REPORT
on the Free Movement of Workers in the United Kingdom in 2004

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Introduction

This is the first report which we have undertaken since 1 May 2004 and thus the matter of highest concern is the treatment of the A8 nationals (ie nationals of all the new Member States who are subject to transitional provisions relating to the free movement of workers) in the UK. Unlike most other Member States, the UK did not intend to apply restrictions under the transitional measures to limit free movement of workers from the new Member States. However, in the final months before 1 May 2004, the Government was influenced by substantial concerns expressed in parts of the press regarding the high (so it was considered) risk of substantial flows of workers from the A8 to the UK in search of work and introduced a 'light' work permit scheme for these nationals. On account of this approach to nationals of the new Member States (excluding Cyprus and Malta) there has been substantial interest in tracking the movement of A8 nationals and their work.

Because of the importance of this group of workers in the UK and the transversal nature of the provisions relating to them, we have included sections in each chapter on how A8 nationals have been treated as regards the specific area. The most substantial information about the worker registration scheme in the UK is to be found in chapter 6, immigration and employment as access to employment for A8 nationals remains a matter of national law. The statistical information, which is quite detailed, is to be found in chapter 7. One of the areas which has given rise to substantial concern has been the statements of various political leaders in the UK that A8 nationals are to be excluded from social benefits. The measures which have been introduced on this matter are to be found in chapter 8 and give rise to concern. This information is repeated in chapter 7 in consolidated form.

There are two other substantial matters of concern regarding the application of EU free movement law in the UK and both relate to third country nationals. The UK remains highly resistant to a comprehensive application of EU third country agreements which relate to workers or the self employed. The UK's failure to include the provisions of EU law regulating the rights of Turkish workers remains inexplicable after so many judgments over more than 10 years from the ECJ. Still Turkish workers are struggling to enjoy rights of continued residence and work in the UK which rights are guaranteed by EU law but which UK authorities have trouble applying properly. Even more worrying has been the UK's unilateral suspension of the consideration of applications for visas and residence documents by self employed nationals of Bulgaria and Romania. This suspension continued for many months, resulting in self employed workers from those countries been stranded in one country or another while their papers sat in a queue. The new processing system which has been instituted in Bulgaria and Romania at the British consulates leaves much to be desired. It appears to lack transparency and consistency. There appears to be very little control over the decision making which is taking place and a recent visit to those two countries by representatives of the UK lawyers association (Immigration Law Practitioners' Association) indicated that there may even be a systematic refusal to provide applicants with information regarding their rights of appeal.

Finally, delays once again top the list of most common complaints of EU nationals against the application of EU law on free movement of workers. While over the past ten years the resources available to the UK immigration authorities have tripled, the ability of those authorities to deal in a timely manner even with straight forward applications remains abysmal. As we note in chapter 4, now even the internal instructions to case workers at the UK authorities advise that they should only pay attention to the 6 month time limit for issu-

ing documents where the applicant or he or her adviser brings it to the case workers attention. This is really rather depressing and results in the frustration of the rights of EU nationals through neglect.

Once again, this year we make recommendations at the end of each chapter regarding action which we consider the Commission may wish to take in respect of issues arising there. We have also compiled these recommendations here for ease of use by the reader.

Chapter 1
Entry, Residence and Departure[1]

Entry

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

The International Passenger Survey estimates that 14.4 million EEA nationals from the old 15 Member States arrived in the United Kingdom in 2004(not including citizens of the Republic of Ireland. EEA Nationals continue 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. Around 1.2 million A8 nationals entered the UK in 2004, bringing the total from the EU 25 to around 15.8 million. Collection of statistics in relation to visits to the United Kingdom from the enlarged European Union were started from February 2004 in anticipation of accession. These showed the expected increase in visits from accession nationals (not including Malta and Cyprus)from around 74,000 in April 2004 to 197,000 in May 2004, with total entries peaking in July 2004 at 211,000 for entries from nationals of all accession countries.

Existing prior entry control at designated ports outside the UK (Dover, Calais, Boulogne and Dunkirk) were extended to Belgium (Brussels–Midi Eurostar Terminal) under the terms of an agreement made between the British and Belgian governments on 15 April 2004. Our previous concerns remain that such prior checks do not comply with Article 2 of Council Directive 68/360 in that third country national family members of EEA nationals may be prohibited from leaving the French and Belgian territories.

UK immigration continues to exercise "light control" on nationals of other member states, to the UK. The EDIs (European Directorates Instructions) referred to in this report do not deal specifically with the question of entry. There appear to have been no major problems with the admission of A10 nationals following accession.

Residence

Texts in Force

- Immigration Act 1971, Immigration Act 1988
- Immigration and Asylum Act 1999

1 Nick Rollason, Kingsley Napley.

- 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

At the date of writing, there are no published statistics in respect of residence of EEA nationals United Kingdom in 2004. A number of requests have been made for the Home Office to provide this information under the Freedom of Information Act 2000, which came into force on 1 January 2005. These requests for statistics have been refused under section 12 of the Act, which exempts public bodies from providing information where the cost of providing the information exceeds a specified limit. Direct requests to the Home Office have also been declined, despite the fact that your rapporteurs have clearly stated that these were required for the preparation of this report.

EEA Nationals are not required to obtain residence permits. Delays in the issue of residence permits have continued. While there are no statistics available and while some applications continued to be delayed for many months, anecdotal evidence suggests that overall, the timescales for completing application for residence permits improved in 2004. From March 2004, straightforward EEA applications could be processed by the Home Offices Initial Consideration Caseworkers. It is not clear on what basis cases were deemed to be straightforward. In addition, facilities were introduced for requesting priority for certain applications where, for example, the applicants were travelling. However, an indication of how seriously the Home Office takes its obligations to issue residence permits as soon as possible and an event within six months can be found in Chapter 1, section 1.4 of the EDI's which states that every effort to meet the six month deadline must be made "particularly where an applicant draws our attention to an alleged breach of this article."

The Immigration Rules were amended on I January 2005 to give effect to the decision of the Court of Justice in *Chen*. As this falls outside the dates of this report, full analysis will be provided in our next report. However, it should be noted that the United Kingdom has subjected the non-EEA parents of self sufficient EEA children to the requirement to obtain leave to enter or remain under the Immigration Rules, presumably so that these parents can be prevented from working by having conditions prohibiting employment attached to their "leave to remain". The EDI's deal extensively with the issue of the rights of residence of self-sufficient EEA children.

Access to employment – third country national family members

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 main difficulty caused by this provision, however, relates to access to employment of third country national family members of EEA nationals and in particular the implementation of Article 11 of Regulation 1612/68. In principle, this provision is implemented by regulation 14 (3) of the Immigration (EEA) Regulations 2000 which states that the spouse of a qualified person:

> "may reside and pursue economic activity in the United Kingdom notwithstanding that his application for a residence permit or residence document (as the case may be) has not been determined by the Secretary of State."

However, the implementing legislation and the guidance given to employers does not permit employers to check document which would prove that the person is the third country national family members of the EEA national (passports of the couple and the marriage certificate). Instead, this requires the passport of the third country national family member endorsed with a residence document. This clearly creates an obstacle in access to employment for these third country national family members contrary to Article 11.

The Home Office have confirmed in recent correspondence that they are entitled to require these persons to obtain a residence document in order to ensure that they are not a party to a marriage of convenience.

We are aware that the Commission recently launched proceedings against Luxembourg in an action brought on 8 April 2005 (Case C-165/05) before the Court of Justice seeking a declaration that, by imposing in its legislation an obligation on nationals of non-member countries married to migrant workers from the European Union to obtain a work permit and by failing to bring its legislation into line with Community law, the Grand Duchy of Luxembourg has failed to fulfill its obligations under Article 11. In its legal argument the Commission has made the following points:

> "*The right to work is unconditional and means that a spouse or other family member who is a national of a non-member country cannot be required to apply for or obtain a work permit in order to be able to take up an activity as an employed person inasmuch as that would have the effect of rendering that right subject to a further prior condition at variance with the express provisions of the aforementioned Article 11* (our emphasis) Luxembourg nationals are not required to hold a work permit in order to be able to take up employment in the Grand Duchy. It is for that reason contrary to Article 3 of Regulation No 1612/68 to impose such an obligation on nationals of non-member countries married to migrant workers from the European Union.
>
> The national statutory framework must dispel all doubt and ambiguity not only as to the content of the applicable national rules but also in regard to the formal value of those rules."

By effectively subjecting the right to take up economic activities contained in Article 11 to first obtaining a residence permit, the Secretary of State is clearly putting an obstacle in the way of the non-EEA family members of EEA nationals in taking to economic activity and preventing the integration aimed at by the Regulation.

The Home Office also suggest that all such individuals should have obtained an EEA family permit and if they did not then they will be penalised for this by not being able to work until they have obtained a residence document. The Commission will be well aware that the requirement which may be applied by a member State to third country national spouses of EEA nationals to obtain a visa is not an absolute requirement as confirmed by the Court of Justice in the case of Case C-459/99 *MRAX* and most recently in *Commission –v-Spain* (Case C-157/03). That line of case made it clear that a member State cannot insist on third country nationals spouse of an EEA national having a visa in order to exercise the rights under Regulation 1612/68.

Requiring their non-EEA national to either leave the country to apply for an EEA family permit abroad to be able to start work, or apply for a residence document and wait for

several months before obtaining the endorsement in their passport which would enable them to start work without offending s.8, would also seem entirely disproportionate.

The Secretary of State's concerns with regard to the question of "abuse" cannot justify a discriminatory obstacle. While the Secretary of State is entitled to ensure that marriage is not one entered into solely for the purposes of obtaining a residence permit, those "checks" can only be made at the stage when an individual applies for a residence permit. Prior to that, the non-EEA spouse of an EEA national may enter the United Kingdom on production of the documents listed in Directive 68/360 (bearing in mind the ECJ's comments about the visa requirement for third country national family members) and should, under Article 11 of Regulation 1612/68, be entitled to take up economic activity *immediately*.

Where the EEA national and their spouse subsequently apply for a residence permit and document respectively then that will be correct time for the member State authority to check whether indeed the EEA national has a right of residence and whether the marriage is one which was entered into for the sole purposes of obtaining a residence permit. If the State authority then concludes fairly and properly that no such right of residence exists for the non-EEA spouse then it would be for that Member State to take the appropriate action to expel the third country national and take any appropriate measures to prevent that person from continuing economic activity on the basis that he or she has no right to do so under Article 11 1612/68.

The above scenario is clearly entirely different to one where the non-EEA spouse of an EEA national must first obtain the residence document (which as the Commission knows can take many months) and only then will they be entitled to comply with the national requirements under section 8 of the Asylum and Immigration Act 1996 to persuade employers that they are entitled to take up economic activity. Such a position clearly raises a major obstacle in the integration of family members and in our view, breaches Article 11.

We recommend that the Commission request clarification as to why the UK believes that it can justify preventing third country national family members of EU nationals from taking up economic activities as employed persons by requiring them to first obtain a residence document.

Administrative Practice

As set out in our previous report, discrimination against EEA nationals and their family members continues as against third country national in the application process. As the Commission is aware, the Home Office continues to provide a premium same day service for certain straightforward applications (for example for spouses of British citizens or those settled in the UK seeking leave to remain). EEA nationals and their family members remain excluded from this fast track service, even if they are entirely straightforward.

The failure to provide a same day service and access to the Public Enquiry Office for EEA nationals and their family members is, in your rapporteurs' 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. 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.

We recommend that the Commission seek urgent clarification from the Home Office as to why a same day application service is not available to EEA nationals and their non-EEA

family members 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.

Departure[2]

Texts in force

- Immigration Acts 1971
- Immigration Act 1988
- Immigration and Asylum Act 1999
- Immigration (European Economic Area) Regulations 2000
- The Immigration (European Economic Area) (Amendments) Regulations 2001
- Nationality Immigration and Asylum Act 2002
- The Immigration (Swiss free movement of persons) Number 3 Regulations 2003
- Immigration (European Economic Area) (Amendment) Regulations 2003

Practice

The Home Office publishes various instructions for caseworkers on its web-site, including instructions dealing with general immigration,[3] asylum,[4] and nationality.[5] The instructions are said to have been made available "in accordance with the principles of openness in the White Paper on Freedom of Information and in the existing Code of Practice on Access to Government Information". In the last year the European Directorate Instructions (EDIs) have been added to the web-site. The EDIs – described as "procedural guidelines for caseworkers on the implementation of the Immigration (European Economic Area) Regulations 2000" – have particular importance for the exclusion and expulsion of Union citizens on grounds of public policy, public security and public health.

