession was no longer necessary. It was pointed out at that time, however, that the average time for an initial decision was then thirteen months.[51] It seems instead

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ticle, the contracting parties "undertake … to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers."

45 *Consultation: Charging for the Consideration of Work Permit and Sector Based Applications: Reviewing the Charge* (Work Permits UK, January 2004).

46 Note however that the fee for other in-country applications for leave to remain is set at £155 for postal applications or £250 for applications made in person: Immigration (Leave to Remain) (Fees) Regulations 2002, SI 2003 No. 1711.

47 Immigration (Leave to Remain) (Fees) (Amendment) Regulations 2004, SI 2004 No. 580.

48 *Statement of Changes in Immigration Rules*, 2002-03 *HC Papers* 1224, paras 16-15, amending paras 128-130 of Immigration Rules.

49 Home Office press release, 'Faster asylum decisions – historical employment concession ended', 23 July 2002.

50 Immigration Minister, Beverley Hughes, *HC Debates*, 15 January 2004, written answers, col 877.

51 Refugee Council, 'Government Announcement and Proposals since its White Paper on Asylum: A Summary' (July 2002), p. 6.

that the change of policy was motivated both by the Government's view that the employment concession might be acting as a factor encouraging asylum applications in Britain, and by its desire to be seen to be take a tough line with respect to asylum applicants at a time when there was media and public controversy over the Red Cross centre in Sangatte.

Ironically, the policy change of July 2002 was inconsistent with the position which the British Government had taken in the negotiations on the proposed directive on minimum conditions for the reception of asylum applicants.[52] Article 11 of the directive provides that member states "shall decide the conditions for granting access to the labour market" where an initial decision has not been taken within 12 months of an application. Britain had initially been unhappy with the proposal that asylum applicants should have a right to take up employment only after 12 months, as that was longer than the six month limit then applicable in Britain.[53] In the event, however, Britain has ended up being obliged to reintroduce some form of entitlement to employment when the directive takes effect on 6 February 2005.[54]

Employer sanctions

Criminal sanctions upon employers for hiring persons without a right to work were first introduced by section 8 of the Asylum and Immigration Act 1996. Under the original system, employers had a defence where they had retained, copied or recorded any of a list of documents which were taken to confirm that the individual was entitled to work.[55] The defence has throughout been unavailable where the employer nevertheless knew that, notwithstanding the document(s) produced, the individual was not entitled to work when they took up employment.

In the 2002 White Paper, the Government announced its intention to reform the rules relating to employer sanctions.[56] The background to the announcement was that, in the four years 1998-2001, there were only 121 prosecutions, and only 34 convictions, under section 8.[57] The main problem the Government identified was that it was too easy for employees to be hired on the basis of a fraudulent documents.[58] A further possible problem – though one on which the Government remained silent - was that the list of acceptable documents was anyway over-inclusive. In particular, it was enough to produce a document with a national insurance number, or a UK birth certificate, even though neither of these is in itself definitive proof of a right to work in Britain.[59]

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52 Council Directive 2003/9 on the minimum standards for the reception of asylum seekers, OJ 2003 31 L 18.

53 Memorandum of 8 April 2002 of Home Office Minister, Angela Eagle, in House of Commons Select Committee on European Scrutiny, 20021-2002, *Twenty-Fourth* report, para. 3.8.

54 This was confirmed by Immigration Minister, Beverley Hughes, *HC Debates*, 15 January 2004, written answers, col. 877.

55 The documents, and the required method of copying or recording, were listed in the Immigration (Restrictions on Employment) Order 1996, SI 1996 No. 3225.

56 *Secure Borders, Safe Haven* (2002), paras 5.5 to 5.21.

57 *Prevention of Illegal Working* (July 2003), 19.

58 *Prevention of Illegal Working: Proposed Changes to Document List under Section 8 of the Asylum and Immigration Act 1996* (Home Office, July 2003), p. 3.

59 B. Ryan, 'Employer Enforcement of Immigration Law after Section Eight of the Asylum and Immigration Act 1996' (1997) 26 *Industrial Law Journal* 136, pp 139-141.

A change in the law was permitted by the amendment of section 8 of the 1996 Act by section 147 of the Nationality Immigration and Asylum Act 2002. The amendment allowed more than one document to be required before the employer defence could succeed. In addition, the Secretary of State was empowered to specify that the documents be retained, where previously the employer could choose whether to retain or instead to copy or record. A further change made by the 2002 Act was to confer express powers of search, entry and arrest upon immigration officers for the purposes of the section 8 offence.

The proposed changes to the documents list were announced in July 2003, and – after minor adjustments – came into force on 1 May 2004.[60] Under the new system only some documents will stand on their own as proof of a right to work: passports (though not for work permit holders), residence permits or documents issued to those with rights under EU law, and employment registration cards. In other cases, it will be necessary for a combination of a work-related and a nationality or residence-related document to be produced. One combination is (i) a document bearing a national insurance number and (ii) either a British or Irish birth certificate, or a document issued by the Home Office confirming the individual's position. The other combination is (i) a work permit and (ii) either a suitably endorsed passport or a Home Office letter confirming the individual's position. The new rules will presumably make it harder for employers to have a plausible defence where they are found to have hired someone who lacked entitlement to work. The changes may as a result have the effect of discouraging the hiring of those whose employment or immigration status it is difficult for an employer to determine with certainty.

Finally, reference may be made here to the Government proposals to introduce an identity card for lawful residents in Britain.[61] The current proposal is that voluntary identity cards will start to be issued in 2007-2008, and it is intended that identity cards would become compulsory at some date thereafter. It is explicit in the Government proposals that one possible use of an identity card is as a method for proving entitlement to work.[62] At the time of writing, the Government's stated intention is that, as long as the identity card is voluntary, "it will not be a requirement to possess a card in order to work."[63] This does not however rule out the possible use even of a voluntary identity card as *one of* the documents through which a right to work is proven.

60 The proposals were in *Prevention of Illegal Working* (July 2003). The final version is in Immigration (Restrictions on Employment) Order 2004, SI 2004 No. 755.

