REPORT
on the Free Movement of Workers in the United Kingdom in 2005

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Introduction

Free movement of persons has continued to be a high political priority in 2005 as it was the previous year. The arrival in the UK of 345,000 nationals of Member States which joined the EU in 2004 for the purpose of work has been significant to policy makers though as a percentage of the national labour force it does not qualify for such an adjective. In general, the arrival of nationals of other Member States for the purpose of work has been well received. 83% of the new workers in the UK are between the ages of 18 – 34. The largest proportions are Polish and Lithuanian workers. The worker registration scheme, under which nationals of eight EU Member States are required to obtain a certificate in order to continue lawful employment, has been the subject of some discussion. It appears to be unpopular with some employers and seen as an obstacle to free movement of workers. It also discriminates against nationals of some Member States in favour of nationals of others. The necessary powers have been put in place to extend the scheme to nationals of Bulgaria and Romania when they are expected to accede to the EU at the end of 2006.

Other areas of UK migration law have been more contentious. Access for third country national tourists to the UK territory from other Member States has been criticised by the Independent Race Monitor. Lingering indirect discrimination on grounds of length of residence or documents continues to raise concerns. Access to the civil service for nationals of other Member States is covered by very complex rules which lack transparency. Again, residence status seems to be a criterion which is all too easily applied.

Third country national family members of migrant EU nationals continue to present difficulties. The length of delay in dealing with applications has diminished though there are still many reports of differential treatment of such family members on entry to the UK than that accorded to the EU citizen principals. Our report indicates that the UK authorities have taken a very restrictive approach to the ECJ's ruling in *Bambaust* limiting its application strictly to circumstances where an EU principal has divorced the third country national spouse or left the state. If the third country national spouses cannot provide hard evidence of a divorce or departure from the territory the application is rejected. New restrictions have been applied to marriage – third country nationals can no loner marry an EU national in the UK unless they are able to obtain a certificate (or visa) to do so.

General immigration policies have been announced the purpose of which is to seek to maximise the economic benefit of migration to the UK. Generally, for third country nationals, a new points system will be put into place over 2006 on the basis of which individuals should be able to determine whether they will be admissible to the UK for employment. However, these changes are being accompanied by further obligations on employers to inform the authorities regarding the whereabouts of their third country national workers and spot fines. A new licensing scheme for labour recruitment intermediaries, known as gangmasters, is coming into force which is intended to provide better protection for workers in lower skilled occupations in agriculture and food processing.

Finally, access to social benefits continues to be an issue for some citizens of the Union. Changes which were introduced in 2004 to limit access to benefits for nationals of other Member States are resulting in a number of court challenges which have yet to be determined by the national courts.

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 2000
- 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
- Accession (Immigration and Worker Registration) Regulations 2004
- Immigration (European Economic Area) and Accession (Amendment) Regulations 2004
- Immigration (Europe in Economic Area) (Amendment) Regulations 2005

The admission of EEA national is regulated by the Immigration Act 1988, section 7 which confirms that EEA nationals are not required to obtain leave to enter or remain in the United Kingdom and by the Immigration (European Economic Area) Regulations 2000, which provide detailed regulations on the admission, residence and deportation of EEA nationals. Guidance on the administrative practice to be applied to EEA nationals is given to Immigration Officers at UK ports of entry in the both the Immigration Directorates Instructions (IDIs) and the European Directorate Instructions (EDIs). The latter were first published in the course of 2005 and full commentary on these have been provided in the 2004 report.

EEA 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. The entry and residence of Swiss nationals is regulated under the Immigration (Swiss Free movement of Persons) (No. 3) Regulations 2002. Section 7 of the Immigration Act 1988 effectivley removes from Immigration Officers control of EEA nationa at UK borders. Immigration Officers are precluded from examining EEA nationals on entry unless that have "reason to believe" that there may be reasons for exclusion on grounds of public policy, public security and public health. Where such a belief is held, regulation 24 of the Immigration (European Economic Area) Regulations 2000 applies so at to treat those EEA nationals as if they were persons seeking leave to enter under the 197 Immigration Act. This then permits an Immigration Officer to apply the UK's administrative provisions as to control on entry, such as examination of the EEA national and also enables the Immigration to detain an EEA national or to grant them temporary admission pending further enquiries. Where a refusal on grounds of public policy, public security and public health is proposed, Immigration officers must refer to a specialist section of the UK Immigration Service for clearance to proceed. While EEA nationals are not generally questioned on entry, their family members who have been issued with a residence document are routinely asked if they are still married and if their spouse or EEA family member is still resident in the UK.

There are no statistics yet available from the UK authorites on the number of EEA nationals admitted to the UK in 2005.

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

1 By Nicolas Rollason, Kingsley Napley.

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
- Immigration (European Economic Area) Regulations 2000
- 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
- Accession (Immigration and Worker Registration) Regulations 2004
- Immigration (European Economic Area) and Accession (Amendment) Regulations 2004
- Immigration (Europe in Economic Area) (Amendment) Regulations 2005

The issuing of residence permits to EEA nationals is governed by the Immigration (European Economic Area) Regulations 2000, regulations 15 to 20. There are no published statistics in respect of residence permits issued to EEA nationals United Kingdom in 2005. The Home Office have indicated that these will be produced in a revised format in the future.
Resident permits are not required by EEA nationals, unless they wish to apply for their family members to obtain residence documents. In addition, those applying for settlement (indefinite leave to remain) must first be issued with a residence permit before being considered for settlement on the basis of four years residence in the United Kingdom exercising Treaty rights.