Most relevant in the present context is Chapter 3 of the EDIs entitled "Deportation (EEA nationals)". Analysis in that chapter of the exercise of the power of deportation on grounds of public security and public health is largely uncontroversial. As regards public security, paragraph 2.2 of the Chapter recognises the United Kingdom's right to protect itself from threats to national security posed, for example, by terrorists. However, in the case of terrorists present practice is not to invoke the public security ground as the basis for deportation but instead to proceed by making an exclusion order under the Prevention of Terrorism Act.

The same cannot be said, however, for the guidance given to caseworkers spelling out the United Kingdom's approach to deportation on grounds of public policy (by far and away the most frequently invoked basis on which Union citizens face expulsion from the United Kingdom).

Whilst there is appropriate general reference to the need to comply with the principles laid down by Council Directive 64/221 (with the example given that deportation "shall not be invoked to secure economic ends and a decision must be based exclusively on the per-

2 This section was written by Rick Scannell, 2 Garden Court.
3 The Immigration Directorates' Instructions.
4 The Asylum Policy Instructions.
5 The Nationality Instructions.

sonal conduct of the individual concerned"), analysis in paragraph 2.1 of the public policy proviso is at best misleading and incomplete.

By reference to the decision of the ECJ in Case 30/77 *Regina v Bouchereau* [1977] ECR 1999 the guidance correctly states that in order for measures to be taken on public policy grounds "the individual should be shown to constitute a present threat to the requirements of public policy", and that the concept of public policy "pre-supposes a genuine and serious threat to one of the fundamental interests of society". However, the guidance continues:

> According to *Bouchereau* an individual who constitutes a threat to public policy would normally be a person who has shown a propensity to re-offend, although past conduct alone may constitute such a threat.

It is the identification of those whose "past conduct alone" is according to the guidance sufficient to warrant deportation on public policy grounds which is most contentious. The guidance states that in considering whether a person's conduct merits deportation on public policy grounds caseworkers should be satisfied that the offence is serious (defined as one "normally attracting a custodial sentence of two years or more"). The guidance states thereafter that deportation may be appropriate where the person's history and previous convictions provide evidence of a propensity to reoffend. However, where there is no firm evidence of a propensity to re-offend the guidance makes clear that deportation may be appropriate "where an offence is particularly serious (drug smuggling, facilitating entry of illegal immigrants, rape, murder etc)".

We are particularly concerned by such prescriptive approach to both the identification of serious offences and to the listing of particular offences which are treated as sufficient in themselves to warrant deportation on grounds of public policy without evidence of propensity to offend. We have no doubt but that this leads to serious dilution of consistently applied Community law principles in the present context.

Such concern is based not only on the experience of practitioners but is apparent from paragraph 9.3 of Chapter 3 itself. Paragraph 9.3 identifies the approach to be taken to the revocation of deportation orders. In identifying the "serious offences" justifying a deportation order to be maintained "for at least 10 years" the guidance describes such serious offences as "normally those which justified deportation on public policy grounds in themselves (regardless of any evidence of a propensity to re-offend)". The list of examples of such offences is long:

- *Violence against the person*: Murder; Attempted Murder; Threat or conspiracy to murder; Manslaughter; Inflicting grievous bodily harm; Inflicting actual bodily harm;
- *Sexual offences*: Offences against children; Rape; Indecent assault (but not indecent exposure); Procurement; Pornography
- *Burglary robbery, theft*: Armed robbery; Persistent and/or large scale cases of theft or burglary
- *Other offences*: Blackmail; Counterfeiting; Forgery (including trafficking in forged Passports); Trafficking in dangerous drugs; Public order/riot/affray etc; Facilitation (assisting unlawful immigration); Trafficking in prostitution

As regards the legal analysis in Chapter 3 we consider the interpretation of *Bouchereau* to be wrong. At paragraphs 27 to 29 of its judgment in *Bouchereau* the ECJ makes very clear its view that in light of Article 3(2) of Council Directive 64/221 a previous conviction can be taken into account *only* in so far as the circumstances which gave rise to such conviction are

evidence "of personal conduct constituting a present threat to the requirements of public policy". Whilst correct that the ECJ did not rule out the possibility that past conduct alone might constitute a present threat to the requirements of public policy this is very far indeed from endorsement of the 'spin' put on the case in the guidance. The decision certainly could not be said to vouchsafe an approach which in practice enjoins caseworkers to pursue the deportation of EU nationals convicted of particular types of offence "regardless of any evidence of a propensity to re-offend".

Moreover, the decision of the ECJ in Case C-340/97 *Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg* [2000] ECR I-00957 – applying the consistently held principles developed through Case 30/77 *Regina v Bouchereau* [1977] ECR 1999; Case C-348/96 *Calfa* [1999] ECR I-11 and Case 67/74 *Bonsignore v Stadt Köln* [1975] ECR 297 – has made clear in a case involving conviction for being an accomplice in the trafficking of heroin that expulsion on public policy grounds would be justified only if the individual's "personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy" (at paragraph 61). It is to be noted that the guidance makes no reference whatsoever to *Nazli*.

We recommend that the Commission requests an explanation from the UK authorities as to why their guidance to caseworkers fails properly to reflect Community law principles applicable where deportation is invoked on public policy grounds, in particular insofar as such guidance fails to require caseworkers to identify whether an individual's personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy before invoking such measures.

We recommend that the Commission requests an explanation from the UK authorities as to why their guidance to caseworkers is prescriptive about particular types of offence which (contrary to Article 3.2 of Council Directive 64/221) normally justify deportation on public policy grounds in themselves (regardless of any evidence of a propensity to re-offend).

We recommend that the Commission requests an explanation from the UK authorities as to precisely what is the present threat to the requirements of public policy of individuals convicted of any of the offences listed in paragraph 9.3 of Chapter 3 of the EDIs where there is no indication in an individual case of any propensity to re-offend.

Chapter II
Equality of Treatment[6]

Texts in force

- Race Relations (Amendment) Act 2000
- Nationality, Immigration and Asylum Act 2002 (repeals paras 23 – 29 and 32 – 40 of the 2000 Act)
- Race Relations Act 1976 (Amendment) Regulations 2003
- Immigration (Provision of Physical Data) Regulations 2003 now amended by SI 2004/474 (adding Sri Lanka and Rwanda to the list) and
- Immigration (Provision of Physical Data) (Amendment) Regulations 2004 (adding Djibouti, Eritrea, Ethiopia, Tanzania and Uganda to the list)
- 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
- Race Relations (Immigration and Asylum) (Employment under the Sectors-Based Scheme) Authorisation 2003
- Race Relations (Immigration and Asylum) Authorisation 2003
- Race Relations (Immigration and Asylum) Authorisation 2004

According to the Home Office the Ministerial authorisations under s 19D RRA are listed at the end of the Race Monitor's second annual report at http://www.ind.homeoffice.gov.uk/ind/en/home/0/reports/second_annual_report.html. They are all still in force except for the authorisation dated 24 February 2004 and extended 21 May 2004 on Examination of Documents (prioritising examination of travel documents of persons of Somali origin), which has expired.

Challenging Discrimination in Border Controls in the New Member States

For the past three years one of the main issues we have been addressing in this section has been the question of discrimination in the application of UK immigration measures and border controls. In the 2002-3 report we advised on the Race Relations Authorisations under section 19D Race Relations (Amendment Act) 2000 which permit the Minister to discriminate on grounds of nationality and ethnic origin.

A challenge by the European Roma Rights Centre and others regarding discrimination against Roma in UK immigration practices at Prague airport raised a number of the critical issues about discrimination and immigration controls. This case came before the House of Lords, in R v Immigration Office at Prague Airport and another ex p European Roma Rights Centre and others [2004] UKHL 55, judgment in which was handed down on 9 December 2004. Their Lordships found that the treatment of Roma carried out by UK Immigration Officers at Prague Airport in the context of juxtaposed controls constituted unlawful discrimination on the basis of race. The UK Government did not rely on the Authorisation under section 19D before the House of Lords. It stated that the Authorisation was not, in law,

6 Elspeth Guild, Kingsley Napley and Radboud University.

an instruction. Instead it argued that that the UK immigration officers were not discriminating at all between Roma and non Roma Czech nationals. The difference in treatment was the result of the proportion of Roma and non Roma who were likely to apply for asylum in the UK not on whether they were Roma or not. Nonetheless, their Lordships took into account the Instruction and some of them considered that it was important to the finding of unlawful discrimination against the UK authorities.

The facts on which the cases were based are summarised in the judgment as follows:

> "At issue in this appeal is the lawfulness of procedures adopted by the British authorities and applied to the six individual appellants at Prague Airport in July 2001. All these appellants are Czech nationals of Romani ethnic origin ("Roma"). All required leave to enter the United Kingdom. All were refused it by British immigration officers temporarily stationed at Prague Airport. Three of these appellants stated that they intended to claim asylum on arrival in the UK. Two gave other reasons for wishing to visit the UK but were in fact intending to claim asylum on arrival. One (HM) gave a reason for wishing to visit the UK which the immigration officer did not accept: she may have been intending to claim asylum on arrival in the UK or she may not." (para. 1).

The UK and the Czech Republic made an agreement in February 2001 that British immigration officers could be stationed at Prague airport and permitted to give or refuse leave to enter the UK to passengers there before they bordered the aircraft. The procedure called preclearance had as its object, according to their Lordships "to stem the flow of asylum seekers from the Czech Republic" (para 4).

It is worth noting that the Prague Airport procedure of 2001 was the first time the UK had used such a procedure and the experiment has not been repeated (para 33 judgment). The flavour of the political unacceptability of the practice is caught in the opinion of Lord Steyn. His choice of wording is particularly telling:

> "The essential features of the operation can be stated quite simply. It was designed as a response to an influx of Czech Roma into the United Kingdom. The immigration officers knew that the reason why they were stationed in Prague was to stop asylum seekers travelling to the United Kingdom. They also knew that almost all Czech asylum seekers were Roma, because the Roma are a disadvantaged racial minority in the Czech Republic. Thus there was from the outset a high risk that individuals recognised as Roma would be targeted by specially intrusive and sceptical questioning. There was a striking difference in treatment of Roma and non Roma at the hands of immigration officers operating at Prague Airport. The statistics show that almost 90% of Roma were refused leave to enter and only 0.2% of non Roma were refused leave to enter. Roma were 400 times more likely than non Roma to be refused permission. No attempt was made by the Home Office to explain by the evidence of immigration officers the difference in treatment of Roma and non Roma. Although the Home Office was from the beginning on notice of the high risk of discrimination on grounds of race, no attempt was made to guard against discrimination." (para. 33).

According to documents produced in court, the Home Office advised immigration officers that "The fact that a passenger belongs to one of these ethnic or national groups will be sufficient to justify discrimination – without reference to additional statistical or intelligence information – if an immigration officer considers such discrimination is warranted." (para 35). Lord Steyn, at least, was not willing to pass the Authorisations without comment. He considered that the existence of the Authorisation permitting immigration officers to discrimination

on the basis of ethnic origin Roma informed immigration officers on how to understand their principal task (para. 35).

The five judges who comprised the court found that the practice constituted unlawful discrimination though Lord Carswell so found on only the ground that the system applied constituted a discriminatory practice as it resulted in the stereotyping of all Roma thus resulting in their differential treatment as a group irrespective of their individual characteristics. Lord Steyn considered that not only did the action constituted unlawful discrimination under UK law, in particular as a result of the change which took effect from 2 April 2001 extending the Race Relations Act to acts of public authorities but it was contrary to the UK's obligations under ICERD and the ICCPR.