61 The latest proposals are in *Identity Cards: The Next Steps*, Cm 6020 (Home Office, November 2003) and *Legislation on Identity Cards: A Consultation*, Cm 6178 (Home Office, April 2004).

62 *Entitlement Cards and Identity Fraud: A Consultation Paper*, Cm 5557 (Home Office, July 2002), pp 31-33.

63 *Identity Cards: The Next Steps*, p 10.

Chapter VII
Statistics

The UK statistical office collects substantial information on the movement of persons to, residence on and removal from the UK. This information is published with varying delays. Asylum statistics are usually published with about three months delay. The annual statistical survey of immigration to the UK is always one year behind. For this reason, this part of the report can only deal with the statistics for the year 2002. As regards 2003 the only statistics currently available relate to asylum. In this chapter we will consider the published statistics as they relate to EU nationals and their family members under 8 headings:

1) asylum;
2) citizenship;
3) before entry into the UK;
4) on entry;
5) granting permanent residence;
6) expulsion from the UK;
7) immigration and criminal offences;
8) net migration.

Asylum

In recognition of asylum's high political profile, the UK statistical agency, National Statistics, compiles and publishes extremely detailed statistics on asylum applications in the UK. The detail is such that these statistical surveys are published separately from the immigration statistics. This amount of attention to asylum statistics is a phenomenon of the 1990s. The most recent statistical bulletin on asylum is for the 4th quarter of 200 (Home Office: Asylum Statistics 4th Quarter 2003 United Kingdom).

The only two Member States for which separate statistics are published and which are now Member States of the Union are the Czech Republic and Poland. The published statistics group together as one category, which includes all the EU and EEA Member States, under the title Europe Other. This category excludes: Albania, Macedonia, Moldova, Romania, Russia, Serbia, Turkey, Ukraine, Other Former USSR or Other Former Yugoslavia. This Europe Other category this includes historic and current Member State other than the Czech Republic and Poland. Among the curious aspects of the statistics is that they are kept for the Czech Republic but not for Slovakia.

Between 2001-2003 the number of asylum applications made by nationals of European countries dropped from 14,215 in 2001 to 6,280 in 2003. As can be seen from the table below, there is a dramatic drop in the number of asylum applications under all four headings as 2003 approaches. Whether this is because the categories cover persons who were increasingly made aware of the approach of free movement rights or not is unclear. This was certainly the allegation in the UK tabloid press in April 2004 where it was suggested that the Prime Minister had entered into agreements with accession states' leaders to diminish the numbers of asylum seekers coming to the UK. It was never clarified exactly how the leaders of countries might be expected to accomplish such a task.

Country	*2001*	*2002*	*2003*
Czech Republic	825	1,365	75
Poland	615	990	95
Europe Other	335	300	85
Total	1,775	2,655	255

As regards the success or failure rate of these asylum applications, in 2002 out of a total of 330 decisions reached regarding applications in the Europe Other category, 5 persons were recognised as refugees and 15 were granted a humanitarian status. In 2002 455 appeals against negative first decisions were determined by the independent judicial authority of which 65 were allowed. For the same category in 2003 of 140 decisions reached, all were rejected by the UK authorities. However, in the same year, 2003, 360 appeals by persons in this category against refusals were heard by the independent judicial authority in the UK of which 55 were allowed.

In 2002, 15 persons in the category Europe other were in administrative detention under the Immigration Act of whom 5 were asylum seekers. As at 27 December 2003 15 persons in this category were being detained of whom 10 were asylum seekers.

Citizenship

The number of European Economic Area nationals applying for citizenship in the UK has dropped fairly consistently since 1998. In 1998 there were 1,700 such grants, in 1999 1,710. In 2000 there was a slight increase to 2,075 but then a drop again in 2001 to 1,680 and in 2002, the last year for which there are published statistics, the number had dropped to 1,585. The percentage of persons born in other EEA countries (excluding Ireland) who, after six years or more in the UK, had obtained British citizenship was 43%. Where the period of residence has been between 6 – 10 years the rate drops to 24% but it rises again for this group when they have been resident in the UK for between 11 and 20 years to 41%. For those who have been UK resident more than 21 years 50% have acquired British citizenship.

In 2002, out of a total of 1,480 EEA nationals who became British, 660 did so on the basis of residence in the UK (normally the requirement is 5 years residence) while 425 did so on the basis of marriage to a British citizen (which also carries a residence requirement of 2 years).

The possibility of retaining nationality of origin is also a consideration on acquiring citizenship. As regards countries of origin of persons applying for citizenship in the UK in 2002, the following has more than 100 applicants:

Country	*Total*[64]	*Residence*	*Marriage*
France	210	70	50
Germany	200	115	30
Greece	170	115	30
Ireland	110	50	30
Italy	210	100	70
Portugal	285	175	75

64 In addition to residence and marriage, there are a number of residual categories which account for the discrepancy between the columns.

Before entry into the UK

This category only applies to non-EU (or EEA) nationals as only these persons can be required to obtain prior authorisation (in the form of entry clearance or visas) before arriving at a UK port of entry. Statistics are only currently available up to 2002. The statistics are broken down into two different groups – persons applying for prior entry clearance to come to the UK for temporary purposes at British posts in other EEA states and persons applying for entry clearance in other EEA states to come to the UK as the spouses or other family members of EU (or EEA) nationals.

As regards the persons coming for temporary purposes the figures are as follows:

	1999	*2000*	*2001*	*2002*
Granted	72,915	87,080	97,635	112,490
Refused	1,550	1,230	1,270	3,825

There is a substantial increase both in the numbers of applications made in 2002 and the number of refusals. The largest number of refusals were made at British posts in France (515), Germany (885), Ireland (765), Italy (740) and Luxembourg (275).

In the category of applications for entry clearance for settlement (which is primarily third country national family members of an EU (or EEA) national principal), the numbers are substantially smaller:

	1999	*2000*	*2001*	*2002*
Granted	645	620	540	725
Refused	40	25	25	55

Again there is a substantial change in 2002 with both a rise in applications granted and in refusals. The published statistics do not provide information on the numbers of applications made in third countries by third country national family members of EU (and EEA) nationals. There are very detailed statistics available for the numbers of applications for family reunification made to British posts abroad, including information on waiting times for family applications on the Indian sub-continent. But the information is not broken down by the nationality of the principal.