Processing of EEA residence permits

Without any existing data from the Home Office as to the average processing times for residence permit applications for EEA nationals in 2005, your rapporteurs are required to rely on anecdotal evidence. A request for such information has previously been made for 2004 under the Freedom of Information Act 2000, but was refused under one of the grounds of exemption, namely that providing such information who exceed cost thresholds set in respect of such requests.

The processing of EEA residence permits has improved considerably over 2005. Anecdotal evidence indicates that processing times throughout the period have been around four to six weeks for the majority of straightforward applications. The system has on the whole remained flexible and applicants are able to submit applications without their passports to enable them to travel while the application is pending. Caseworkers will then request passports and other additional information when the application is ready to be considered. The Home Office has agreed certain procedures with representative organisations, including the Immigration Law Practitioners Association, providing legal representatives of applicants with a contact fax and telephone number where requests for priority to be given to processing for compassionate of business reason can be made. In cases of extreme urgency, arrangements can be made with Home Office staff for the delivery and collection of passports where, for example, the applicant travels frequently and a short notice on business.

Application forms are not mandatory for applications made by EEA nationals under EU law. Applicants are however encouraged to use the Home Offices application forms. Guidance given to applicants on the Home Offices website states that "It would be helpful to us if you used form EEA1

which is available on this website". New forms for EEA applicants and their family members were issued by the Home Office in 2005.

Administrative Practice

The main issue with regard to the application process remains discrimination on grounds of nationality in access to services by EEA nationals. The Home Office has for some time operated a fast track system for considering straightforward application. This was initially a 48 hour postal service and with the introduction of charging for applications made under the UK Immigration Rules on 1 April 2005, this became a same day service (known as the premium service). EEA applicants are specifically excluded from using this service. From meetings with Home Office staff, it appears that the only justification for not making this service available to EEA applicants is that such applications would not be chargeable. The continuing failure to make available this same day service constitutes unlawful discrimination on ground of nationality. There can be no justification of this exclusion on grounds that applications are more complex than applications for permission to remain under the national immigration rules. This discrimination is most clear when an EEA national, who has been granted permanent residence in the United Kingdom, wishes to transfer this stamp from an expired to a new passport. Identical applications made by non-EEA nationals can be processed on the same day, while those made by EEA nationals may take up to six weeks.

Departure

Texts in force

- Immigration Act 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) Regulations 2005

The Immigration (European Economic Area) Regulations 2000, part IV also deal with the issue of removal and deportation of EEA nationals. In addition to the provisions on entry(see above) Regulations 21(3) enables an EEA national to be made subject to administrative removal if he is not a "qualified person" (a person with enforceable Community law rights of free movement) within the meaning of the EEA Regulations. In addition, a person who has been a qualified person be ceases to be qualified may be liable to administrative removal under section 10 of the Immigration Act 1999.

Concerns have been raised that the 2000 Regulations do not adequately cover all free movement rights and restrict these to those falling within secondary legislation on workers, the self employed, service providers, students and the self sufficient. Rights of free movement contained in, for example, Article 18 EC are not covered. In practice, it is rare that EEA nationals are removed where they are no longer qualified persons.

Regulation 24 of the 200 Regulations contain legislative guidance on the application of the public policy, public security and public health proviso and states:

Decisions taken on grounds of public policy, public security or public health ("the relevant grounds") must be taken in accordance with the following principles:

(a) the relevant grounds must not be invoked to secure economic ends;
(b) a decision taken on one or more of the relevant grounds must be based exclusively on the personal conduct of the individual in respect of whom the decision is taken;

(c) a person's previous criminal convictions do not, in themselves, justify a decision on grounds of public policy or public security;
(d) a decision to refuse admission to the United Kingdom, or to refuse to grant the first residence permit or residence document, to a person on the grounds that he has a disease or disability may be justified only if the disease or disability is of a type specified in Schedule 1 to these Regulations;
(e) a disease or disability contracted after a person has been granted a first residence permit or first residence document does not justify a decision to refuse to renew the permit or document or a decision to remove him;
(f) a person is to be informed of the grounds of public policy, public security or public health upon which the decision taken in his case is based unless it would be contrary to the interests of national security to do so.

Practice

The guidance given to Immigration Officers on refusal of admission and deportation of EEA nationals on grounds of public policy, public security and public health are contained in the European Directorates Instructions (EDIs). The guidance on public security and public health appears to remain uncontroversial. However, your rapporteurs continue to have reservations with regard to the Home Office's interpretation of case C- 30/77 *Bouchereau* and in particular, the Home Offices prescriptive approach to the definition of serious offences (by reference to periods of custodial sentences) in particular to listing a number of offences which would justify deportation without the need to show personal conduct indicating a specific risk of new and serious prejudice to the requirements of public policy conduct as evidence of propensity to offend.