The lead judgment on the discrimination issue was given by the first woman appointed to the House of Lords in a judicial capacity. The key question she had to deal with was whether the practices of the UK immigration officers at Prague Airport actually constituted discrimination or whether the difference in treatment was such that it could not be discrimination. The judges in the lower courts had accepted that there was a difference but did not accept that it constituted discrimination. Their position was that the Roma were not being treated differently *qua* Roma but *qua* potential asylum-seekers. Baroness Hale considered whether the factual basis was made out. She noted that the objective of the practice was not to prevent would be travellers at the airport but to deter them from even getting that far. She states

> "Given the high degree of congruence between the object of the exercise and a particular ethnic group, which was recognised in public statements by the Czech Prime Minister and his deputy, the risk that the operation would be carried out in a racially discriminatory manner was very high."

She also undermines the UK Government's argument that it was not relying on the section 19D Authorisations in respect of the practice. She notes that the slides and accompanying briefing notes for training which all staff received on the 2000 Act and the Ministerial Authorisations stress

> "the importance of the Authorisations to the work of the Department and [ ] point out that discrimination against the listed groups is permissible without statistical or intelligence information, and advise of the need to be familiar with the list, to be able to identify passengers belonging to those groups, and to use their experience, knowledge of groups and local intelligence to assist in identification." (para 88).

The effect of the Prague operation in her Ladyship's opinion when taken in conjunction with the ministerial authorisations was "to create such a high risk that the Prague officers would consciously or unconsciously treat Roma less favourably than others that very specific instructions were needed to counteract this." (para. 89) No such instructions were given.

As a result the court found that the practice was contrary to the UK legislation (the Race Relations Act 1976) but also the majority of their Lordships considered that it was contrary to the UK's international obligations in particular the ICCPR and the ICERD. While the judgment does not consider EU law, it seems highly likely that the practice would also be contrary to the right of free movement of persons, particularly as regards service providers and recipients and the self employed. The convergence of a right to move and state action to prevent movement which is unlawful on account of its intention and effect of constituting

discrimination prohibited by Article 13 EC and the implementing directives needs to be carefully monitored. We are unaware of any similar judgments in other Member States and we would hope that the UK courts interpretation of the state obligations under the international commitments would at least be a threshold of an EU interpretation as well.

This judgment is of great significance in the UK. The UK authorities have shown substantial interest in the increased use of UK immigration officers posted abroad and Immigration Liaison Officers to pre-screen travellers before they board carriers to come to the UK. There has been substantial interest in particular in pre-screening in sensitive airports where substantial numbers of asylum seekers. While it is apparent from the judgment that the UK practice was very heavy handed with apparently very little concern for the racially discriminatory effects (although the UK authorities did not rely on the Authorisations before the court it is clearly that their Lordships were fairly well satisfied that the Authorisations were a central factor to the way in which the practice was carried out) the principle that such measures are prima facie suspect appears to be established.

The judgment is also of significance for Dutch, British or French nationals of ethnic minority backgrounds where they encounter discriminatory treatment at the intern al or external frontiers of the EU. The regulation establishing a Community Border Code which has been approved for adoption includes a prohibition of discriminatory treatment by border guards on the basis of race. This judgment may be useful in understanding how that obligation could be interpreted.

We have sought from the UK authorities copies of all the Section 19D Authorisations currently in force. We have been advised on various occasions either that this information is not available or that officials are still working on it. We consider this to be unacceptable. Finally, when we invoked the Freedom of Information Act we were sent copies of the Authorisations.

We recommend that the Commission request advance information in the event that the UK seeks to commence a Practice of pre-screening of passengers by UK immigration officers in existing or candidate Member States.

Chapter III
The Derogations Article 39(4)

While the use of the civil service derogations in the UK have not been the subject of judicial challenge in the UK over the period under consideration here, they are nonetheless rather questionable. There have been attempts over the past five years to issue guidance to applicants to central government posts which are consistent. This general guidance which can be found on the website of the UK government is as follows:

> "The general guidance
>
> *What are the nationality requirements for working in the Civil Service?*
> You can apply for any job in the Civil Service as long as you're a UK national, or have dual nationality (one of which is British). As a European Economic Area national, EU national or Commonwealth citizen, you're eligible for about 75% of our jobs, but most Fast Stream candidates must be UK nationals."

The first thing to note about the guidance is that if one take seriously the interpretation by the European Court of Justice on Article 39(4), then it is not evident that nationals of other Member States can be denied the possibility of applying for any job. Their application can be rejected on nationality grounds where the post complies with the requirements of allegiance as clarified by the ECJ. However, perhaps for nationals of other Member States it is not so problematic to be advised from the beginning that they cannot apply than to be encouraged to apply only to be rejected on nationality grounds. Secondly, it is worth noting that the UK authorities specify that most of the civil service posts are open to nationals of other Member States (including new Member States).

The exclusion of EEA nationals from most of the Fast Stream posts is of dubious legality. The Government described the Fast Stream as follows:

> **What is the Fast Stream?**
> Quite simply, it's the Civil Service's accelerated development programme. Of course, many people join the Civil Service every year without going through the Fast Stream. You can too, by looking out for vacancies advertised in the press or checking the main Civil Service gateway on the web.
> Those who join the Fast Stream, however, are guaranteed a series of intensive job placements designed to prepare them for senior managerial positions. Fast Streamers move regularly between projects and sections within their departments; they take up postings in other departments and agencies, they are seconded to Europe, international partners such as the USA and the world of business.
> Hence, 'Fast Stream'.
> Whatever your degree discipline, whatever your skills and whatever your interests, there's a wealth of challenge and stimulation on offer within the Civil Service: there are 173 government departments and agencies employing nearly half a million people.
> Minimum requirements
> To apply to the Fast Stream, you'll need at least a 2:2 in any degree discipline and generally you must be a UK national. In most cases, your degree subject won't restrict your options.
> There are four ways to join the Fast Stream, plus the Secret Intelligence Service. The first is what's called the General Fast Stream, which has five options. When you apply, you'll

need to choose the option that's of most interest to you – you can specify the order of your preferences. You can click on an option now to find out more about it.
General Fast Stream: Central Departments
General Fast Stream: Science and Engineering
General Fast Stream: European Fast Stream
General Fast Stream: Diplomatic Service
General Fast Stream: DFID Technical Development Specialist
General Fast Stream: Clerkships in Parliament
Fast Stream for Statisticians
Fast Stream for Economists
Government Communication Headquarters (GCHQ) Fast Stream
Secret Intelligence Service (SIS)

While clearly the exclusion of other EEA nationals from the SIS is probably permissible it is less so to exclude for instance statisticians or civil servants in engineering (particularly when this is outside the armed forces).

As regards the Government legal service, there ware also problems in that only UK legal qualifications are accepted. Directive 98/5 regulates access to the legal profession in the Member States. It seems that the UK Government requires the registration of an EEA national lawyer before a national authority before he or she becomes eligible to apply for a job within the Legal Service (see Annex 1).

The most restrictive field is the intelligence service where EEA nationals are excluded. See Annex 2. This is likely to be consistent with Article 39(4).

Nationals of the new Member States have the same access to the public service in the UK as other EEA nationals.

Chapter IV
Family Members[7]

Texts in force

- Immigration Acts 1971
- Immigration Act 1988
- Immigration and Asylum Act 1999
- Immigration (European Economic Area) Regulations 2000
- The Immigration (European Economic Area) (Amendments) Regulations 2001
- Nationality Immigration and Asylum Act 2002
- The Immigration (Swiss free movement of persons) Number 3 Regulations 2003
- Immigration (European Economic Area) (Amendment) Regulations 2003
- Immigration (European Economic Area) (Amendment Number 2) Regulations 2003
- Treatment of Claimants Act 2004

Administrative Practice

As set out in previous editions, under the Immigration (European Economic Area) Regulations 2000, third country national family members of EU nationals exercising Treaty rights in the United Kingdom 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. These family permits were granted for one year throughout 2004 giving the applicant this window of space to travel to the United Kingdom. This is likely to be decreased in line with other visas to six months in 2005. As set out before, Swiss nationals now benefit from the same rules as other EEA nationals.

As highlighted before, the Immigration (European Economic Area) Regulations 2000 specifically exclude from the meaning of spouses in the regulations "any party to a marriage of convenience". The meaning of the term "marriage of convenience" is not defined although the Diplomatic Service Instructions do state that an entry clearance officer should "normally confine [his] enquiries to an assumption 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 United Kingdom" (Chapter 21.5.8). Although this guidance and current practice by the Home Office does not appear to have led to substantial problems, there has been some anecdotal evidence to show that the UK authorities are beginning to challenge the nature of marriages, particularly where an EU national marries a third country national who has irregular immigration status in the United Kingdom before the marriage. Registrars have the power to inform immigration authorities if they think that a marriage has been entered into for immigration purposes and it appears that this power may have been used more frequently than in former years. This appears to have coincided with an announcement by the Secretary of State that in future, all third country nationals will need to apply for a certificate from the Secretary of State before being allowed to marry in the United Kingdom. If an applicant does not have current leave in the United

7 Alison Hunter, Wesley Gryk Solicitors.

Kingdom, he will be denied a certificate and will need to leave the country and apply for entry clearance if he wants to marry in the United Kingdom.

The situation in relation to delays in issuing EEA family permits continues. 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. Even straightforward applications for residence permits are routinely taking over three months. From the internal guidance given to Home Office caseworkers, it is clear that the Home Office are aware of their duty to decide applications within six months. The guidance goes on to say though that 'Every effort should be made to do so, *particularly where an applicant draws our attention to an alleged breach of this requirement*' (2.6 European Directorate Instructions). It seems somewhat difficult to reconcile this with what should be an absolute obligation on the Home Office to deal with applications within six months. There also has been a move away from the European Directorate dealing with all cases with an EU aspect and most cases are initially now dealt with by the main caseworking teams within the Immigration and Nationality Directorate at the Home Office. This has led, in a significant number of cases, to poor decision making due, in part to a lack of understanding of EU law.

It remains the case, as evidence from practitioners and family members of EEA nationals shows, that a considerable number of family members continue to be 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

The main case of interest in this area was that of C-200/02 *Chen*. It is clear that the United Kingdom government is concerned about the impact that this case may have. The repercussions from this case were not felt in 2004 but amendments to legislation were being considered by the Home Office.

C-109/01 *Akrich*, as was set out in last year's report, was granted the right to stay in the United Kingdom. Throughout 2004 the regulations were not amended and therefore the repercussions were very limited. New regulations are proposed and we remain concerned at a possible narrow interpretation of *Akrich* with possible resulting limitations it would place on free movement. We recommend that the Commission follows developments in relation to both these cases carefully.

Unmarried partners

Provision for unmarried partners to be permitted to join their UK resident partner is included in the Immigration Rules at paragraph 295D. The requirements are that one party must be registered 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 non EEA national partner is normally given twenty four 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 twenty four 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 not 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. It should be noted that some non EEA nationals who have been in the United Kingdom illegally, or if the couple have been living together continuously for four years have been granted leave to remain. However, the provisions are not as generous as for an illegal non EEA national marrying an EEA national.

Access to indefinite leave to remain

This is being dealt with in Chapter 1 as regards EU nationals. Third country national family members suffer the same problems as the principal with regard to acquiring permanent residence rights. Discrimination continues as outlined in the report from 1999, i.e. that third country national family members or 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.

Accession States

Family members of workers from the A8 countries can obtain family permits once the worker has registered his or her employment. This applies for both third country nationals and A8 family members. This would entitle the family member to work. If a family member is a national of an A8 country, he or she would also need to register with the Worker's Registration Scheme if he or she took up employment. Self-employed citizens of the A8 countries do not need to register and can apply for a residence permit and their dependants can apply for residence documents. As yet, there appear not to have been any specific problems for third country nationals and their families.

We recommend that the Commission request an explanation from the UK authorities as to why their internal advice to case workers suggests that the EU duty to determine an application be complied with only where the applicant or his or her adviser specifically makes reference to the duty.

We recommend that the Commission request detailed information on how the UK authorities comply with their duty to ensure that applications are dealt with as soon as possible and *in any event* within six months.

We recommend that the Commission request an explanation from the UK authorities regarding equal treatment of third country national family members of EU nationals as regards the acquisition of an independent residence status in comparison with that of British nationals and third country nationals settled in the UK.

Chapter 5
Follow up in the UK of Decisions of the European Court of Justice[8]

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.

Baumbast, Case C-413/99, 17/09/2002.

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. There is no reference to *Carpenter* in Home Office internal guidance.

Chen, Case C-200/02, 19 October 2004, see Family Members chapter.