On Entry

The number of EU (and EEA) nationals entering the UK has dropped slightly since 1997:

Year	*EU (and EEA) National Arrivals (millions)*
1998	15.8
1999	15.6
2000	15.3
2001	14.2
2002	14.4

Very detailed statistics are published on admission of individuals from the new Member States and the category of admission.

Granting Permanent Residence

After four years lawful residence in a category which is other than temporary a person can apply for indefinite leave to remain (permanent residence) in the UK. This is a national immigration category acquisition of which is required before an individual may apply for British citizenship. As EU (and EEA) nationals are not required to apply for residence permits in the UK (though they may do so if they like) when EU (and EEA) nationals have completed the residence period necessary to acquire British citizenship and decide to do so, they must first acquire indefinite leave to remain. Thus there may be an incentive for some EU (and EEA) nationals to obtain indefinite leave to remain. For the third country national family members of EU (and EEA) nationals there is a very strong incentive to obtain indefinite leave to remain as this provides them with a residence status independent from their EU (or EEA) national principal. In this category detailed statistics were collected and maintained until 1998. Then no statistics were published at all on the grant of indefinite leave to remain to these categories of persons until 2002. For the year 2002, 2,285 persons in this category obtained indefinite leave to remain. This figure is broken down by EEA nationality and thus does not include third country national family members. The largest number of EEA nationals applying for the status were Portuguese (565); French (335); Italian (305) and German (265).

Expulsion from the UK

The country of nationality of persons subject to removal from the UK is not published in the annual statistics. The numbers of persons refused entry to the UK and removed (either immediately or some time thereafter) rose from 37,865 in 2001 to 50,360 in 2002. In 2002 47,630 of these were not asylum seekers. The figure for persons removed as a result of enforcement action after their entry into the UK is substantially smaller: in 2001: 10,290 and in 2002: 14,205.

Immigration and Criminal Offences

Again, the statistics on immigration related criminal offences are not broken down by nationality. One offence which is of interest to this report is that under s 25(1)(a) Immigration Act 1971 – knowingly facilitating the entry of an illegal entrant. It is this offence which a person crossing the Channel to the UK with a third country national hidden in the vehicle with a view to gaining access for the third country national to the UK is most likely to be charged with. It is also the second largest category of criminal prosecutions for immigration related acts after the criminal offence of seeking leave to enter or remain or avoidance or postponement of enforcement action by deception.

In 2002, the UK authorities commenced proceedings for the offence of knowingly facilitating illegal entry in 225 cases before the lower criminal courts (the Magistrates' Courts) and in 170 cases before the higher criminal courts (the Crown Courts). In that year 62 persons were found guilty of the offence in the Magistrates' Courts and 142 in the Crown Courts.

Net Migration

The UK population is changing very slowly as a result of immigration. While in 1993 there was a net loss of population from the UK of –1.2 (thousands of persons) in 2002 there was a positive figure of +153.4. For EU (and EEA) nationals, the figures have varied substantially over the past five years:

Year	Net EU migration (per thousand)
1998	+33.0
1999	+8.0
2000	+6.1
2001	+11.2
2002	+11.1

Interestingly, 2002 was the year of the largest exodus of British citizens from the UK in the last ten years: -91.1 persons left in comparison with only –53.0 the year before.

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Chapter VIII
EU Enlargement

Unlike most other Member States, the UK has permitted Members of all the new Member States to work from 1st May 2004, subject to requirement of registration except for Cyprus and Malta (see the European Union (Accessions) Act 2003 and in particular the Accession (Immigration and Worker Registration) Regulations 2004). Nonetheless concern has been expressed about the extent to which the UK will be an attractive destination for 'benefit tourists' intent on settling and taking advantage of social welfare benefits rather than working. This has resulted in new Regulations being passed, the Social Security (Habitual Residence) Amendment Regulations. Two particular changes are worth mentioning here. First, the requirement of habitual residence, referred to above, is amended. In addition to the current test, applicants will have to show lawful residence in the UK thus (according to the Government) bringing the UK into line with other Member States and implementing the principle that EU law permits Member States to refuse entitlement to residence and benefits to non economically active EU Citizens if they become an unreasonable burden on the Host State. There has also been some concern that individuals from the new Member States should not be able to work for short periods of time and then claim welfare benefits. Thus jobseekers from these A-8 States will not have 'lawful residence' in the UK, excluding them from benefits, and those who work but lose or leave their jobs within a year will not be entitled to the full range of benefits.

Although the first of these changes (the lawful residence requirement before benefits are given) seems, in principle, not necessarily incompatible with EU law, the second seems contrary to Community law, and concerns have been expressed about other parts of the Regulations. Attached in the Annexe is a copy of the regulations, a copy of the Explanatory Memorandum produced by the Department of Work and Pensions for the Social Security Advisory Committee, a response to a consultation on the Draft Regulations by that Committee which was prepared by ILPA, the report of the Social Security Advisory Committee and the Government response to this report. In particular, we draw attention to the criticisms of the new Regulations made by the SSAC, which were dismissed by the government in favour of swift action.

A further issue that has arisen following enlargement is the situation of Asylum Seekers from the Accession States who have already been admitted to the UK and whose applications are currently being considered. These individuals were considered no longer eligible for support as asylum seekers, although as existing applicants their applications for asylum will still be considered. They were told, often at sort notice, that they had to find work, support themselves, or leave the UK – and many complained that they were not given sufficient notice and that they would find it difficult or impossible to fulfil the registration requirements in time to start work immediately. Legal challenges are underway at the time of writing to ensure that families are not evicted from their homes immediately, and the Government has indicated that each case will be reviewed individually before any families are evicted. Immediately following enlargement on 1st May, permission was given for the legal challenge to proceed but no further decision on the merits of the cases has been given. Nonetheless, the UK's obligations to

such individuals as new EU Citizens – to permit them to stay and have access to benefits if they are not an 'unreasonable burden' and how this might apply in the case of individuals who have been lawfully present here for several years as asylum-seekers - remains uncertain.