Remedies

Under the general rules on immigration appeals in the UK permit only one level of appeal however in certain circumstances a reconsideration of the determination of the AIT may be permitted. Appeals must be lodged within tight time limits. There is normally an oral hearing of the appeal where both parties appear. The decision of the AIT takes the form of a determination setting out the facts, law and the decision. Thereafter if there is a point of law which is disputed, a party may seek permission to appeal to the Court of Appeal. This application can be made either to the IAT or to the Court of Appeal. In the event of a claim of procedural irregularity, a party may seek judicial review of the decision by way of an application for permission to seek judicial review. This application is made to the High Court. The AIT maintains a good website with substantial information about its activities.[2]

Until 30 April 2006 when the Immigration (European Economic Area) Regulations 2006 came into force, appeal rights were regulated by the 2000 Regulations (SI 2004/2326) which were amended in 2001, 2002 to include the Swiss, 2003 and 2004 to deal with enlargement. There is a right of appeal to the Asylum and Immigration Tribunal (an independent judicial authority the members of which are appointed by the Lord Chancellor) against decisions on family permits, removal, entitlements to residence permits and exclusion/expulsion. The Nationality, Immigration and Asylum Act 2002 provides at sections 82 and 84 for appeals against immigration decisions on the grounds that the decision is not in accordance with Community law. Under the 2000 Regulations there was a general right of appeal against a negative decision which gave rise to an in country right of appeal. This was amended in 2003 to exclude from an appeal right altogether a person claiming to be an EEA national unless the person could produce a valid national identity card or a valid passport issued by an EEA state. The document, according to the Regulations is to be accepted as what it is stated to be if it is "reasonable apparent" that it is so and as relating to the holder if, again it is "reasonable apparent" that it does so. Another change brought about by the 2003 amendments is that the Secretary of State (or his/her officer) may certify that that an EEA ground in respect of an appeal was previously determined in an appeal already disposed of under the Regulations of section 82(1) of the 2002 Act. Regulation 29 provides for a right of appeal against a refusal to revoke a deportation order or an appeal from abroad (ie in respect of an EEA family permit). If the decision is on the grounds of national security or the inter-

2 http://www.ait.gov.uk/statistics/statistics.htm

ests of the relationship between the UK and another country the appeal is to the Special Immigration Appeals Commission (SIAC) which has specific and constraining rules.

When the new Regulations 2006 came into force on 30 April 2006 in anticipation of the end of the transposition period for directive 2004/38, the UK's Immigration Law Practitioners' Association made the following comments regarding the proposed new Regulations as regards appeal rights:

Appeals

Unlike other immigration appeals, an appeal under the Regs is not treated as abandoned solely because the appellant leaves the UK.

Reg. 26 (2) states that an EEA national may not appeal under the Regs unless he produces a valid national ID card or passport and similarly under Reg 26(3) the family member of an EEA national may not appeal unless he produces an EEA family permit or other proof that he is related as claimed to the EEA national. Since the validity of a passport or ID card might itself be in dispute this provision carried over from the 2000 Regs seems circular and an lawful means of excluding EEA nationals and family members from procedural rights.

Reg 27 provides that there is no in-country appeal in respect of a number of EEA decisions including a refusal to admit the person; a refusal to revoke a deportation order made against him; a refusal to issue an EEA family permit and decision to remove the person from the UK after he has entered in breach of a deportation order. There are certain exceptions including where the person states that a ground of appeal is that the decision is in breach of human rights – but only for decisions relating to removal in breach of a deportation order or refusal to admit the person.

Reg 28 provides for the circumstances in which appeals will be heard by the Special Immigration Appeals Commission. They include where the SSHD certifies that the EEA decision was taken by him wholly or partly on national security grounds or in the interests of the relationship between the UK and another country. This later ground is an extraordinary extension of the public policy/public security grounds for deportation defined by Community law. That an EEA decision could be made on that basis it itself extraordinary. That the appeal will be in secret before SIAC is even more appalling.

An appeal will also be to SIAC where the SSHD certified that the EEA decision was made in reliance of information which in his opinion should not be made public in the interests of public security or in the interests of the relationship between the UK and another country. This is even more tenuous use of SIAC and is plainly open to abuse. There is a genuine question mark of the compatibility of this provision with Community law.

Reg 29 provides for the effect of appeals. If the person in the UK appeals against an EEA decision to refuse to admit him or to remove him removal directions cease to have effect whilst the appeal is pending. However provisions relating to detention apply as if the removal directions were in force.

Chapter II
Access to Employment[3]

Text(s) in force

- Asylum and Immigration Act 1996, section 8
- The European Union (Accessions) Act 2006, section 2
- 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.

Registration of workers of new Member States

The Accession (Immigration and Worker Registration) Regulations 2004 remain in force. The Regulations laid down a registration scheme for A8 nationals (ie nationals of Member States which acceded to the EU on 1 May 2004 and who are subject to transitional provisions relating to the free movement of workers).

The Accession Monitoring Report, May 2004 –December 2005, confirms that A8 nationals have contributed to the success of the UK economy whilst making very few demands on the welfare system or public services. The report highlights that accession workers have helped to fill the gaps in the labour market, especially in administration, business and management, hospitality and catering, agriculture, manufacturing and food, fish and meat processing. In addition, according to the report, A8 nationals are supporting the provision of public services across the UK, such as bus drivers, care workers, teachers, dental practitioners and doctors. Further statistical information about the flows of A8 workers to the UK is contained in Chapter 9.

The European Union (Accessions) Act 2006 came into force on 16 February 2006. It enables the Home Office to make regulations governing the entitlement of Bulgarian and Romanian nationals to enter or reside in the UK as workers. As for A8 nationals, the Home Office is entitled to make it a requirement that Bulgarian and Romanian workers are registered and to charge a fee for registration. At the time of writing, the Home Office has not made regulations.

Turkish workers

In *Queen on the application of Ezgi Payir v Secretary of State for the Home Department* [2005] 1 WLR 3609, the High Court held that a Turkish national who had entered the UK as an au pair was a "worker" with consequent rights under Article 6(1) of Decision 1/80. In another case *Queen on the application of Ozturk and Akyuz v Secretary of State for the Home Department* [2005] Imm AR 677, the High Court had reached a similar decision in relation to two Turkish students who had worked part-time in the UK. At the time of writing, the Home Office had appealed both cases to the Court of Appeal and judgment is awaited.