D'Hoop, Case C-245/98, 11 July 2002 and *Grzelczyk*, Case C-184/99, 20 September 2001, see Students chapter.

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 treatment 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. The Gender Recognition Act came into force on 4 April 2005. It permits those person who have undergone gender re-assignment to have their post-operative gender recognised in law. This will also permit them to marry.

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. To date no specific measure has been taken to give effect to this decision. Home Office internal guidance refers to the UK authorities' view that Article 6(1) of Decision 1/80 does not apply to students or trainees.

8 Nicola Rogers, 2 Garden Court, Temple.

Your rapporteurs continue to remain very 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. Furthermore it is now apparent that if an applicant is refused leave to remain under Decision 1/80 by the Secretary of State, because that decision is not included in the Immigration Rules, the applicant will be denied a statutory right of appeal. The denial of rights under Decision 1/80 to students who have lawfully worked and the denial of rights of appeal has been challenged in the High Court by way of judicial review and the outcome is awaited.

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 your rapporteurs 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.

C-285/01 *Burbaud* is a decision of particular interest to the Commission. In this case the application of requirements to enter a competition, successful completion of which is a prerequisite for employment in certain sectors was in issue. The effect of the formal requirements in the case was effectively to exclude any EU national who had not undertaken most of his or her training (indeed schooling) in the Member State in question. The ECJ held that the requirement was not consistent with EU law regarding the recognition of diplomas. The judgment is not of particular important in the UK as there is very little use of competitions for entry into sectors. We are not aware of any problems which have been arising in this regard. The majority of problems which come to our attention relate to qualifications obtained outside the EU either by EU nationals or their family members. The ECJ jurisprudence on this aspect is however not particularly helpful to those encountering difficulties.

Chapter VI
Immigration and Employment[9]

Texts in force

- Asylum and Immigration Act 1996, section 8
- Immigration (European Economic Area) Regulations 2000, SI 2000 No. 2326
- Accession (Immigration and Worker Registration) Regulations 2004, SI 2004 No. 1219
- Immigration (Restrictions on Employment) Order 2004, SI 2004 No. 755.

A note on irregular labour migration

Irregular labour migration was the subject of particular political attention in 2004. That was in large part due to the drowning of at least 21 Chinese cockle pickers by incoming tides in Morecambe Bay in February 2004. Their deaths focused attention both on the lack of enforcement of safety standards in employment, and on the presence on the British labour market of significance numbers of unauthorised workers in certain sectors.

The Morecambe Bay tragedy ensured parliamentary support for what became the Gangmasters Licensing Act 2004. The Act provides a statutory framework for the regulation and supervision of the provision of labour in agriculture, gathering of shellfish and the packing and processing of that produce. Under the 2004 Act, a 'gangmaster' is defined as anyone who supplies a worker to work for another in those sectors.[10] The Act will make it a criminal offence to act as a gangmaster without a licence.[11] It will also be a criminal offence for an employer to arrange to be supplied with workers by an unlicensed gangmaster, save where 'reasonable steps' have been taken by the employer to ensure that the gangmaster has a valid licence.[12]

The practical consequences of the 2004 Act will to a large extent depend upon licensing system. Licensing is to be performed by the Gangmasters Licensing Authority, in accordance with rules which it is to draw up. The Government's expectation is "that the issue of a licence will be dependent on a gangmaster demonstrating that his business is complying with general employment law (including immigration and taxation legislation)."[13] The Authority commenced operation on 1 April 2005.[14] It is expected that the criminal offences will come into effect in mid-2006.[15]

9 Bernard Ryan, Law School, University of Kent.
10 Gangmasters Licensing Act 2004, s 4.
11 Gangmasters Licensing Act 2004, ss 6 and 12.
12 Gangmasters Licensing Act 2004, s 13.
13 *Explanatory Memorandum to the Draft Gangmasters (Licensing Authority) Regulations 2005*, para 7.2.
14 See Gangmasters (Licensing Authority) Regulations 2005, SI 2005 No 448.
15 Statement by Minister for Environment, Food and Rural Affairs, Alun Michael, *House of Commons Debates*, 4 March 2005, col 1436-1437W.

Questions in relation to specific sectors

Maritime sector

The nationality restrictions concerning British ships are in the Merchant Shipping (Officer Nationality) Regulations 1995.[16] The Regulations relate to British ships of 'strategic' importance, defined as fishing vessels of at least 24 metres in length and cruise ships, tankers and roll-on roll-off ferries of at least 500 tons. The Regulations require that the masters of such ships must be a Commonwealth citizen, or an EEA nationals, or a national of another state which is a member of NATO.

Since there is no favouring of British nationals over other EA citizens, the Court of Justice rulings of 30 September 2003 in Case C-45/01 *Colegio de Oficiales de la Marina Mercante Española* and Case C-47/02 *Anker* do not pose any particular difficulties in Britain

Professional football

In February 2005, UEFA announced a proposals to set a quota of 'home-grown' players in European club competitions.[17] If adopted, it would mean that from 2006/07, of a squad of 25 players, at least two would have to be club trained (registered for a minimum of three years between the ages of 15 and 21) and at least two more would have to be association trained. These figures would rise to three and three in 2007/08, and four and four in 2008/09.

These proposals have generated significant differences of opinion within the key organisations concerned with football in England. The Professional Footballers' Association and the Football League (which is made of clubs outside the first tier) appear to support the proposals. By contrast, it is reported that only 2 of the 20 clubs in the Premier League support the proposals, and that the Football Association (the sport's governing body) has also declined to support the proposals.[18] The football associations of other parts of the United Kingdom – i.e. Scotland, Wales and Northern Ireland – can be expected to support the proposals. It has also been reported that the Scottish Football Association favours the introduction of a similar system in domestic club competitions as well.[19]

These reported differences of opinion within British football correspond in general terms to the distribution of winners and losers in the period since the establishment of the Champions League and English Premiership in 1992. Since that time, television revenues have fuelled a marked increase in the gap between the richest clubs in England (Arsenal, Chelsea, Liverpool, Manchester United and Newcastle) and Scotland (Celtic and Rangers), and their competitors. These clubs have come to dominate domestic league and cup competitions, and with them qualification for European club competitions. It is widely thought that the *Bosman* ruling in 1995 contributed to this situation of competitive imbalance, since only the top clubs have the financial weight to import significant numbers of better players from other parts of the EEA. It is also widely thought to have weakened the domestic game in England and (in particular) Scotland, because of the associated decline in the number of national players with top clubs, and so playing in European club competition.

16 SI 1995 No. 1427.
17 'Local Training Debate Moves Online', UEFA press release 6 February 2005.
18 'FA Chairman under fire for opposing quota' *Guardian*, 16 February 2005.
19 'Eight Player Rule a Boost' *Sunday Mail* , 13 March 2005.

The UEFA proposals might be thought inconsistent with Article 39 EC. If adopted, they would almost certainly be *prima facie* indirectly discriminatory on grounds of nationality, since young players from a given state would be much more likely to be trained there, and therefore to remain there throughout their careers. In *Bosman*, the Court of Justice accepted the legitimacy of arguments based on competitive balance and the training of young players for restrictions on the free movement of persons. It was sceptical however as to reliance upon those arguments in order to justify the restrictions in issue there – the transfer system (both arguments) and the national quota system (competitive balance only). We would argue that experience shows that the Court of Justice in *Bosman* underestimated the benefits of certain restrictions on the freedom of contract within professional football. For that reason, we would argue that some version of the UEFA proposals is probably justifiable under Article 39, in providing incentives for clubs to train players, while reducing sporting inequalities.

Chapter VII
EU Enlargement

Texts in force

- Asylum and Immigration Act 1996, section 8
- Immigration (European Economic Area) Regulations 2000, SI 2000 No. 2326
- Accession (Immigration and Worker Registration) Regulations 2004, SI 2004 No. 1219
- Immigration (Restrictions on Employment) Order 2004, SI 2004 No. 755

Accession nationals

Introduction

The implementation report for 2002/2003 highlighted the comparatively benign approach to labour migration in public policy since 2001, an approach which is linked to low levels of unemployment in Britain in recent years. That general background explains Britain's decision not to impose substantive restrictions on the employment of nationals of the new Central and Eastern European member states (known as 'A8 nationals'). This chapter focuses on the legal framework governing the employment of A8 nationals after 1 May 2004, and on related developments. Particular attention is paid to potential legal and practical difficulties associated with British implementation.

Looking for work

Because of the absence of substantive limits on their employment, A8 nationals are free to travel to Britain in order to look for work. Legally, that is reflected in the absence of special provision for A8 nationals as regards admission to the United Kingdom in the Immigration (European Economic Area) Regulations 2000. [20] A8 nationals who are looking for work are however denied a right of residence under the Accession (Immigration and Worker Registration) Regulations 2004.[21] The ultimate purpose of that provision is to provide a basis for denying social assistance to A8 job seekers (see chapter 8 of this report).

The registration scheme

While there are no substantive limits on the employment of A8 nationals, they are subject to procedural restrictions. Under the 2004 Regulations, within a month of starting a job, A8 nationals must apply to register under the 'Workers' Registration Scheme' with a Home Office unit in Cannock in Staffordshire. The first registration leads to the issuing of a 'registration card'. There is a fee of £50 for the first registration, and it is necessary to submit confirmation that the employment has commenced, and either an identity card or passport. A8 nationals are free to take other jobs, but must again apply to register this fact within one

20 SI 2000 No. 2326, Reg 12. Note that Reg 3 of the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004 No, 1219) amended the definition of an 'EEA state' in the 2000 Regulations in order to achieve that result.

21 SI 2004 No. 1219, Reg 4.

month, though without paying a fee or submitting proof of employment or a travel document. Subsequent registrations lead to the issuing of a 'registration certificate'.

The £ 50 fee

There is room to doubt the consistency of the £ 50 fee with the 1961 Council of Europe Social Charter, which Britain has ratified. For workers who are not EEA or Swiss[22] nationals, the British authorities charge for applications both for 'immigration employment documents' (work permits, etc.) and for extensions of leave to remain for employment purposes. [23] In each case, however, there is an express exemption for nationals of other signatory states of the 1961 Social Charter, or of the revised 1996 Social Charter. That is because, under Article 18(2) of each of these treaties, 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." This exception is currently of benefit to nationals of seven states: Albania, Armenia, Bulgaria, Croatia, Moldova, Romania and Turkey. It is not clear why, if Britain accepts that it is inconsistent with Article 18(2) of the Social Charter to have charges for work permits and leave to remain applications, it does not apply the same principle to the registration of A8 workers.

We recommend that the Commission request an explanation from the UK authorities as to the compatibility of the £ 50 fee with the 1961 European Social Charter.

The employer sanction

The registration obligation is supported by Regulation 9 of the 2004 Regulations, which makes it a criminal offence to employ an A8 national who is obliged to register but has not done so.[24] An employer has a defence to any prosecution if they can show that, during the first month of employment, they were shown a document which "appeared … to establish" either that the A8 national was not required to register or that they had applied to do so.[25] It is also necessary that the employer retain a copy of the document in question.

There is no requirement to register or employer sanction in the first month of employment.[26] It follows that the requirement to register and sanction do not apply at all if the employment relationship lasts less than a month.

22 Note that British law anyway treats Swiss nationals as if they were 'EEA nationals': see Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002, SI 2002 No. 1241.

23 Immigration Employment Document (Fees) Regulations 2003, SI 2003 No. 541, as amended, and Immigration (Leave to Remain) (Fees) Regulations 2003, SI 2004 No. 580, as amended. With effect from 2 July 2004, the fee for a work permit applications (including the sectors based scheme) was increased to £153. It was announced on 7 February 2005 that the fee for all extensions of leave to remain would increase to £335 with effect from April 2005: Statement by Immigration Minister, Des Browne, *HC Debates*, 7 February 2005, col 71 WS.

24 This is in line with the general offence of hiring unauthorised workers, in section 8 of the Asylum and Immigration Act 1996, which does not apply to A8 nationals.

25 SI 2004 No. 1219, Reg 9(2) and 9(3).

26 This is the effect of SI 2004 No. 1219, Reg 7(3), which provides that an employer is 'authorised' during the first month of employment.