We recommend that the Commission examine carefully the compatibility with EU law of these new changes introduced by the Regulations in 2004 and monitor particuarly carefully the treatment of nationals from the 8 Accession States, if necessary commencing infringement actions.

Chapter IX
Social Security, Students and Citizenship[65]

a) Texts in force

The body of statutes and regulations on social security generally is very large indeed, some of the most significant are as follows.

- Social Security Contributions and Benefit Act 1992
- Social Security Benefit (Persons) Abroad Amendment (No2) Regulations 1994
- Income-related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994
- Social Security (Persons from Abroad) (Miscellaneous Amendments) Regulations 1995
- Job Seekers Act 1995
- Immigration and Asylum Act 1999
- National Asylum Support Service
- Nationality Immigration and Asylum Act 2002 schedule 3
- Witholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation)
- Regulations 2002
- European Union (Accessions) Act 2003
- Accession (Immigration and Worker Registration) Regulations 2004
- Social Security (Habitual Residence) Amendment Regulations 2004
- Immgiration (European Economic Area) and Accession (Amendment) Regulations 2004
- Education (Student Support) Regulations.

Social security

For the general structure of the UK benefits system we refer you to our 1998 report which sets this out in some details. Further more recent details may also be found in publications such as Welfare Benefits (Puttick, 2003) and Law of Social Security (Wikely Ogus Barendt, Butterworths 2002). There are three main categories:

1. contributory social security benefits;
2. non-contributory family and disability benefits;
3. means-tested benefits.

Non-contributory family and disability benefits

In our last three reports, we raised concern about the practice of the Department for Social Security (DSS) to limit the definition of third country national family members (and thus their eligibility for benefits) to spouses, and children aged under 19 years. This practice, which we believe is contrary to Articles 7(2) and 10 of Regulation 1612/68, has to our knowledge yet to be challenged or remedied.

We also note the provisions of the Nationality Immigration and Asylum Act 2002 section 54 and Schedule 3 (reproduced as Annexe 1) and the regulations made under it in

65 With the collaboration of H. Toner, Oxford University.

2002 (reproduced as Annexe 2). The effect of these together is that in respect of EEA nationals, Local authorities are precluded from providing support under a list of specified legislation but are under the regulations empowered to provide for travel arrangements for the individual to return to the EEA state and temporary accommodation while these arrangements are being made.

Habitual Residence

The UK authorities have been developing new guidelines on the application of the habitual residence test in UK law so as to bring its policies into line with the ECJ judgment in *Swaddling*. We reproduce again this note for completeness in the annexe to this chapter, and refer you to the annexes dealing with the Habitual Residence (Amendment) Regulations 2004 for further background on the operation of the habitual residence test. However, eligibility for benefits subject to the habitual residence test has changed again in 2004 as a result of enlargement, and this issue merits fuller discussion.

Students

As mentioned in the last report in 2001, students continue to be an issue of concern. The full implications of the Court of Justice decisions in *Grezelczyk* and *D'Hoop* are still emerging. The issue which arises in the UK is that of access to benefits. If Member States are not entitled to discriminate against students from other Member States in access to education benefits what are the consequences at the national level. We have not at the present time had sight of any revisions to the guidelines to Local Education Authorities consequent on the *Grzelczyk* case.

During the period in question, the issue of funding Higher Education generally was a very hotly contested political question, the final outcome of which remains uncertain at the time of writing. The Government has introduced a Bill, which amongst other things will introduce the possibility of variable University Tuition fees – but concessions in delaying payment of fees until graduation and greater assistance for those from low-income families. More relevant to the specific situation of student is the case of *Bidar* pending before the Court of Justice. Broadly, the effect of the current regulations is that for first degrees, EU Students are charged tuition fees in the same way as home (UK) students and are eligible for the same assistance (means tested whole or partial remission of fees) but are generally not eligible for the subsidised loans provided for living costs due to the eligibility requirement pursuant to the Education (Student Support) Regulations. (We would also note the different practice in Scotland in charging no up-front tuition fees paid by the student from 2000/2001 but this does not affect the distinction that remains between equal treatment which is granted to EU students in respect of fees but not in respect of loans for maintenance costs). From the report of the *Bidar* case (attached) it appears that the practice in granting student loans for maintenance varies across different areas. The case raises difficult and controversial issues as to whether the general practice (which continues) of excluding EU students arriving from other Member States from student maintenance grants and/or subsidised loans on the basis that these remain outside the scope of application of the Treaty (as determined in *Brown*, *Lair*) can continue. This is a particularly sensitive issue at a time when 5.5% of students [sta-

tistic from Higher Education Funding Council for England] are from Non UK EU Member States. The UK is a popular destination for EU students and there is real concern that pressure on places will increase on enlargement. (There is also some concern that with new arrangements being planned which would re-introduce greater 'up-front' immediate assistance to those from low-income backgrounds including reinstatement of limited grants in respect of maintenance costs, this would make the UK an even more attractive destination for students from Accession states where average incomes are significantly below levels in the UK). Pending the outcome of *Bidar*, we have not had sight of the most recent guidance on the application of the eligibility criteria for loans although we are unaware of major amendments since our last report.