Publication of the European Directorate Instructions

The Home Office's European Directorate Instructions (EDIs) are intended as procedural guidelines for Home Office caseworkers on the implementation of the Immigration (European Economic Area) Regulations 2000. They are now published on the website of the Immigration and Nationality Directorate.

3 By Judith Farbey, Tooks Chambers.

Chapter III
Equality of treatment[4]

Text(s) in force

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

There two keys issues which are important to examining equality of treatment. The first I will examine is access to the territory – is there equality of treatment here. Secondly I will examine treatment within the state (but access to social benefits will be covered separately in chapter 10).

Access to the territory

As the UK continues to apply border controls on the movement of persons from other Member States to the UK, the question arises as to whether the treatment which they receive on entering the UK is equivalent to that which British nationals receive. This issue was discussed in some depth in the 2004 report as the House of Lords had handed down judgment in a case where the UK authorities were found in breach of the equality requirement as regards the actions of immigration officers at Prague Airport. The key finding of that judgment was that the UK authorities had discriminated against Czech nationals who were Roma in comparison with other Czech and EU nationals seeking to come to the UK.

In following this issue, the Independent Race Monitor, Mary Coussey, presented her annual report 2004/5 on 5 July 2005. She is appointed by the Government under Section 19E Race Relations (Amendment) Act 2000 to monitor the effect of and the operation of Ministerial authorisations to discriminate on grounds of nationality and ethnic origin in relation to the operation of immigration and nationality functions. In the period covered by her review, there were nine authorisations in operation. In her opinion, the most far reaching of the authorisations is that which permits the prioritization in the examination of arriving passengers. In her opinion the accession of 10 Member States on 1 May 2004 has had a marked effect on the list of priority nationalities. She states that this is because "prior to this, nationals from Poland, Lithuania, Latvia and the Czech Republic were among the top ten nationalities refused entry in 2003."[5]

The other main concern which the Monitor highlights in her report is the operation of juxtaposed controls which were extended to include controls on trains travelling from the UK to Belgium and vice versa.

On access to the territory, the top nationalities refused in 2003 and 2004 (data for 2005 is not yet available) were Malaysia, Jamaica, Brazil and other central and south American countries, Romania, Ukraine, South Africa and Nigeria. Of these Romania may be of particular interest in light of the anticipated enlargement to Romania in 2007. The Monitor noted that many of the refusals of entry of priority nationalities arose as the result of intra-EU movements of persons. She states "Similarly, I was informed that Gare du Nord was being targeted, because it was wrongly perceived to be easier to

4 By Elspeth Guild.

5 M Coussey, Annual Report 2004/5 Independent Race Monitor, 5 July 2005; p 2.

gain entry to the UK by rail. I was told that tour parties arrive in Madrid from Brazil, spend a couple of days in Spain and France and say they intend to visit London for sightseeing. Key factors in refusals are that the person's income does not justify the expense of the visit, they mainly come from a poor region (Gioana), they know little about the sights they intend to visit, have no travel record and often have new passports."[6]

The reasons for refusal of entry are wider than those which are found in the Community Code on border control, though this is not relevant for the UK as it does not participate in the Code. However, the effect of refusing passengers moving within the internal market has consequences for other Member States. The Monitor considered at some length the operation of juxtaposed controls and the decision making to refuse entry to the UK of third country nationals who are still on the territory of another Member State (ie France or Belgium). The Monitor expressed concern that the establishment of priority nationalities for extra investigation when persons of that nationality are seeking to come to the UK may be resulting in a negative profile (para 2.28).

Equal treatment within the territory

Citizens of the Union are entitled to equality of treatment with nationals of the Member State in which they find themselves in respect of all matters within the material scope of the EC Treaty. Article 7(2) Regulation 1612/68 was the relevant provision for the period under examination here. It provides for equal treatment in social and tax advantages. As regards social advantages within the social assistance and security schemes, please see chapter 10.

Two issues have come to your experts attention this year as regards access to credit and banking facilities. First, as regards access to credit, the UK authorities established a scheme to assist workers in the public sector who are designated as key workers to have preferential access to credit in order to purchase their own homes in areas of particular price pressure. The scheme was opened in 2005 to nationals of any country (including EU citizens).[7] Secondly, access to banking facilities has begun to raise issues for nationals of other Member States. In order to respond to the UK's implementation of the money laundering regulations, UK banks have begun to require more and more detailed information confirming an individual's previous address before accepting to open a bank account for them. According to the British Banking Association (www.bba.org.uk) banks differ according to the documents which they require from individuals. For EU citizens, the BBA advises that a national identity card, residence permit issued by the Home Office and national driving licence should be sufficient to prove identity. But the individual must also prove his or her address in the UK and may be required to prove their previous address either in the UK or abroad. Here the number and variety of documents varies quite substantially. The UK financial ombudsman, contacted in this regard, noted that while there have been complaints received in his office. The Banking Code Standards Office was able to provide substantially more information. A check of recent complaints to the office revealed the following:

1. Caller with Latvian girlfriend unable to open an account;
2. Caller with German girlfriend unable to open an account because bank "kept changing its mind over acceptable documents";
3. Caller whose Spanish ID document was refused;
4. Caller whose "foreign employee" was refused an account;
5. Polish man, calling on behalf of a Polish friend. He says they took all the correct documents to the bank (the caller knew what to take) but the application was turned down, he said, because the applicant didn't speak English.