The 12 month exception

Under the Act of Accession, workers who on any date after 1 May 2004 have been "admitted to the labour market" of a given Member State "for an uninterrupted period of twelve months or longer" gain unrestricted labour market access in that Member State.

The 2004 Regulations apply the 12 month exception in two cases: (i) where on 30 April 2004 an A8 national had leave to be in the United Kingdom, and was not subject to a condition restricting employment;[27] and, (ii) where a worker has been "legally working in the United Kingdom without interruption throughout the period of 12 months" ending on any date starting on 1 May 2004.[28] For this purpose, the concept of employment 'without interruption' is defined to mean that the individual was in employment at the beginning and end of the 12 month period, and that any intervening periods in which the individual has not legally worked do not exceed 30 days.[29]

The British approach to the 12 month rule appears inconsistent with the Act of Accession. The concept of "admission to the labour market" used in the Act of Accession arguably refers to permission to work only. It does not necessarily require actual employment, as does the British approach.

We recommend that the Commission request the UK authorities to clarify why they base the 12 month test on actual employment, rather than on permission to work.

Family members

In order to comply with EU law on personal movement, the obligation to register does not apply to A8 nationals who are the family members of EEA nationals (including A8 nationals) or Swiss nationals with rights of residence in EU law. This category includes the relevant family members of EEA or Swiss nationals who are in the UK as a student, self-employed person, retired person or a person of sufficient means.[30] The category also includes the relevant family members of EEA or Swiss nationals who are workers "other than as an accession State worker requiring registration".[31] This second category therefore exempts A8 nationals who are the family members of A8 workers who need not register.

The interaction of the family provisions and the 12 month rule is an area of potential difficulty. Under the British approach, when an A8 worker meets the 12 month rule, their family members no longer need to register. In the short run, this appears more generous than the Act of Accession, which confers the right of employment in Article 11 of Regulation 1612/ 68 on family members only (i) if they were resident in the state on 1 May 2004 and the worker at that point met the 12 month test or (ii) in other cases, after 18 months' residence by the family member.[32] However, the Act of Accession also confers a right of employment

27 SI 2004 No. 1219, Reg 2(2).
28 SI 2004 No. 1219, Reg 2(3) and 2(4).
29 *Ibid*., Reg 2(8).
30 SI 2004 No. 1219, Reg 2(6)(b). Note that the exception for A8 family members did not initially apply to those whose relationship was with a self-employed person. That omission was rectified by the Immigration (European Economic Area) and Accession (Amendment) Regulations 2004, SI 2004 No. 1326, Reg 3.
31 SI 2004 No. 1219, Reg 2(6)(b) (i).
32 See for example para 8 of section 1 of Annex V concerning the Czech Republic, OJ 2004 L 236/ 803.

on resident family members of workers "from the third year following the date of accession." This appears to mean that from 1 May 2006, even A8 workers who have not met the 12 month test will confer a right of employment on their family members.

It should be added that the 2004 Regulations follow current EC law in that, in the case of students, retired persons and persons of sufficient means, the family members whose right to work is recognised are the spouse and dependent children only. In the case of workers and self-employed persons, the family members who count are the spouse and children who are dependent or under 21.[33] By contrast, when Directive 2004/ 38 it comes fully into effect on 30 April 2006, it will widen the range of family members with a right of employment.[34]

We recommend that the Commission request the UK authorities to ensure that from 1 May 2006, the relevant family members of an A8 worker are free to take employment as soon as the A8 worker is given permission to work.

Posted workers

The Regulations exempt A8 nationals who are 'posted workers' from the obligation to register.[35] Time spent in Britain as a posted worker does not however count towards the period of 12 months' employment after which an individual does not have to register. Technically, this is because the 12 month rule requires employment with an 'authorised employer', and the employer of a posted worker is not listed in that category.[36]

Outcomes

In the first eight months (to the end of December 2004), 130,990 A8 nationals had applied to register under the Workers' Registration Scheme.[37] The breakdown by nationality was as follows:[38]

State	Applicants	% of total
Poland	73,545	56
Lithuania	20,095	15
Slovak Republic	13,445	10
Latvia	9,070	7
Czech Republic	8,850	7
Hungary	3,740	3
Estonia	1,990	2
Slovenia	165	<0.5
'Other'	95	<0.5

33 SI 2004 No. 1218, Reg 2(9)(c), as amended by SI 2004 No. 1326, Reg 3.
34 See Articles 2, 3, 7(4) and 23 of Directive 2004/ 38.
35 SI 2004 No. 1219, Reg 2(6)(a).
36 The definition of 'authorised employer' is in SI 2004 No. 1219, Reg 7(2).
37 Home Office and other departments, *Accession Monitoring Report: May-December 2004* (February 2005), available at http://www.ind.homeoffice.gov.uk/ind/en/home/0/reports/accession_monitoring.html.
38 Information taken from *ibid*., Table 2.

The Government estimates that of those, 40% were already present in Britain before 1 May 2004, which presumably means that in many cases they had previously been working on an irregular basis. There is evidence that some A8 nationals have very poor employment conditions, including wages below the statutory minimum, unauthorised deductions for accommodation and transport, and an absence of national insurance numbers.[39] The willingness of A8 nationals to tolerate poor conditions appears to be linked to the charge for worker registration and to their lack of social welfare protection in cases of unemployment (discussed in chapter 8 of this report).

Future intentions

At the time of writing (early April 2005), no public announcement has been made as to future British intentions under the Act of Accession transitional arrangements. Britain can be expected to seek to retain freedom of action at least for the five year period (up to 30 April 2009) contemplated by the Act of Accession. The fact that Britain has allowed labour market access for A8 nationals will however make it hard for it to justify national measures into the sixth and seventh years after enlargement, since the Act of Accession permits exceptions only "in case of serious disturbances of its labour market or threat thereof.

It is likely however that the smooth operation of the Workers' Registration Scheme will become increasingly problematic over time. As we have seen, some A8 nationals can acquire an unlimited right to work through 12 months' employment, while others can qualify as family members of EEA or Swiss nationals. It is expected therefore that employers will find it increasingly difficult to differentiate A8 nationals who are required to register from those that are not. Considerations of this kind may come to influence British policy.

We recommend that the Commission request the UK authorities to examine over time whether employers find it difficult to differentiate A8 nationals who are required to register from those who are not.

Wider effects

The decision to give unrestricted labour market access to A8 nationals on 1 May 2004 had knock-on effects upon two British schemes concerning migration for lower-skilled employment. The first is the Seasonal Agricultural Workers' Scheme (SAWS), which 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 with workers coming almost exclusively been from Central and Eastern Europe. This scheme had recruited extensively among future A8 nationals prior to accession, with 12,220 of the total of 20,715 permits (or 59%) issued to future A8 nationals in 2003.[40] The 2004 enlargement led to a reduction in the SAWS quota, from 25000 in 2003 and 2004 to 16250 in 2005.[41]

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39 See Trades Union Congress, *Propping up Rural and Small town Britain: Migrant Workers from the New Europe* (November 2004), Ch 4 and the special report by Felicity Lawrence, 'Polish workers lost in a strange land find that work in UK does not pay', *Guardian* 11 January 2005.

40 Statement by Immigration Minister, Des Browne, *House of Commons Debates*, 14 June 2004, col 766W.

41 Statement by Immigration Minister, Des Browne, *House of Commons Debates*, 19 May 2004, cols 49-51W.

The second is the Sectors Based Scheme (SBS), which is a quota system in the food processing and hospitality sectors only. It operates as an exception to the work permit system, in that it is possible to gain admission to Britain with a level of skills and experience which is lower that that normally required. In the period from 30 May 2003 to 31 May 2004, the SBS quota was 20,000, of which 7,500 were reserved to nationals of the 10 states acceding to the EU on 1 May 2004. Subsequently, the quota was modified to 15,000 for the period starting on 1 June 2004.[42]

The 1 May 2004 enlargement also appears to have prompted the British authorities to tighten the rules governing the general criminal offence for employers who hire persons without a right to work (section 8 of the Asylum and Immigration Act 1996).[43] Under the original system, a copy of any relevant document could establish the employer defence to the offence of employing an unauthorised worker. Under the new rules which came into force on 1 May 2004, some documents will count on their own, such as EEA passports and residence permits/ documents issued to EEA nationals and their family members. These documents have in common that they contain photographs and that they give clear evidence of a right to work. In other cases, it will be necessary to produce a combination of an employment-related document and an immigration-related document – for example, a British national insurance card with a British or Irish birth certificate, or a work permit with a related passport.

A8 Nationals and Statistics

The UK statistical agency has been requested to provide very detailed information about A8 nationals and the UK. Since the beginning of 2004 monthly statistics have been published showing the number of A8 nationals visiting the UK. A comparison with the years 2002 and 2003 is provided in the information (the figures are in thousands):

Month	*2002*	*2003*	*2004*
January	44	38	69
February	25	45	67
March	59	68	70
April	53	41	82
May	53	86	114
June	43	63	83
July	87	73	211
August	89	98	141
September	54	76	183
October	39	63	138
November	47	76	120
December	33	41	113
Annual Total	626	767	1,392

These figures are then further broken down to show the numbers by nationality of A8 nationals coming to the UK for each of the four quarters of the three years in question. The largest groups is of course Polish nationals followed by Czech nationals and Hungarians. It is interesting to note in relation to the respective populations that Cyprus produce 37,000 visitors in 2004 and Malta 50,000.

42 *Statement of Changes in the Immigration Rules*, *Cm*. 6339 (September 2004).
43 Immigration (Restrictions on Employment) Order 2004, SI 2004 No. 755.

As regards workers from the A8 coming to the UK to most recent statistics were published on 10 November 2004 and cover the period from May to September. Over that period just under 91,000 A8 national registered for work in the UK. Of these 80,730 applications were approved and 935 were refused. The rest were either outstanding or withdrawn. On change of employer, A8 nationals are required to re-register. Over the period there were 3,075 re-registrations, indicating a substantial rate of change of employment. There were also 1,480 multiple registrations which are registrations by persons working for more than one employer. Multiple re-registrations came to 2,100.

The authorities estimate that 45% of all applicants were already present in the UK before 1 May 2004. The largest national group were Polish at 48,585 applicants followed by Lithuanians at 14,590 then Slovaks: 8,395; Latvians: 6,145; Czech nationals: 5,675; Hungarians: 2,310; Estonians: 1,340 and Slovenians: 115. The difference rate among the Baltic states is surprising. 45% of the applicants were between the ages of 18 – 24 while a further 39% were between 25 and 34. The next age group (35-44) represents only 9% of the applicants. According to the UK authorities 95% of A8 workers in the UK who registered between May and September do not have dependants living with them in the UK.

Information about employment sector has also be published. The largest sector employing A8 nationals is hospitality and catering accounting for 24,170 applications. This is followed by administration, business and management at 15,920 then agriculture at 13,520. Manufacturing only accounts for 5,655 applications and all other sectors less than 5,000. 96% of A8 nationals were working full time (which is defined as more than 16 hours per week). 80% were earning between £4.50 (EURO 6.39) and £5.99 (EURO 8.51) per hour. 44% were in temporary employment and 53% in permanent (some failed to provide the information requested). By sector, temporary employment account for 65% of persons working in agriculture 82% in administration, business and management but 21% in hospitality and catering. Information was also published on the geographical distribution of A8 workers in the UK. While London accounts for 19,225 applicants, Anglia was not far behind with 15,145.

Very few, less than 500, have applied for social benefits of which 97% have been refused. The statistics do not show the ground for refusal. More worrying is the fact that just under 2,800 claims for child benefit were received over the relevant period of which only 37% had been approved by November. Of the income related benefits, income support accounted for 108 of which all but two were disallowed. Jobseekers allowance accounted for 370 applications of which 356 were disallowed. Child benefits applications accounted for 2,789 with 1,018 approved and 471 rejected. Tax credits, a form of income supplement, were applied for in 314 cases with 72 rejected. Local authority housing was provided to a total of 14 applicants; applications for housing assistance under the UK homelessness provisions were 322 of which 104 were successful.

Chapter VIII
Statistics

The UK authorities collect and publish ever more detailed statistics on asylum applicants and their consideration. These statistics are increasingly published in 'real time' ie very quickly after collection. Thus one can obtain very substantial statistics on persons in this category for 2004 but almost nothing for other categories where the time period for publication. Further for the period 2003, very detailed statistics are published on admission of third country national family members, particularly husbands and wives. Other areas are less well served. However, there is increasingly detailed information about expulsion from the UK. Where a number of years ago this information was quite sketchy it is now highly detailed with categories including gender, country of origin, basis of expulsion all now published.