EU Citizenship

On Citizenship more generally, the habitual residence test continued to be applied to certain benefits during the period in question. For a fuller explanation of this we refer to the annexes attached dealing with the Habitual Residence (Amendment) Regulations. The status of EU Citizens and the legality of exclusion of immediate access to jobseekers benefits as a result of the habitual residence test was challenged in the Court of Justice in *Collins*, a case referred from the UK. The applicant was an EU Citizen arrived from outside the EU after a number of years absence. His initial claim for Jobseekers Allowance was rejected on the basis that he did not satisfy the habitual residence test. The Court of Justice confirmed that although the applicant, as a newly arrived jobseeker, was not a worker within part II of regulation 1612/68, the continued exclusion of a benefit such as the jobseekers allowance intended to assist the applicant seeking work could no longer be considered outside the material scope of the Treaty. Nonetheless, drawing on *D'Hoop*, it considered that it might be justifiable to require a link to the employment market of the Host State, and that this might be established by a period of residence, although this must not be disproportionate. The implications of this judgment remain to be seen, but as mentioned above, this issue has been heavily influenced by the prospect of enlargement. The *Collins* judgment itself does not seem to have prompted a reconsideration of whether the habitual residence test is strictly necessary – on the contrary, the changes that are now being introduced in 2004 seem to be adding yet another test (lawful residence) that applicants for certain benefits will have to satisfy while keeping the current habitual residence test unchanged. However, we would draw attention to the criticisms made in the report of the Social Security Advisory Committee on these new regulations, noting the current lack of certainty and transparency in the current habitual residence test and expressing concern in particular about the practicalities of introducing a new test of lawful residence to be operated by those administering the benefits system.

We recommend that the Commission monitor the response to the *Collins* judgment and consider carefully whether the operation of the habitual residence test in similar situations in future meets the requirements out there – of proportionality but also in particular of certainty and transparency required by the Collins judgment.

Chapter X
Establishment[66]

CEEC Applicants under the EC Association Agreements (ECAA)

The Commission is referred to previous reports setting out the regime under which applicants are sent from Eastern European Countries (CEECs) may be admitted to the United Kingdom and establish themselves in the United Kingdom under the provisions of the immigration rules. The Rules set out in detail (at paragraphs 200-223 of the Immigration Rules, provided with earlier Reports) the criteria for those seeking to establish businesses in the United Kingdom either by applying for visas abroad or by applying to switch their status in the United Kingdom. The ECJ has examined the UK Immigration Rules and stated that they generally give effect to the establishment provisions contained in the Association Agreements. Its examination of the Immigration Rules in the past has focused on the mandatory entry clearance requirement.

Visas

CEEC nationals applying for entry clearance abroad in order to come to the United Kingdom to establish a business must demonstrate that they meet all the requirements of the immigration rules.

Prior to 1 March 2004 applications for entry clearance would be made at a UK Embassy abroad. The application would then be referred to the Home Office in the UK for approval. If an application was approved the entry clearance office would be requested to grant entry clearance.

There were considerable delays in processing applications for entry clearance from abroad which causes particular difficulties where CEEC businessmen who have identified a business opportunity wish to come to the United Kingdom. These delays were caused firstly by waiting times for individuals to be interviewed by overseas consular posts (in some cases up to two months from the initial application) and further delays whilst the application was being referred back to the UK where it will then join a queue of work. The queue of work throughout the period in question has varied from a minimum of approximately 2 months to a maximum of approximately 6 months. In some cases, applications can therefore take up to 9 months to be considered and approved.

Until 1 April 2003 all applicants were interviewed by the UK Embassy officials. However a number of complaints were made by representatives to the Home Office and the Foreign and Commonwealth Office on the basis that these interviews were causing unacceptable delay which was acting as an obstacle to the freedom of establishment. From that date, all applications were sent directly from the UK Embassy overseas to the Home Office in the UK. This has made the procedure more speedy although the queue of work at the Home Office has continued to cause varying lengths of delay.

Apart from delays, your rappourteurs are aware of a number of complaints that have been made against officials at the British Embassies in Sofia and Bucharest. In some cases the officials appeared to be unaware of the decisions of the ECJ. In particular officials appeared to be unaware that there can be no mandatory refusal of an application

66 With the collaboration of N. Rollason and Nicola Rogers.

from a CEEC businessman who had previously been in the UK in breach of immigration laws. Even where the business application had been approved by the Home Office, the British Embassies are known to have refused to issue the visa on the basis of past immigration history. We have been led to believe that the Foreign and Commonwealth Office has reminded the Embassy officials that general immigration breaches are not sufficient to warrant refusal and any refusal must be on public policy grounds.

The procedure changed on 1 March 2004. Applications for "assessment" are made directly by the CEEC businessman to the Business Case Work Unit in the Home Office in the UK. If the application is approved by the Home Office the businessman will then apply for entry clearance at a British Embassy. The timescales involved are not yet known due to the recent imposition of the procedure although it is anticipated that such changes will speed up procedures.

The processing of all applications was suspended on 30 March 2004 (see below).

On Entry

Following the ECJ's decision in *Barkoci* and *Malik* (Case C-257/99) and in particular the findings of the Court in respect of applicants arriving at UK ports of entry seeking entry upon the basis of the Agreements, the Home Office reconsidered their position in respect of those seeking entry into the United Kingdom on this basis. It should be recalled that a substantial number of cases where such applicants had either arrived at the port and applied immediately upon entry or had sought entry in another capacity were held pending the outcome of the ECJ proceedings. Following the Judgment, the UK government sought to implement a policy which would seek to give effect to the clear statements made by the ECJ on the discretionary treatment of those arriving at UK ports of entry without the relevant visas. The Home Office indicated in correspondence with representatives that, following the Judgment in the ECJ, that the Home Office required an applicant to demonstrate that he "clearly and manifestly" meets the other requirements of the rules such that the entry clearance requirement should be waived. Taking as its cue the ECJ's confirmation that such applications could be given "less extensive" scrutiny, the criteria to be used by the Immigration Service, who consider applications at ports of entry, in these cases are as follows:

> "i. from a brief perusal;
> ii. of the documents provided together with any information;
> iii. it is readily apparent that there is;
> iv. an established and viable business that meets the immigration criteria."

The way that this practice is operated is really only to apply the "readily apparent that there is an established and viable business that meets the immigration criteria". It does not seem to take into account the position of an individual who arrives in the United Kingdom not having yet established a business, a position which was clearly envisaged by the ECJ in its Judgment.