Language ability certainly seems to be one of the issues involved in the difficulties in opening bank accounts in the UK but may not reveal the full extent of the problem.

Equal treatment in working conditions is an important concern of the Commission. One issue which has been raised is in respect of indirect discrimination against researchers and other university staff. There is little report of discrimination on the basis of nationality which is direct. But there are

6 Ibid, para 2.17.

7 G Macklin, Housing Director, Association of London Government, 21 February 2006, Brussels.

measures which are being taken which may constitute indirect discrimination in this field. These relate to the criteria on the basis of which foundations make available research funding for academics. A typical example is from the Times Higher Education Supplement, March 10, 2006 p 52. There is an announcement of the 2006 Leverhulme Major Research Fellowships. Eligible candidates must "hold an established post in a humanities or social sciences at a UK university and have held such a post for at least the past five years at the closing date of application." In light of the jurisprudence of the European Court of Justice and its general disapprobation of temporal limitations as potentially discriminatory in respect of EU nationals, a question must be raised about a five year employment requirement which can only be fulfilled by employment at a UK institution. Access to research funding is critical for the career promotion of all academics working in the UK. Thus the ability to apply for research funding is a social advantage for academic workers in the UK. British citizens are more likely to fulfil the five year employment requirement than nationals of other Member States. Thus it may be questionable to extent to which the temporal limitations on this kind of research funding are compatible with the EC Treaty.

Chapter IV
Employment in the Public Service[8]

The concept of public service in the United Kingdom

The concept of public service in the United Kingdom mainly covers those who work in the civil service, the army and the police. The term 'civil service' refers to work for the United Kingdom central government administration, as well as employment by the separate administrations in Northern Ireland, Scotland and Wales. It does not however include employment by any of the following: local government at city or county level, schools, universities and within the health service.

The historically favoured group for civil and military service

Historically, the rules on eligibility for civil service and military appointments permitted the recruitment only of British citizens, citizens of other Commonwealth countries and Irish citizens. Persons who are not British, other Commonwealth or Irish citizens are classed as 'aliens', and have historically been excluded from civil or military employment.[9]

Section 3 of the Act of Settlement 1700 – which is still in force – states that "no person born out of the kingdoms of England Scotland or Ireland or the dominions thereunto belonging … shall be capable … to enjoy any office or place of trust either civill or military." In contemporary terms, this means that birth in the United Kingdom or its dominions is required for civil and military posts. Section 3 of the Act of Settlement has however been supplemented by a clause in Schedule 7 of the British Nationality Act 1981. It permits employment in civil or military service of all British, other Commonwealth and Irish citizens, irrespective of place of birth.

In practice, persons relying upon a non-UK Commonwealth citizenship must also comply with the rules relating to work permits. Other Commonwealth citizens are free to take up employment only in a limited number of circumstances: (i) if they have 'indefinite leave to remain' in the United Kingdom, (ii) if any of their grandparents was born in the United Kingdom,[10] or (iii) if they are Cypriot or Maltese nationals (since these Commonwealth states joined the EU in 2004). Where none of these qualifications is met, a work permit will be required, and will depend upon evidence that there is no suitably qualified resident or EEA labour.

Aliens in the civil service

People classed as aliens are excluded by legislation from appointment to the civil service. This follows both from the underlying general rule set out in the Act of Settlement and from section 6 of the Aliens Restriction (Amendment) Act 1919, according to which "no alien shall be appointed to any office or place in the Civil Service of the State."

The prohibition in the 1919 Act has been relaxed in limited circumstances by section 1 of the Aliens' Employment Act 1955. It firstly permits the appointment of aliens to work *outside* the United Kingdom if the relevant Minister has approved the employment of that nationality and/ or the employment of aliens in that category of employment. Secondly, section 1 permits the appointment of aliens to work *in any position* if a certificate covering their employment has been issued by the relevant Minister. For these purposes, a certificate may cover a named individual for a given position. In that case, the Minister must be satisfied "either that no suitably qualified person being a British subject is available for employment in that service or that the alien possesses exceptional qualifications or experience fitting him for such employment." Alternatively, a certificate may cover aliens generally for a specified position or class of positions. In this latter case, the Minister must be satisfied that "suitably qualified persons being British subjects are not readily available, or available in sufficient

8 By B. Ryan, Kent University.

9 See British Nationality Act 1981, s 51. The category known as 'British Protected Persons' are also deemed not to be aliens by section 51 of the 1981 Act. However, since they are not covered by the qualification to the Act of Settlement contained in Schedule 7 of the 1981 Act, they remain subject to the underlying prohibition on civil or military employment.

10 See para 186 of the Immigration Rules.

numbers, for employment in the service, or class or description of service, specified in the certificate." In either case, the relevant Minister must obtain the consent of the Treasury before issuing a certificate, and certificates lapse after 5 years. It appears that in practice recourse to certificates is limited: official figures show that 45 persons were employed under them in the year 2001-02, and 50 persons in the year 2002-03.[11]

The impact of EU membership on civil service eligibility

Since 1991, the legal position as regards employment in civil service has come to be influenced significantly by EU membership. In place of the old distinction between British, Commonwealth and Irish citizens on the one hand and aliens on the other, what has emerged is a distinction between senior civil service positions, which are reserved to British citizens, and other posts, which are open to other Commonwealth nationals and to EEA nationals and their family members. The dividing-line between senior and non-senior posts is that given by the 'public service' exemption in Article 39(4) of the European Community Treaty.