Lies, Damned Lies and Statistics

Numbers and foreigners were high on the political agenda in the UK in 2004. The Prime Minister entered the asylum numbers debate in June 2002 announcing that the numbers of new asylum applicants would be reduced by half by September 2003 in comparison with October 2002. The UK Home Office claimed success in achieving this target in September 2003. However, doubts were raised about the accuracy of the statistics and the Government requested the National Audit Office to review the reliability of the statistics which resulted in a report, *Asylum and migration: a review of Home Office statistics* 25 May 2004. The report supports the Home Office statistical analysis relying on a report prepared by the Migration Research Unit of University College London. Among the conclusions which are of interest regarding the reduction of asylum applicants to the UK are:

> 1. "There is no statistical evidence that asylum seekers who might otherwise have come to the UK switched to other Western European destinations"
>
> 2. "There is no statistical evidence that some people who might have claimed asylum entered the country through other legal migration routes."
>
> 3. "In the absence of data on illegal migrants, it was not possible to assess whether some people have decided not to claim asylum but have entered, or stayed in the UK illegally."

The Report supports the statistical claim that the reduction in the number of asylum applications from nationals from 11 countries was the key. Two of those 11 countries are new Member States of the Union: the Czech Republic (gross reduction between 2002 and 2003: 1,292); Poland (gross reduction between 2002 and 2003: 894); and one candidate country, Romania (gross reduction between 2002 and 2003: 663).

Arrival in the UK

The latest published statistics on arrivals of EEA nationals in the UK indicate that the number rose by one million from 2002 to 2003. However, the numbers have not reached the levels they had achieved in 1998.

Year	Number of EEA (and Swiss from 2002) arrivals: millions
1993	9.5
1994	12.1
1995	13.7
1996	15.6
1997	16.2
1998	15.8
1999	15.6
2000	15.3
2001	14.2
2002	14.6
2003	15.1

Residence and Departure

The most recently available statistics on residence of EEA nationals in the UK comes from the UK National Statistics: Population Trends 116 published in Summer 2004. These statistics include detailed information about inflow and outflow of migrants to and from the UK from and to other EU Member States over the period 1971 until 2002. While there was a positive balance in 1998 since then more people have left the UK than come to it for each successive year. It may be hope that this trend may be reversed with the latest enlargement though there is not statistical evidence yet regarding this.

Year	Inflow to the UK (thousands)	Outflow from the UK (thousands)	Balance
1971	21	31	-10
1976	33	39	-6
1981	25	33	-8
1986	72	62	+9
1991	95	95	+0
1994	95	76	+19
1996	98	94	+5
1997	100	92	+9
1998	109	85	+24
1999	99	103	-4
2000	96	103	-8
2001	86	94	-7
2002	89	125	-36

These statistics are augmented by information on citizenship and movement to and from the UK over the same period. This indicates that there is a gradual increase in the number of British citizens who leave the UK in comparison with those returning. The opposite is true as regards nationals of other Member States coming to the UK and leaving it.

Year	Inflow British (thousands)	Inflow EU (thousands)	Outflow British (thousands)	Outflow EU (thousands)	Balance British/EU (thousands)
1971	92	-	171	-	-79/-
1976	87	19	137	18	-50/+1
1981	60	12	164	16	-104/-4
1986	120	36	132	13	-11/+22
1991	109	53	154	53	-45/0
1994	108	50	125	42	-17/+9
1996	94	72	156	44	-62/+28
1997	89	72	149	53	-60/+18
1998	103	82	126	49	-23/+33
1999	116	67	139	59	-23/+8
2000	104	63	161	57	--57/+6
2001	106	60	159	49	-53/+11
2002	95	63	186	52	-91/+11

Citizenship and EU Nationals

The statistics on acquisition of British citizenship for the year 2003 were published in May 2004. Among the 'old' Member States nationals, a total of 2,185 were granted British citizenship in 2003. Of these 910 were granted on the basis of residence and 525 on the basis of marriage to a British citizen (and residence). Portugal provided the largest number of nationals becoming British with 500, mostly on the basis of residence, followed by France with 325. Italy provided 125 new British citizens and Germany 280.

Among the 'new' Member States in 2003 Cyprus provided 340, the Czech Republic 120, Estonia 20, Hungary 185, Latvia 40, Lithuania 95, Malta 215, Poland 750, Slovakia 195, and Slovenia 15 British citizens. Again the majority were on the basis of residence but a larger proportion on the whole were on the basis of marriage than is the case for nationals of 'old' Member States.

EU Nationals and Asylum

Asylum statistics for the first three quarters of 2004 have now been published. On 22 February the fourth quarter will be released. It would appear that five Poles applied for asylum in the UK in the second quarter of 2004. There appears to have been one application from the Czech Republic. Among countries which are candidates for accession, only Romania and Turkey figure in the statistics. In the second and third quarters of 2004 respectively 55 and 60 Romanians applied for asylum in the UK. Among Turkish nationals these figures are: 255 and 245 respectively.

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Sources of Information

- Home Office Statistical Bulletin: Control of Immigration: Statistics United Kingdom 2003
- Home Office Asylum Statistics: 3rd Quarter 2004
- Persons Granted British Citizenship 25 May 2004 07/04
- National Statistics Population Trends Summer 2004 No 116
- Asylum Statistics United Kingdom 2003 2nd Ed 11/04 24 August 2004
- Asylum and migration: a review of Home Office statistics, Report by the Comptroller and Auditor General HC 625 Session 2003-2004 25 May 2004
- Home Office, Department for Work and Pensions, Inland Revenue, Office of the Deputy Prime Minister, Accession Monitoring Report May – September 2004, 10 November 2004

Chapter IX
Students, Citizenship, Benefits[44]

Summary

There are two main issues that have arisen during 2004 which will be the focus of this section. The first is the question of the accession of the ten new Member States; the position of A8 nationals during the transitional period, and associated changes that were made to various benefits regulations which affect all applicants for certain benefits. The second is the position of students: new legislation altering the system of student support was passed, and the C-209/03 *Bidar* case raised the question of the legality of the conditions of access to student maintenance loans. Some attention must also be given to the response to the C-138/02 *Collins* judgment.

Legislation in force

- Education (Student Support) Regulations
- Habitual Residence (Amendment) Regulations 2004
- Accession (immigration and worker Registration) Regulations 2004

General Social Security Legislation and Regulations are too extensive to set out in any detail: see generally eg Wikeley, *the Law of Social Security* (Butterworths, 2002), *Welfare Benefits and Tax Credits Handbook* (Child Poverty Action Group 2005), *Welfare Benefits and Immigration Law* (Browne & Pothecary, College of Law, 2005), and further *Social Security Legislation*, Volumes I-IV (Sweet & Maxwell 2005).

Students

Bidar and access to maintenance loans

The *Bidar* case raised the question of access by EU nationals to maintenance loans. Under existing legislation migrant EU students are eligible only if they are both 'settled' in the UK within the meaning of immigration law – this normally requires four year's residence – and if they have been resident in the UK for three years prior to the beginning of their course. Dependents of migrant workers do not have to fulfil these requirements. However, time spent in full-time education were not counted for the purpose of residence for gaining 'settled' status.

Bidar was not the dependent of a migrant worker but he and his mother, who was seriously ill, moved to the UK in 1998 to receive medical treatment. After the death of his mother the following year he remained in the UK living with and provided for by his grandmother. Due to his age he attended secondary school as normal and gained entry to university. He was refused a student maintenance loan. He was apparently not eligible for two reasons: both the time he had been in the UK (three years not four) and the fact that his residence was regarded as ineligible for counting towards settlement due to his full-time education.

44 Dr Helen Toner, Warwick University.

The Court indicates in its judgment that the provision of maintenance assistance for lawfully resident EU citizen students can no longer be regarded as falling outside the scope of the treaty. Nonetheless, it also indicates that the approach taken by the UK to insist on a period of residence or settlement before granting such assistance may be justified to ensure a degree of integration of the migrant into society before the assistance is granted and to avoid unreasonable burdens on the State. However, there is one significant issue that will have implications for the future of the eligibility criteria as applied in the UK. The regulations and the way they are applied which makes it virtually impossible for someone like *Bidar* – not the dependent of a migrant worker – to gain settled status because he spends his time in full-time education. The Court indicates quite clearly that this is an unnecessary and disproportionate measure as those (like *Bidar*), who have spent an otherwise sufficient period of time in other Member States receiving secondary education may well be well integrated into the host society. It is less abundantly clear whether the four year period normally applied before an individual becomes 'settled' would be regarded as proportionate or whether a lesser period, such as three years, would be the limit of proportionality in these cases. The Department for Education and Skills has yet to respond fully but considers that only a small and limited number of students in very particular circumstances will be affected by this judgment (Times Online Article, A Blair, R Watson, 16 March 2005, see further plans relating to medical students discussed by D McLeod Times Online Article 6th April). Specifically this will affect those such as *Bidar* who have spent time in the UK as self-sufficient migrant EU citizens in full time education, perhaps dependent on others who are not migrant EU workers. Aside from ensuring that periods spent in full-time education here would and could towards settlement, there is no indication that they intend to alter the generally applicable four year period.

Devolved education support

Education – and in particular financial support for students – is a matter that is devolved to the Scottish Parliament and Executive. There were already differences in fees charged to Scottish (and other EU) students and English students but during 2004 it was announced that the enhanced fees paid by English resident students would be raised. There has been a challenge to this on the basis that it constitutes racial discrimination. The Scottish Executive however maintains that this is not an issue affected by EU law. Although an interesting question, the orthodox interpretation of Community law would indicate that they are probably right. To our knowledge the case has not yet been resolved. (Times Online Article, C Fracassini, June 24 2004).

Changes to come

There are more changes to come for England, introduced by the Higher Education Act 2004 but effective from 2006. The system of student support will change. Major points to note are the following: (1) A limited and means-tested scheme of non-repayable *grants* for those from low-income backgrounds will be re-introduced, (2) Variable tuition fees, up to £3,000 per year, set by each university individually, but in reality most will charge the maximum amount (3) deferred payment of fees: although fees will rise, unlike the current system these will not be payable immediately but on graduation and commencement of earnings above a particular level. However, the basic system of eligibility discussed above, and due to be amended in a relatively limited manner consequent upon the *Bidar* judgment, will not

change. Tuition fees and associated assistance will be available to migrant EU students, but assistance by way of loans and grants for maintenance will be subject to residence/settlement conditions that newly arrived migrants will find it virtually impossible to fulfil.

Access to benefits and citizenship, including A8 nationals

The accession of the ten new Member States – including the 8 to which transitional provisions apply – was dealt with by the enactment of new regulations which came into force on 1st May 2004. The position of workers is dealt with elsewhere in this report. These regulations were intended to deal primarily with those who are not economically active. The regulations are intended to prevent those EU migrants who have no right of residence in the UK – because they are neither EU workers or a relevant dependent, nor self-sufficient and entitled to residence in their own right – from claiming a range of benefits. The government claimed that there was no systematic way under UK law and practice to identify and refuse these benefits to those who were not entitled under Community law. The habitual residence test introduce in the mid-1990s did not perform this role, focusing on the fact of residence rather than its legality or legal basis. This was no doubt exacerbated by the well-publicised fear of 'benefit tourism' on the part of nationals of the new Member States on accession.

The solution to this problem was to add a new requirement for eligibility for the relevant benefits. Applicants will now have to show that they have a legal right to reside in the UK and no-one without such a legal basis for residence will be regarded as habitually resident. Criticisms have been made of this approach (ILPA response to Consultation on the Regulations, Social Security Advisory Committee report): in particular whether it is a necessary and proportionate response to particular concerns about A8 nationals (although there would undoubtedly be problems enacting measures specifically directed at them), but also the difficulties involved in the application of a test centred on whether or not the applicant has a legal right to reside in the UK being applied by those administering social welfare benefits. Although many A8 nationals have entered the UK there is no evidence of large numbers of individuals being dependent on benefits. All the evidence is that those who do come are economically active: there are very few applications for benefits and even fewer successful applications (Monitoring Report on A8 Nationals, see statistics chapter).