The application of the above criteria is demonstrated in a number of letters from the Immigration Service(Enclosures Chapter IX(2)) in which it is stated that:

> "immigration officers are not accounting or business taxation experts. That is precisely why the IO does not carry out a substantive consideration but only a brief perusal on the face of documents. The ECJ upheld the Secretary of State's entitlement to require the mandatory entry clearance and, were your client to return to Lithuania to obtain that, his application under the ECAA would be substantively considered by the entry clearance officer in conjunction with the Business Case Unit at the Home Office which does have the necessary expertise. Those persons are best placed to consider the application substantively. The IO is not. At this stage, therefore, it is for your client to demonstrate that he clearly and manifestly meets the other requirements of the rules such that the entry clearance requirement should be waived."

What is therefore clear is that there are two regimes which apply to individuals in the way in which their cases are examined. Those applying on entry and those applying for entry clearance. While the ECJ did state that the examination of an applicant at a UK port may be less extensive than that carried out when applications were made for visas abroad, the difficulty is that applications at port now seem to be considered under different criteria from those applied by the Business Case Unit at the Home Office. It is therefore not a question of consideration being less extensive so much as that the criteria applied are different. It is also clear that an individual's previous immigration history is taken into account in coming to a decision which may conflict with the statements of the ECJ in the case of *Glosczuck*.

Residence

The Immigration Rules specifically allow CEEC nationals to switch their status if they are lawful in the United Kingdom at the time when they apply. The regime applicable to those individuals has previously been set out as well as the rapporteurs' concerns about the compliance of the UK immigration rules with the rights set out in the agreements themselves. Of particular concern are the following:

- The prohibition in engaging in business where an individual has applied when lawfully in the United Kingdom and pending a decision of the Home Office approving the application. The Home Office view is that all those who apply who do not have permission to engage in business and those who do so are in breach of their conditions. Thus, if a visitor seeks to remain in the United Kingdom under the ECAA when he or she is lawfully here and begins establishing their business before the Home Office approval, then they will be treated as being in breach of UK immigration law and may in fact fall outside the provisions of the agreement because of their illegal status. This would seem to go against the clear indications given by the ECJ in the CEEC cases which indicated that the right of establishment had direct effect and had as its corollary a right of entry and residence. Although the Court clearly stated that those rights were not absolute and were subject to being checked by the national authority to ensure that an individual was genuinely self-employed, preventing the individual from exercising his right in the United Kingdom for a very considerable period is in our view contrary to the Agreements and effectively negates any of the rights given under those Agreements. Waiting times have substantially increased at the Home Office and preventing an individual from establishing his or her business for up to 11 months is, in our view, contrary to the Agreement in itself.

- The requirement for audited accounts – whilst at one stage the Home Office were not requiring applicants to produce audited accounts, that requirement appears to be more stringently applied now. The Home Office now insists that any accounts evidencing the financial position of business must be prepared by accountants. Again, we are of the view that this is a discriminatory requirement as it does not apply to British business persons who are established in business.

Applications have been taking between 4-11 months in the period of 2002-2003 although towards the end of that period there was a Home Office operation to speed up processing of those applications (Operation Brace). By the end of 2003 applications were being processed in 2-4 weeks.

However, this operation has been the cause of some controversy resulting in a Government enquiry into the processing of all ECAA applications following allegations that fraudulent applications had been approved by the Home Office in Sheffield.

On 30 March 2004 the Government announced the suspension of the processing of all ECAA applications (as well as work permit and other business related applications from Bulgarian and Romanian nationals) whilst the enquiry was underway. Your rappouteurs are of the view that the suspension is contrary to the Agreement since there is no power to unilaterally suspend its operation or application of the rights contained in the Agreement by one party or Member State. We are not aware of the Commission or indeed the Bulgarian or Romanian Government's being consulted about this suspension. Your rappourteurs are of the view that the suspension unlawfully interferes with directly efforceable rights under Community law and will cause considerable loss of business to applicants particularly those who need to travel or indeed those applicants making applications from abroad.

Illegals – The position of overstayers and illegal entrants

The United Kingdom government has repeatedly stated that it has felt vindicated by the decisions of the European Court of Justice in *Kondova* and *Gloczszuck*. Since the decision of the ECJ, it has taken the view that any individual who is an overstayer and who established their business after their leave to remain expired or who entered the United Kingdom illegally, cannot benefit from provisions of the Agreement and should be required to return to their country of origin to apply for entry clearance. The Immigration and Nationality Department Policy Directorate has confirmed to us that all illegals and overstayers must return to their country of origin and that removal action will be taken in order to return them unless they benefited from one of the "concessions" operated outside the immigration rules for individuals with long residence. These concessions effectively allow an individual who has been unlawful in the United Kingdom for 14 years to remain on a permanent basis and for the families of children who has spent 7 years in the United Kingdom to apply to regularise their status.

The difficulty with this position is that it does not take into account the significant difficulties which individuals may have in leaving their businesses in the United Kingdom and travelling abroad to obtain entry clearance. As we have stated above, this can take up to 6 months to obtain during which time the individual will be outside the

United Kingdom not able to operate his or her business and to provide services. This includes individuals who have been in the United Kingdom for a very considerable time (in some cases up to 7 years) and who applied to regularise their status on the basis of the Agreement some considerable time ago. The problem with returning to apply for a visa is made worse by the delays in having such applications considered (4-6 months). We believe that the insistence on those individuals having to return to countries of origin in order to apply for entry clearance where they have been resident in the United Kingdom for so long, have well established businesses and in some cases have families with children at school in the UK, is disproportionate and contrary to not only the provisions of Community law but to the provisions of the ECHR. It should be recalled that in its decision in *Kondova* at paragraph 90 the Court states that immigration measures rejecting applications:

> "must be adopted without prejudice to the obligation to respect the nationals fundamental rights, such as the right to respect for his family life and the right to respect for his property, which follow, for the Member State concerned, for the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 or from other international instruments to which that State may have acceded".

The possibility of a CEEC national having his case reviewed if he is to be removed from the United Kingdom now exists by virtue of Section 82 of the Nationality, Immigration and Asylum Act 2002 which provides for right of appeal against any decision of the Secretary of State to remove a person from the United Kingdom where such removal would allegedly interfere with their human rights. Thus, it is now possible for an individual who has been in the United Kingdom for a considerable time operating a business to seek to have his position reviewed if it is proposed to remove him.