The first step was the amendment of the Aliens Employment Act 1955 by the European Communities (Employment in the Civil Service) Order 1991.[12] As a result of the amendment, section 1 of the 1955 Act now expressly permits the employment of nationals of Member States of the 'European Communities', together with their family members who are covered by EU law, in civil service posts to which the principle of free movement of workers applies. That permission is extended to other EEA nationals and their relevant family members, because of the general provision in section 2 of the European Economic Area Act 1993 that the term 'European Communities' is to be understood to cover all of the European Economic Area. The possibility of civil service employment has also been extended to Swiss nationals and their families since the EU-Swiss Agreement on the Free Movement of Persons came into effect on 1 June 2002.[13] In their case, however, access to the civil service does not appear to be provided for in UK legislation, either expressly or by implication.

The 1991 Order was intended to ensure compliance with Article 39 EC.[14] The Order was presumably therefore a response the Communication of 5 January 1988 in which the European Commission had sought to define the range of posts to which the 'public service' exemption applied.[15] In the Commission's view, the exemption applied only to positions such as those in the armed forces, the police and the judiciary, and to work for the government only where it involved the exercise of public law powers. The Communication was itself based upon the approach of the Court of Justice to the public service exception Article 39(4) set out in particular in *Commission* v. *Belgium* in 1980.[16]

The second development, in 1996, saw the possibility of appointment to higher civil service posts being reserved to British citizens alone, to the exclusion of other Commonwealth and Irish. This change was not achieved through legislation but through an amendment to the civil service's management code. While the change was not required by EU law, the category of senior posts from which Commonwealth and Irish citizens are excluded is the same as for EEA/ Swiss nationals.[17]

What is unclear however is the manner in which it is determined whether or not a given post is within the EU concept of 'public service'. The civil service's online recruitment information contains only this quite general statement on the subject:

11 See HMSO, *Crown Employment (Nationality) Bill 2002-03 - Explanatory Notes,* para 9 and *Crown Employment (Nationality) Bill 2003-04 - Explanatory Notes*, para 9.

12 SI 1991 No 1221.

13 This appears from the Civil Service information on 'Nationality Requirement', at http://careers.civilservice.gov.uk/ (accessed 8 March 2006).

14 See the 'Explanatory Note' attached to the Order.

15 Communication of 7 January 1988 on 'Freedom of Movement of Workers and Access to Employment in the Public Service of the Member States, OJ 1988 C 72/2.

16 *Commission* v. *Belgium* Case 149/79 [1980] ECR 3881.

17 See the statement by the responsible Minister, Roger Freeman, *House of Commons Debates*, 1 March 1996, col 751.

> "about 75% of Civil Service posts are open to Commonwealth citizens and nationals of any of the member states of the European Economic Area (EEA). The remainder, which require special allegiance to the state, are reserved for UK nationals. This includes most Fast Stream posts."[18]

What is lacking in particular is a public list of the positions which other EEA nationals and their relevant family members are eligible to apply for, or precluded from applying for.

Crown Employment (Nationality) Bills 2002-2006

The position of aliens as regards non-senior civil service appointments has been the subject of parliamentary activity in recent years. In each of the four parliamentary sessions since 2002-2003, Andrew Dismore, a backbench Labour MP, has proposed an identical Crown Employment (Nationality) Bill.[19] The Bill contemplates the removal of the existing restrictions on the appointment of aliens. Instead, there would be a general power for the executive to lay down requirements as to nationality within the civil service. Since the work permit framework would remain in place, the main practical consequence of this legislation would probably be to permit the appointment of long-term UK residents who are not Commonwealth or EEA nationals.

The principles of the Bill have attracted extensive support from within Parliament. In particular, the Bill was endorsed by the January 2004 report of the House of Commons Public Administration Committee, entitled *A Draft Civil Service Bill: Completing the Reform*,[20] as part of its wider proposals that the United Kingdom civil service should have a statutory foundation. The 2003-04 parliamentary session also saw the Bill reach the Report stage (the final stage prior to approval) in the House of Commons, where it failed for lack of support.

Labour Governments in recent years have remained ambivalent on the question of civil service recruitment from outside the Commonwealth/ EEA. The original Crown Employment (Nationality) Bill appears to have been drafted with the assistance of the Cabinet Office, and the Cabinet Office authored the explanatory notes which have been published alongside it. In addition, on the one occasion when the Bill was the subject of extensive discussion (session 2003-04), the Government announced that it supported the Bill.[21] Despite that, the Government did not attempt to keep the Bill alive during the 2003-04 parliamentary session, and the Government has not subsequently acted on its principles.

The armed forces

The possibility to enlist in the armed forces is also limited by nationality. Because of section 3 of the Act of Settlement, as modified by the British Nationality Act 1981, only British citizens, other Commonwealth nationals and Irish citizens may be the enlisted into the armed forces.

It appears from information given to Parliament by the Ministry of Defence in 2004 that other conditions are also imposed.[22] It is required that both parents of an applicant (i) have at all times been British, other Commonwealth or Irish citizens, and (ii) were born in such a country. It also stated however that this parental requirement can be relaxed in the case of posts with high level security clearance. It is also normally required that the applicant have resided in the UK for a minimum of ten years – although this too may be relaxed in the case of posts with high-level security clearance.