As noted there were no immediate plans to change the habitual residence test in any significant way in response to the *Collins* judgment. White suggests ('Residence, Benefit Entitlement and Community Law', 12 Journal of Social Security Law, at page 22) that the test probably does meet the requirements set out in Collins and that 'this is particularly so since it is generally accepted that habitual residence is likely to be established in a period of between one and three months and that special reasons will need to be adduced if habitual residence is denied after a period of residence of three months'. Perhaps the length of time involved may not be easily open to objection on the grounds of dis-proportionality, but one might suggest that greater clarity in the criteria would be helpful and indeed perhaps necessary to comply fully with the suggestion in Collins that any test must rest on clear criteria known in advance.

Difficulties with the new regulations and A8 nationals

A number of concerns have been raised about the new regulations and the treatment of A8 nationals. In particular the treatment of those whose previously submitted claims for asylum are pending remains of concern. These individuals were informed that they would no longer be eligible for asylum support and should seek work, find other means of support, or return home. They challenged this with some success on the basis that the abruptness of the transition was unfair and unreasonable. The case currently seems to be in abeyance but some individuals have been refused support.

As to the position of A8 workseekers, the provisions relating to them have also raised some concerns. These individuals will not be treated as legally resident – unless they are self-sufficient – and thus they will be excluded from benefits until they have had one continuous year of employment. This means that individuals with significant periods of residence and work, but who have encountered even short periods between spells of employment could find themselves, after even three or four years, excluded from benefits should they lose their employment and in principle dependent on self-sufficient status to remain lawfully resident. A judicial review on this point of compatibility of the Regulations with Community was considered at the same time as the challenge referred to above of the unfairness of the transitional arrangements for withdrawal of asylum support from A8 nationals. The case on exclusion of A8 nationals from benefits intended to facilitiate access to the labour market (particularly jobseekers allowance such as in *Collins*) was not thought by the Administrative Court to be strong enough to permit it to proceed (*R (A and D) v Secretary of State for Work and Pensions*, 4 May 2004, Collins J). The argument that, since there could be discrimination by way of exclusion from the job market altogether, the same must hold for these measures relating to job-seekers prevailed. However, this issue is certainly something that the Commission may wish to consider more fully. Some have expressed concern about the operation of this aspect of the scheme and its compatibility with Community law (ILPA report, see also Wikeley, JSSL (2005) at p 25). It must be of particular concern in its application to those who have worked legally under the registration scheme for a number of months in the UK.

As we have noted, the amendments to the benefits regulations are of general application and therefore of wider relevance than just to A8 nationals and concerns have been raised about the compatibility of the regulations with Community law in terms of the application of the test of right to reside (under Community law). A reference is being sent to the ECJ to clarify this point. A Dutch national, Abdi Adar, who is already in receipt of disability living allowance and income support for some 18 months while resident in the UK. He is cared for by family members (aunts) but they cannot assist him by way of offering accommodation. He has been residing in a friend's house from which he now has to leave and his application for homelessness assistance has been rejected because of these new regulations. The reference is now being drawn up but the case will seek clarification in particular of whether homelessness assistance is within the scope of the Treaty and whether the discrimination against EEA nationals inherent in the right to reside test is justified.

We recommend that the Commission requests clarification from the UK authorities on the way in which they have implemented access to social benefits for A8 nationals in view of the duty under article 7(2) Regulation 1612/68.

Chapter X
Self-Employed/Business Persons, Bulgaria, Romania and the Ankara Agreement[45]

Establishment

There has been no change to the law on establishment for citizens of the Union since our last report. This right is not much used by nationals of the old Member States. It was substantially used by nationals of the new Member States before enlargement and gave rise to a number of cases. However, since 1 May 2004 and the introduction of the worker registration scheme it seems likely that a number of A8 nationals who were in the UK working as self employed may have moved into employment.

Very severe problems have arisen, however as regards nationals of Bulgaria and Romania who seek to exercise their rights as self employed persons under the agreements between their countries and the EU. In particular it is not clear that their procedural rights are being respected in accordance with the ECJ's interpretation of the establishment provisions of the Europe Agreements in *Panayotova* (par. 27).

Bulgaria and Romania

The tabloid press ran a series of articles at the end of 2003 and beginning of 2004 suggesting that visas for nationals of these two countries to come to the UK as self employed persons under the Agreements were being granted improperly and on an inadequate assessment of the capacities of the individuals in fact to be successfully self-employed. The allegations came from officials in the UK consulates in Bucharest and Sophia and suggested that the guidance given by the minister to the authorities processing these applications in the UK recommended only the most cursory of investigations. The political furore over these allegations resulted in the resignation of a junior minister and the establishment by the Government of an inquiry, carried out by a former civil servant, Roger Sutton, into the allegations. Sutton presented his report on 24 March 2004 (just before the date of enlargement) and by and large exonerated the minister and the UK authorities. In tabling the report the minister made the following statement:

> "The vast majority of those [applicants for establishment visas] approved under this guidance were already lawfully in the country. From internal management information, we estimate that around 36,000 decisions in the ECAA category have been made in this financial year of which 29,000 were from people already in the UK.

Mr. Sutton has also referred to the relevance of more general working guidance for staff on the clearance of backlogs of older cases. The volume of applications for extensions of stay means that all Governments at least as far back as the late 1980s, have had to address this problem. Over the years, it has been accepted that making decisions on the basis of the information already available to the caseworker can sometimes be justified as a means of tackling backlogs. This is because long backlogs make immigration controls less effective, as it becomes more difficult to take action against people whose applications have been stuck

45 Nick Rollason, Kingsley Napley and Nicola Rogers, 2 Garden Court.

in the system. They are also unfair to legitimate applicants, most of whom are already in the country legally.

Mr. Sutton has found that managers in Sheffield believed that the approach they took was consistent with general guidance on the clearance of backlogs, but he concludes that it went further in extending the procedure to a broader range of cases including new as well as old cases and that it led staff to going too far in easing the application of the checks.

Mr. Sutton's report shows that mistakes were made. There is no suggestion that these were deliberate or the result of lack of effort. Rather there was an excess of zeal in pursuing the common objective of reducing backlogs. Mr. Sutton's inquiry was not a disciplinary investigation. The Director General of the Immigration and Nationality Directorate has therefore now initiated a disciplinary investigation (with all the safeguards necessary to ensure fairness to members of staff) which will decide what management action is required and whether the management in Sheffield needs further strengthening beyond that already announced.

We are determined to learn from this episode. I have accepted all the recommendations made by Mr. Sutton to address the management and other weaknesses identified in his report. This will make it clear who is responsible for determining caseworking practice, their level in the organisation and the respective roles of Ministers and civil service managers. Staff have a right to expect such clarity and for managers to have a defined measure of authority to manage the business in a sensible way. As part of the follow-up to Mr. Sutton's report and as he has recommended, there will be a major effort to standardise guidance for staff in each operational area, ensure that appropriately senior managers are clearly responsible for authorising that guidance, and lay down clearly the circumstances in which Ministers must be consulted."[46]

This Report was followed by a further report on entry clearance decsisions made in Romania and Bulgaria, which was published in June 2004[47]. That report was commissioned in response to press reports that the ECAA category was being abused. The Report reviewed the procedure and application criteria applied by the Home Office (to whom responsibility for making decisions on entry clearance applications had been transferred in 2003) and suggesting a new more challenging approach favoured by entry clearance staff in Sofia and Bucharest. This new approach, which was advocated in the report (see paragraph 3.49) appears to suggest that the right of establishment is not a right at all, but a privilege to be exercised at the discretion of an entry clearance officer. Only where the ECO forms the opinion that the person is credible and that they would be able to establish themselves in business and support themselves from the profits of their business without working, can the right be exercised. The new approach is no longer to issue entry clearance for a probationary period of 12 months and assess whether the person has established themselves in the United Kingdom.

Furthermore, the new approach set out in paragraph 3.49 of the enquiry shows exactly how this subjective examination of applications works in practice.

- Previous immigration history may be taken into account in assessing the credibility behind the application. This is contrary the ECJ's jurisprudence (see *Kondova*). The practice of entry clearance officers of labelling those who have breached immigration

46 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmhansrd/vo040325/wmstext/40325m02.htm.

47 Enquiry into handling of ECAA applications from Bulgaria and Romania published on 17 June 2004.

control at some time in the past as not being credible individuals is in itself incompatible with the ECAA jurisprudence.

- Individual who have sought legal representation and the professional expertise of an accountant to prepare a business plan are now penalised. However, the new application form (VAF6) introduced to assist with the consideration of applications itself requires a business plan. Penalising individuals for providing a document which has been requested which is professional prepared appears to be not only illogical but undermines the right of every individual to seek any professional advice they wish in order to make an entry clearance application. If the same requirement were applied to the general business rules under paragraph 200 of the UK's Immigration Rules HC395, all such applicants would be penalised.
- Fluency in English – your rapporteurs consider that any requirement for the English language is discriminatory by its very nature. Moreover, it is also most likely irrelevant as many ECAA nationals will have a large network of contacts in the UK through which they can find work and obtain assistance with completing legal formalities such as tax and national insurance and through which the requirement to speak English become meaningless. Most ECAA applicants pick up sufficient English within the first few months of their stay in the United Kingdom as their needs dictate. The enquiry seems to indicate that lack of language can be a factor to be counted against an individual applying under the ECAA. Our view is that this is both discriminatory and that there is no objective justification for introducing such a requirement.
- Adequacy of funding – that this is an important test and that where necessary, checks should be carried out. The enquiry rightly identified the significant problems of identifying available funds for the business. However, the UK authorities must that applicants may not have held bank accounts and will only open an account for the purposes of proving that they have these funds. To penalise them for doing so by accusing applicants of artificially increasing their accounts is not warranted in most cases

The UK authorities reponse to both reports has left much to be desired. First there was a freeze on the consideration of all applications, whether new or extension, from self employed Bulgarians and Romanians both inside the UK and in the countries of origin. The freeze was lifted in 2004 in respect of entry clerance applications and in 2005 in respect of applications for further leave and indefinite leave to remain. Responsibility for decision making for entry clearance cases has been moved to the consulates abroad, resulting in great concern about consistency.

Anecdotal evidence suggests that applicants are being subjected to irrelevant questioning, for example a builder being asked to confirm the proportion of public to private housing in the area in which he proposed to live or a cleaner being asked to provide extensiive market research of the UK market for cleaners. The application process is now made almost impossible by the need to provide more and more inforamtion and documents which it is ofetn impossible to provide(with particular problems for those who have not held their funds in bank accounts). Our view is that this intrusive questionning and the requirment for these documents make the process of consideration so subjective as to make it excessively difficult for applicants to obtain their entry clearances.

On behalf of the Immigration Law Practitioners Association, two eminent UK lawyers visited the consulates in Bucharest and Sophia in April 2005 to investigate concerns about the processing of applications. Initial reports indicate that there was serious irregularities.

The full report is not yet available (and falls outside the period under review here). However, evidence provided by the British Embassy in Sofia indicated that only around 10 per cent of applications under the Agreements are granted, with the other 90 per cent either refused or abandoned.

There are serious concerns about the adquacy of the UK's implementation of its obligations under the Bulgaria and Romania Agreements as regards access to the territory for self employed persons from these two countries

In addition, the Immigration Rules were amended in August 2004 to include a new requirement for those applying for leave to remain to have entered the United Kingdom with entry clearance under the Agreements. This provision now effectively prevents "switching" applications by those lawfully in the UK, subject to a general proportionality test. In effect, only those with established businesses in the UK who are lawfully resident may now switch their status on the territory.

Of serious concern to your rapporteurs in the position of those who had applied to switch their status early in 2004 before the suspension of applications. These individuals were advised that the the no switching rules would have retrospective effect to apply as at the date of a decision on their application, rather than as at the date of application. As the Agreements provide specific directly effective rights under Community law then any rules must comply with Community law generally. Community law clearly requires legal certainty and in particular, where Community law is given effect through national law. In the case of *Collins* (case C-138/02, judgment of the ECJ on 23 March 2004), the Court of Justice confirmed in respect of the application of the habitual residence test to Community nationals that:

> "More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of a redress of a judicial nature"

Community law clearly requires legal certainty. The fact that the Immigration Rules purport to give effect to the directly effective provisions of the EC Association Agreement mean that they must provide that legal certainty if they are to implement Community law correctly. The application of retrospective requirements undermines legal certainty and in our view, is incompatible with Community law and ultra vires the Association Agreement.