Family Members

The Immigration Rules permit spouses and children under 18 to accompany or join the CEEC applicant in the UK (paragraph 243). Your rappourteurs are aware of cases in which consular posts were refusing applications from family members of CEEC business persons without proper or lawful reasons to do so. In particular we are aware of cases where applicants for family reunion were refused entry clearance on the basis that they or the CEEC business person whom they wished to join in the UK had previously been in the UK in breach of Immigration laws. Such decisions were even made where the CEEC business person had been granted 3 years leave to remain in the UK by the Home Office in full knowledge of the breach of immigration laws.

In addition, applications are often referred back to the Home Office unnecessarily which causes further delay.

b) Judicial Practice

We are aware of cases that have been determined by the Immigration Appellate Authority concerning the refusal of extensions of leave to remain to CEEC businessmen. Adjudicators are given training on CEEC applications and other aspects of EU law. They are therefore well aware of the CEEC Agreements. On the whole they tend to a pragmatic

view of applications and will allow appeals against the refusal of extensions where it can be demonstrated that the appellant can maintain and accommodate himself and any dependants in the UK and is genuinely engaged in business.

Turkish Nationals and CEEC Nationals

Turkish Nationals

A partial review of the UK's application of the decision in *Savas* (case C-37/98), is set out in our previous report. Since that report, the Home Office guidance on Turkish ECAA right of establishment cases in January 2003 [Annex CH X (1)]. We will review the existing rules below.

There is already guidance on the rights of Turkish workers under the EC Turkey Agreement which in effect repeat the wording of Decision 1/80 with some direction for case workers. In the guidance, issues of importance are the fact that the guidance advises that after one years employment with one employment on renewal of the Turkish workers documents, he or she should be granted only an extension for a further one year, rather than the three year extension provided for in Decision 1/80. Further, the guidance states "Nor do we accept that students and trainees (because of the specific reference to vocational training in Article 7) should benefit from the provision. Nor should Turkish au pairs, because they come to learn English, are required to leave and cannot by their 5 hours helping in the home be said to be integrated into the labour force." (IND Policy Instructions (IDIs) Chapter 5 Section 10). This guidance is clearly not compliant with the jurisprudence of the European Court of Justice. See our report 2001 for further discussion of this guidance.

Visas/entry

In our previous report, we raised concerns about the application of the *Savas* judgment in respect of visa (entry clearance) applications and the possibility of Turkish nationals submitting such applications in accordance with the decision in *Savas*. Home Office guidance on handling such applications states:

> "In accordance with *Savas* there is no directly enforceable right to come to the United Kingdom to exercise a right of freedom of establishment (paragraph 64). The Turkish ECAA does not provide Turkish nationals equivalent rights to EU nationals. Applicants for entry clearance abroad to come to the UK and establish themselves are required to seek entry clearance under the current provisions for leave for business people in (at date of issue of this guidance) HC 395 as amended (paragraphs 200-204). Given that the current immigration rules are applied in this situation an entry visa requirement for Turkish nationals can be maintained".

This reading of *Savas* ignores the application of the standstill clause and that while such a clause does not in itself provide a right of entry to Turkish nationals under Community law, it "freezes" the position in relation to establishment of Turkish nationals as it was on 1 January 1973. The rules at that time were clear in that they allowed Turkish nationals who applied for entry clearance to come to the United Kingdom to establish themselves without the need for either a visa (Turkish nationals were not subjected to a visa regime at that time) or the requirement to invest significant funds within the busi-

ness (at present £ 200,000) and employ 2 UK resident employees on a full time basis in the business.

The current UK rules excluding visa applications for Turkish nationals wishing to establish themselves clearly do not comply with the standstill clause.

Similarly, those seeking leave to enter under the Turkish Association Agreement on arrival in the United Kingdom will be treated as equivalent to an out of country application (see above) and are to be considered under the existing rules which require applicants to hold a business entry clearance.

Turkish nationals arriving with visas who subsequently seek to enter the United Kingdom on the basis of a proposed business are also to be refused.

Those seeking leave to enter the United Kingdom who are on temporary admission (a status often given to asylum seekers who enter the UK illegally or those who are refused entry into the United Kingdom) and who seek permission to enter to establish themselves in business are to be refused under the existing rules unless they have, as part of their temporary admission, been given no restrictions on taking employment or self employment, in which case the application will be considered under the standstill provision under the existing rules in force on 1 January 1973. Those persons must demonstrate that their documents clearly and manifestly show there is a clearly an established business which meets the immigration criteria. This is at odds with paragraph 30 of HC 509, the applicable rules in 1973, which simply state that: "Passengers who are unable to present such [entry] clearance but nevertheless seem likely to be able to satisfy the requirements of one of the next two paragraphs [the entry clearance requirements] should be admitted for a period of not more than 2 months with a prohibition on employment and advised to present their case to the Home Office."

Again, it appears that the standstill clause is not being applied correctly and that new rules other than those which were applicable on 1 January 1973 are being applied contrary to the standstill provision.

The guidance then becomes a little confused. It seeks to exclude applications made by those who have temporary admission, and have absconded for a period of 1 year or more on temporary admission during which period they have set up their business and are then seeking permission to enter on the basis of an established business. The rationale given by the Home Office for this differential treatment appears to be that they "can be said to have waived the limited right of establishment provided by the standstill clause". Only when an explanation as to why the person absconded is given and that person previously had permission to establish themselves in business can their case be considered under HC 509.

Again, it appears that the standstill clause is being applied arbitrarily. On 1 January 1973, immigration officers could take into account a person's immigration history when deciding whether to allow them to remain in the United Kingdom in order to establish themselves. Although we are unclear as to the reason why the one year test is introduced into the guidance, it may be because that was the guidance given to immigration officers in 1973. However we have not had sight of any guidance given to immigration officers at that time.

Residence

The guidance confirms that self employed Turkish nationals who have lawful residence in the United Kingdom in any capacity can apply to remain under the establishment provision are entitled to have their application considered in accordance with the standstill clause under the 1973 rules. This includes those switching from other categories to business.