The police

The position of police officer is classed as a 'civil' office for the purposes of the Act of Settlement.[23] Until recently, only British, other Commonwealth or Irish citizens were eligible for appointment. That

18 http://careers.civil-service.gov.uk/ (accessed 8 March 2006).
19 2002-03 *House of Commons Bills* 48, 2003-04 *House of Commons Bills* 39, 2004-05 *House of Commons Bills* 40 and 2005-06 *House of Commons Bills* 34.
20 2003-04 *House of Commons Papers 128*.
21 Solicitor-General, Harriet Harman, *House of Commons Debates* 1 May 2004, col 606.
22 Ministry of Defence memorandum to the House of Commons Select Committee on Defence, 'Care for Service Recruits and Trainees', 2004-05 *House of Commons Papers* 63.
23 See HMSO, *Explanatory Notes to the Police Reform Act 2002*, para 399.

position was however changed by the Police Reform Act 2002. Section 82 of the 2002 Act provides that "irrespective of … place of birth, a person of any nationality" may become a police officer. It should be appreciated however that this new position does not prevent residence-based criteria being applied. For example, the Metropolitan Police Force's requirements state that non-EEA nationals are eligible for appointment only if they have the status of permanent residence in the UK.[24]

24 See http://www.metcareers.co.uk/application_specials_ssq.asp (accessed on 8 March 2006)

Chapter V
Family members[25]

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) (Amendment) 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
- The Asylum and Immigration (Treatment of Claimants etc) Act 2004
- Civil Partnership Act 2004.
- The Immigration (European Economic Area) (Amendment) Regulations 2005

Administrative Practice

As set out in previous editions, under the Immigration (European Economic Area) Regulations 2000, third country national members of EEC 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 are now granted for six months (formerly one year), giving the applicant this window of space to travel to the United Kingdom. This change came into force on 7 February 2005. As set out before, Swiss nationals 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 updated Diplomatic Service Instructions (September 2005) state that 'A marriage of convenience is, […] a sham marriage entered into solely for immigration purposes, where the parties have no intention from the outset of living with the other as man and wife in a genuine and settled relationship' (Chapter 21.4.16). 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 have challenged the nature of marriages. 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 continued as in the year 2004 to have been used more frequently than in former years. (See below for changes in relation to people who are illegally in the United Kingdom being able to marry).

The situation in relation to delays in issuing EEA family permits has improved. As mentioned in the last report, the introduction of fees for most applications made to the Home Office under domestic immigration laws (not under European law), meant that caseworkers had strict targets to meet in relation to taking domestic immigration decisions and informing the applicant and as a consequence applications under European law were neglected. 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 has not been amended since last year and states 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.

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.

25 By Alison Hunter, Wesley Gryk Solicitors.

In relation to the implementation of *Baumbast*, the Home Office has stuck to the letter of the wording set out in the Immigration (European Economic Area) Regulations. Applications are being refused if there is no evidence that the EU national has left the United Kingdom or the couple are not divorced. In practice therefore, if proof of the EU national having left the United Kingdom is not available or if the couple is still married and the EU national is in the United Kingdom, but not in touch with the applicant, the application is refused.

The Home Office has in the past refused to take into account future earnings of a third country national spouse in calculating resources of the family if that spouse had not previously been working or had work permission in the United Kingdom. This does not therefore reflect accurately whether the EU national and his dependants will have sufficient resources, nor does it take into account the personal circumstances of the EU individual. In relation to outstanding residence document applications, the Home Office will not confirm that work is permitted during the time that they are reviewing the application. This can lead to problems for third country national family members wanting to take up employment as extensive employer liability legislation means that employers need to see documentary proof of the right to work of the individuals they employ.

Consequences of references to the European Court of Justice

The main case of interest in this area was that of *Chen*. At the end of 2004 the immigration rules were amended to take this case into account and came into force on 1 January 2005. The rules allow for the primary carer or relative of an EEA national self sufficient child to enter or remain in the United Kingdom and to be issued with a residence permit for the period of five years. However, the primary carer or relative explicitly is not allowed to work or have recourse to public funds throughout their time in the United Kingdom. This seems to be at odds with fundamental principles of Community law. In addition, the fact that this case was transposed into the immigration rules (rather than the Immigration (European Economic Area) Regulations) means that general grounds of refusal as set out at Part 9 of the immigration rules, apply to this right established under Community law. It also means that individuals benefiting from this case are subject to immigration control of the United Kingdom and any discretionary powers that the Secretary of State may wish to exercise.

Akrich, as was set out in last year's report, was granted the right to stay in the United Kingdom. Our concern that the case would be interpreted narrowly proved well founded as the obiter section of the European Court of Justice's judgment has been adopted in the Immigration (European Economic Area) (Amendment) Regulations 2005. A British national who now travels to another member state with his or her third country national spouse will only be able to make use of EU law to return to the United Kingdom if his or her spouse is lawfully resident in the other member state. The third country national will therefore be left with two realistic options: to apply to join the British spouse under domestic law or for the British national to exercise a Treaty right in another member state and to be legally joined by the third country national spouse before returning to the United Kingdom. Arguably if the British national has exercised free movement rights in another member state, an obstacle is being placed in his way if he is unable to return with his spouse to the United Kingdom.

New marriage provisions

The announcement mentioned in the last report by the government to tackle sham marriages has now come into force. Since 1 February 2005, people subject to immigration control who want to get married, need to do so at a specially designated register office, of which there are 76 throughout England and Wales and includes all the register offices in Scotland and Northern Ireland. People subject to immigration control are not able to marry unless they have an entry clearance specifically for the purpose of marriage in the UK or they have written permission from the Secretary of State in the form of a certificate of approval from the Home Office. Once the notice has been accepted by the registrar in the designated office, the couple can marry at any register office.