In this particular case, it appears that the change in the rules is being applied retroactively in respect of events (entry onto the territory) which have already been concluded. As has been confirmed by the leading writers in the area (see Craig and De Burca, EU Law, Third edition pp. 380 ff):

> "A basic tenet of the rule of law is that people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions. This fundamental aspect of the rule of law is violated by the application of measures which were not in force at the time the actual events took place."

Your rapporteurs believe that these principles have been abandoned for the sake of political expediency.

The Ankara Agreement

The application of the "standstill clause" relating to establishment and the provision of services contained in Article 14 of the Additional Protocol to the Ankara Agreement has been extremely controversial in the UK.

The Commission will recall that the ECJ has confirmed in two cases, *Savas* (Case C-37/98, 11 May 2000) and *Abatay* (Case C-317/01, 21 October 2003) the standstill clause gives no *right* of entry or residence to Turkish nationals wishing to set up business in the Member States. However, the Turkish nationals are entitled to set up their businesses in the Member States on conditions that are no more stringent than were in place at the time when the Additional Protocol came into force in the host Member State. "Conditions" will include conditions of entry, stay and establishment itself.

Those wishing to establish themselves in business in the UK will therefore need to rely on the immigration laws and practice that were in place on 1 January 1973. This was primarily the Immigration Act 1971 and the Immigration Rules HC509 (control on entry) and Immigration Rules HC510 (control after entry).

Compared with the current immigration rules applicable to business persons (HC395) the 1973 Immigration Rules HC509 and 510 were extremely flexible and generous. In brief the principle differences are:

- There was no minimum level of investment under HC 510 or 509.
- There was no requirement to offer employment to a minimum number of people under HC 510 or 509.
- There was no mandatory entry clearance requirement under HC 509 and passengers arriving without entry clearance would be given a period of leave to enter to have their application examined by the Home Office.

The ECJ in *Savas* confirmed that this provision applied to all Turkish nationals resident in the Member States, whether or not that residence had become unlawful by virtue of the Turkish national overstaying a visa.

After *Savas* the Home Office issued guidance in January 2003 suggesting that the standstill clause only applied to those who sought lawfully to switch in-country or overstayers but not to port applicant asylum seekers on temporary admission, illegal entrants or persons applying for entry clearance. Applicants on temporary admission, illegal entrants or those applying for entry clearance would have their applications considered under the *current* immigration rules HC 395 rather than the 1973 Rules. In other words the UK did not accept that the standstill provision affected anyone who had not at one stage been given leave to enter or remain by the Secretary of State. Since it is the case that very few Turkish nationals obtain visas or leave to enter in other capacities, the Government was really limiting the benefit of the standstill provisions.

Whether the standstill provision (and therefore the 1973 Rules) could apply to on-entry and temporary admission cases was challenged in an action for judicial review in two joined cases: *R (on the Application of Veli Tum) and R (on the application of Mehmet Dari v Secretary of State*, CO/2298/03). The cases were successful in the High Court. Davies, J. found that the standstill provision must apply to all Turkish nationals whether or not they had been granted leave to enter in some other capacity. He therefore quashed decision letters which had refused business applications on the basis of the current immigration rules and held that the Secretary of State was obliged to apply the 1973 Rules to those applications.

The Secretary of State appealed against the decision of Davies, J. to the Court of Appeal. By judgment dated 25 May 2004 the Court of Appeal dismissed the Secretary of State's appeal and upheld the decision of the court below. The Court of Appeal considered that all Turkish nationals could obtain the benefit of the standstill clause. Therefore all Turkish nationals whether in the UK or outside including asylum seekers on temporary admission should have their applications to enter or remain on the basis of their businesses considered under the 1973 Rules.

The Secretary of State petitioned the House of Lords. At a permission hearing before the Lords, their Lordships ordered at reference on the question to the ECJ. All cases which relate to the conditions and procedures which apply to a Turkish national seeking to enter the UK for the purposes of establishing a business will need to be stayed pending the outcome of the reference to the ECJ in *Tum (C-16/05)*.

Pending the outcome of *Tum* the Home Office issued now further guidance on the application of the standstill clause to those are seeking entry to the UK to establish themselves in business. The guidance states that applications will be considered under the current Immigration Rules and the 1973 Rules simultaneously. If the person does not have entry clearance or does not otherwise satisfy the current immigration rules, the Officer will then examine the case under the 1973 Rules. If the person seems likely to be able to satisfy the 1973 Rules then the person will be granted temporary admission with a prohibition on taking employment but permitted to start their self-employment. The cases will then have to be re-examined after the ECJ ruling in *Tum*.

Your rapporteurs are aware that the Home Office is applying this guidance in an extremely strict way and there are now a number of challenges underway where applications have been refused, without a right of appeal. Only when challenged by way of judicial review does the Home Office apparently review these cases rigorously, leading to a reconsideration of the decision to refuse entry.

The current Home Office guidance states that the British Embassy in Ankara will not consider applications under the 1973 Rules and they will only be considered under the current Immigration Rules. This is in direct conflict with the Court of Appeal decision in *Tum*. Applicants have a right of appeal to an Immigration Judge.

During the reporting period the Home Office suspended consideration of applications from in-country applicants who wished to remain in business in the UK. The justification given for that suspension was that Ken Sutton had touched upon the subject in his inquiry into the ECAA applications. Your rapporteurs are aware that in the main applications were not considered from March 2004 to December 2004.

The Home Office has now produced guidance on in-country switching cases. The guidance correctly identifies that the ECJ decision in *Savas* makes clear that the standstill clause does apply to applicants who are already "in-country" having obtained leave to enter or remain, whether or not they have overstayed that leave. There is much emphasis however in the guidance on the use of fraud in in-country switching cases and obtaining leave to enter or remain in the first instance by use of fraud. In the Home Office view any use of fraud would mean that the application should be refused under the current Immigration Rules rather than by reference to the 1973 Rules. Your rapporteurs' view is that this is the incorrect approach to a standstill clause. Turkish business applicants should always have their cases considered by reference to Immigration laws and procedures that were in place in 1973. If certain behaviour would have lead to refusal in 1973 then such application should be refused for that

reason. The Home Office cannot however impose current rules and procedures relating to immigration on Turkish business applicants.

We recommend that the Commission requests the UK to advise on the measures it has taken to implement the standstill provisions of the EC Turkey Additional Protocol regarding the self employed and service providers in particular in light of the ECJ's jurisprudence.

Chapter XI
Miscellaneous

There has been substantial activity this year in the UK regarding training on EU free movement law. The Immigration Law Practitioners Association ran more than four courses for lawyers on aspects of EU law with specific reference to A8 nationals and family reunification.

Further, the non-governmental organisation, Justice, continued a programme on European asylum law, focussing on the EU dimension, including A8 nationals.

An excellent new book appeared on EU free movement of persons written by two of the contributors to this report, Rick Scannell and Nicola Rogers*, Free Movement of Persons in the Enlarged European Union*, Sweet & Maxwell 2004. This provides an excellent resource for lawyers and academics in the field and is up to date. Another of your rapporteurs, Elspeth Guild, published *Legal Elements of EU Identity: Citizenship and Immigration,* Kluwer law International, The Hague 2004, in this period as well.

There have been no substantial changes to citizenship law in the UK. Since the 2002 Act (discussed in the previous report) widening the possibilities for withdrawal of British citizenship on the grounds of public policy to our knowledge there is only one case where the UK authorities have sought to withdraw citizenship on this ground. This case is currently before the courts.

Annex 1. Access to the public service – the legal service

The Government Legal Service
Legal Recruitment Schemes and Current Opportunities

Eligibility

Most of our lawyers join after qualification. If you are a barrister called to the Bar of England and Wales and have completed pupillage, or a solicitor admitted in England and Wales, you are eligible to apply to the GLS.

However, we also take a small number of trainees each year, sometimes with sponsorship, if appropriate. Trainee solicitors may be trained in more than one Government Department and, in some cases, a period of attachment to the private sector may be arranged. Pupil barristers spend part of their pupillage in Chambers where there is an agreement to have GLS trainees.

There is also a vacation work placement scheme aimed at giving students an insight into the GLS' unique perspective of the law. The placements are targeted at penultimate year law students and final year non-law students who are interested in applying to the GLS for legal training. The placements are usually for a two or three week period.

Certain non-EEA family members of EEA nationals may also be eligible for appointment.

Annex 2. Access to the Public Service – in the intelligence service

Nationality rules

The following rules relate to a candidate applying for employment at GCHQ or the JTLS. Please read them carefully to ensure that you comply with them.

Nationality

A. You must be a British citizen (but see Note 1), **and**
B. One of your parents must be a British citizen or have substantial ties with the United Kingdom or, if deceased, have had such citizenship or ties before death. (See Note 2).

Note 1: If you hold dual nationality, of which one component is British, you will nonetheless be considered. If successful, you will normally be required to be prepared to give up your non-British nationality as a condition of your confirmation of appointment to GCHQ.

Note 2: For this purpose a person has "substantial ties" if: a. that person holds citizenship of a British Dependent Territory, is a British Overseas citizen, holds citizenship of the Commonwealth, holds the status of a British protected person, holds the status of a British National Overseas, holds EEA nationality, or citizenship of the United States of America and: b. has a demonstrable connection with the United Kingdom by way of family history or period of residence in, or other service to, the United Kingdom.

General guidance on spouses and cohabitees

A candidate married to or living with a person who is not a British citizen remains eligible for employment at the discretion of the department. Candidates should note that marriage to, or co-habitation with a person who is not a British citizen after appointment may in some circumstances result in withdrawal of security clearance and transfer to another Department, or (if this is not possible or the officer does not wish to transfer) dismissal. Each case will be considered on its merits, taking into account the ties between the person involved and the United Kingdom.

Residence

Candidates for employment at GCHQ must normally have been resident in the UK for 10 years prior to the date of their application. You may nonetheless be considered if (for example):

- You have been serving overseas with HM forces or in some other official capacity as a representative of HMG.
- You were studying or took a gap year abroad.
- You were living overseas with your parents.

The above is not definitive. If you are uncertain as to your eligibility, please contact the GCHQ Recruitment Office.

In such cases, you must be able to provide referee cover for the period(s) of residence overseas.

The duration of your residence overseas and the country in which you lived will also be relevant.

Annex 3. Access to the Public Service – the Fast Stream

IS THE FAST STREAM FOR ME?

Nationality Requirements

The Fast Stream is normally open only to UK nationals. There may, occasionally, be vacancies open to other Commonwealth citizens or to European Economic Area nationals with an unrestricted right to reside in the UK, however, the European Fast Stream is reserved for UK nationals only. If successful, you'll be asked about your nationality at birth, whether you have ever possessed any other nationality or citizenship, whether you are subject to immigration control and whether there are any restrictions on your continued residence or employment in the UK.

To join the Diplomatic Service, you must be a British citizen and been resident in the UK for at least two of the previous 10 years, at least one year of which must have been a consecutive twelve month period. Furthermore, to enable the appropriate security checks to be carried out, you must have resided for at least three consecutive years in one country. All applicants should be aware that a lack of sufficient background information may preclude an applicant from being granted security clearance. If you hold dual nationality (i.e. you are a British citizen and are also a national of another country), you should check with Recruitment at recruitment.public@fco.gov.uk or write to: Head of Workforce Planning Operations Team Room 2/90 Old Admiralty Building London SW1A 2PA

European Economic Area Nationals

European Economic Area National means a national of a European Community Member State or European Free Trade Area Member State. EC Member States (besides the UK) are the Member States of the European Community, ie Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden. EFTA Member States are, for the purposes of recruitment to the UK Civil Service, Iceland and Norway from 1 January 1994 and Liechtenstein from 1 May 1995.

Switzerland – Although Switzerland is not part of the EEA, and Swiss nationals are not EEA nationals, the EU-Swiss Agreement (1 June 2002) confers upon Swiss nationals many of the same rights as are enjoyed by EEA nationals and their family members, including employment in the central departments of the Civil Service in non-reserved posts.