Again, where a Turkish overstayer is seeking to regularise their status, whether they can benefit from the standstill clause appears to be dependent on the seriousness of the breaches of immigration rules. In cases where there is "minor illegality" such as a brief period of overstaying, applications can be considered on the basis of the standstill clause. In cases of major illegality including serious deception or overstaying for one year or more, then the current more restrictive immigration rules would be applied.

Finally, those who are illegal entrants (including clandestine entrants or those who use deception to gain entry) are deemed to have waived the limited right of establishment provided by the standstill clause. The more restrictive immigration rules, including a visa requirement, will apply to them.

The Home Office's guidance shows clearly that the Home Office remains confused about the impact of the *Savas* judgment by confusing the standstill clause, which merely provides a right to be treated under the national laws prevailing on 1 January 1973, with some limited right of establishment which can be lost through the person's conduct. Of particular concern are the exclusion of Turkish nationals from applying for visas and on entry into the United Kingdom in a number of circumstances. This is subject to a challenge in the UK Court (see below). The confusion was recognised by the UK courts (see Veli Tum (below)).

Administrative Practice

Applications made under the EC Turkey agreement standstill clause are considered on the same basis as those made by other ECAA applicants applying under the Association agreements with Central Eastern European countries. The ECAA Team at the Managed Migration Directorate at the Home Office consider all such applications. There is a separate queue for consideration of Turkish applications. No application form is required. Dependants including spouses and children under 18 are granted permission to stay for the same period as the Turkish business person. Applications were taking approximately 12 months to be processed at the start of the period covered by this report and around 2-4 months towards the end of that period, although backlogs have arisen recently.

c) Judicial practice

The Queen on the application of (1) Veli Tum and (2) Mehmet Dari v. Secretary of State for the Home Department [2003] EWHC 2745, QBD 19 November 2003 [Annex CH IX (2)]

The High Court considered that the case of two Turkish nationals claiming leave to enter the United Kingdom for the purposes of establishing a business. The High Court con-

sidered whether Community law obliged the Secretary of State to apply the immigration entry rules in force on 1 January 1973 or to apply current less favourable immigration rules.

The first appellant was a Turkish national who was discovered on board a ferry at Dover. He was refused leave to enter and subsequently claimed asylum before removal. Mr Dari was granted temporary admission and his asylum application was refused, France having accepted responsibility under the Dublin Convention. He subsequently absconded and pursued a number of legal appeals. In the meantime he had set up a pizza business and established a UK Limited company in respect of which it was accepted that he was self employed.

The second claimant Mr Tum was a Turkish national who arrived in the UK on 29 November 2001. He claimed asylum on arrival and was granted temporary admission with a restriction on employment. Mr Tum subsequently applied for leave to enter on the basis of his prospective self employment in reliance on the Association Agreement. He submitted a business plan for the proposed business, offers of contracts from prospective customers and letters of support. The Home Office responded asserting that Mr Tum required entry clearance before seeking to establish a business and that he would therefore be removed to Germany.

The High Court considered that whether or not those seeking to enter the United Kingdom, as it was agreed was the case with the claimants, could invoke the standstill clause contained in article 41(1) of the additional protocol to the EC Turkey Association Agreement. In allowing the appeal, Mr Justice Davis stated:

> "At all events, on the view I take of article 41(1) I conclude that any Turkish national genuinely seeking to establish a business within the UK as a self employed person and falling within any of the four categories which I have identified above would in principle be entitled to invoke the "standstill" provision of article 41(1) of the Additional Protocol. …that being so…it follows that, by reason of the operation of article 41(1) of the Additional Protocol, Mr Tum and Mr Dari are entitled to require their applications to be considered by reference to the applicable immigration rules in place as at 1 January 1973."

This case was heard by the Court of Appeal in May 2004. The Court found in favour of the appellants arguments.

K. v. Secretary of State for the Home Department [2003 UKIATOOO33] Immigration Appeal Tribunal, 22 July 2003. [Annex CH IX (3)]

The appellant was a Turkish national who entered the United Kingdom on 11 May 1997 as an au pair and was given 2 years' permission to stay. On 7 May 1999 she applied for indefinite leave to remain on the basis of her marriage to a person settled in the United Kingdom and for leave to continue her employment under the EU Turkish Association Agreement. Her application was refused as her husband was not present and settled in the United Kingdom as is required under the Immigration Rules. Her application under the Association Agreement was refused on the basis that she had been admitted as an au pair and was expected to leave the United Kingdom at the end of her placement. In light of this she could not be said to have been integrated into the workforce.

The Immigration Appeal Tribunal agreed that the first application on the basis of the marriage could not succeed and therefore considered her rights under Decision 1/80 of the Association Council. The Appellant worked for a family for 2 days for a total of 15 hours, receiving £ 30 per week and had previously worked full time until her marriage (22-25 hours per week).

The tribunal considered whether the Appellant was a worker. The Appellant relied on the ECJ's jurisprudence in *Birden* [C-1/97] and that she was a worker within the meaning of Community Law. The Tribunal, however, accepted the Home Office's argument that the Appellant was not a worker for the simple reason that she was pursuing activity as an au pair within the specific provisions of the immigration rules. The Tribunal's view was confirmed as follows:

> "The Appellant does not meet the basic community definition of a "worker". She has been granted leave to enter as an au pair. The purpose of this arrangement is to learn English and to live as a member of an English speaking family. The restriction in the passport on other types of work cannot be interpreted as an admission or concession that the Appellant is in fact a worker. The adjudicator was correct to find that the Appellant's activities in the United Kingdom were within the specific rules prescribed for an au pair placement and did not amount to being a worker."

The Court went on to state that:

> "As an au pair, she cannot properly be regarded as belonging to the labour force."

In coming to this conclusion, the tribunal seems to have been swayed by the fact that under the UK immigration rules an au pair placement is an arrangement primarily for the purpose of learning English and living with an English speaking family.

The decision of the tribunal on who is and who is not a worker seems to be contrary to the ECJ's jurisprudence in *Birden*.