EEA nationals and Swiss nationals are exempt from having to obtain a certificate of approval as they are not subject to immigration control. However a third country national wanting to marry an EEA national would have to seek approval. If the third country national does not have leave in the UK or the total leave granted to the individual was under six months or s/he has less than three months

remaining of the current leave, s/he would not be able to marry the EEA national in the United Kingdom. It remains to be seen whether this will be considered by the courts in the United Kingdom as an obstacle to free movement.

Unmarried partners

Provision for unmarried partners to be permitted to join their UK resident partner is included in the Immigration Rules at paragraph 295D. In addition, the Civil Partnership Act came into force in December 2005. This allows homosexual couples to register their relationships with similar obligations and rights to those of marriage. Immigration law has been amended accordingly and EEA nationals will be able to bring their partners to the United Kingdom to undergo a civil partnership ceremony or, if the partner is already in the United Kingdom, apply for a certificate as mentioned above under the new marriage rules. In line with spouses, these partners will initially be granted two years' leave to remain.

After this period the third country national will be granted leave in line with the EEA national. Therefore if the EEA national has a five year residence document, the third country national will be granted to the date that this expires or he will be granted indefinite leave if the EEA national has already obtained this.

The requirements for unmarried partners who do not enter a civil partnership are that one party must be resident in the UK, the non EEA partner must be lawfully present (or else the application must be made from abroad), they can support and accommodate themselves without recourse to public funds, and they intend to live together permanently. The 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 immediately (unlike a British national returning to the United Kingdom). 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.

Access to indefinite leave to remain

This is being dealt with in Chapter 1 as regards community nationals. Third country national family members suffer the same problems as the principal with regard to acquiring permanent 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. There appear not to have been any specific problems for third country nationals and their families since these provisions have been in force.

Chapter VI
Follow up in the UK of decisions of the European Court of Justice

In this chapter[26] 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.

Bidar, Case C-209/03, 15/3/2005. This case concerned the award of maintenance loans to students and the imposition of a requirement that the students acquired "settled status" (a condition automatically satisfied by British citizens) in the UK before the loan would be awarded. The ECJ found this requirement to be discriminatory. Since the judgment of the ECJ the relevant education regulations have been amended to remove the requirement that settled status is obtained. Your rapporteurs are aware however that the settled status requirement is still being applied to the award of bursaries for nursing studies and other NHS courses.

Baumbast, Case C-413/99, 17/09/2002. Your rapporteurs are concerned that an overly restrictive approach to the effect of Baumbast is taken by the Home Office. Whilst the facts of Baumbast and R related to situations where the EU national parent had left the UK or had divorced the non-EU national parent, we do not consider that the principles are restricted to these factual scenarios. Your rapporteurs are aware of cases where a non-EU national parent has been denied right of residence with a child in education where the EU national parent remains living in the UK but is estranged from the non-EU national parents. The ECJ cannot have intended that the principle that a primary carer will only attain the right of residence if the EU national definitively leaves the UK or divorces the primary carer.

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 previous chapter on family reunification.

Commission v Spain (re residence visas), Case C-157/03, 14/4/2005 This case concerned the failure by Spain to correctly transpose the provisions of Directives 68/360 and 64/221 into domestic law by applying additional conditions to the grant of residence documents for family members and delaying in issuing such residence documents. The UK authorities have improved the time taken for consideration of residence permit/document applications. However it is of concern that Home Office internal guidance states that caseworkers should process applications quickly where the representative first draw attention to the provisions of Directive 64/221.

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

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 (see further section on Association Agreements).

Professional football

In our report for 2005, we noted that in February 2005, UEFA announced a proposals to set a quota of 'home-grown' players in European club competitions.[27] The proposals were adopted on 21 April 2005 and mean that from 2006/07, of a squad of 25 players, at least two have to be club trained (registered

26 By Nicola Rogers, Garden Court Chambers.

27 'Local Training Debate Moves Online', UEFA press release 6 February 2005.

for a minimum of three years between the ages of 15 and 21) and at least two more have to be association trained. These figures rise to three and three in 2007/08, and four and four in 2008/09.

As we noted last year, 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.[28] This included the vice president of Arsenal football club a fact noted by the newspapers as curious at a time when for the first time in its history that club had no home born players on its team.[29] The football associations of other parts of the United Kingdom – i.e. Scotland, Wales and Northern Ireland - supported 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.[30] The Football Governance research Centre based at Birkbeck College, University of London held a number of seminars on the question of football regulation in 2005, some of which specifically raised the issue of the new rules.[31]

As we noted last year, regarding the changes, differences of opinion within British football correspond 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.

As we suggested in our 2004 report, 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.

28 'FA Chairman under fire for opposing quota' *Guardian*, 16 February 2005.
29 http://football.guardian.co.uk/print/0,,5130931-3057,00.html
30 'Eight Player Rule a Boost' *Sunday Mail* , 13 March 2005
31 http://www.football-research.org/seminars.htm

Chapter VII
Practices and policies of a general nature[32]

Introduction

Although Government policy on admission for employment did not change significantly in 2005, it was the subject of a far-reaching consultation process. In the run-up to the general election held on 5 May 2005, the Home Secretary published what it termed a 'five year strategy' in February 2005, entitled *Controlling our Borders: Making Migration Work for Britain*, covering the whole field of immigration, nationality and asylum law. Soon after the Labour Government's re-election, in July 2005, the Home Office launched a more detailed consultation in relation to policy on labour and student admission, entitled *Selective Admission: Making Migration Work for Britain*. Further details were then announced on 7 March 2006, in a document entitled *A Points-Based System: Making Migration Work for Britain*. In the meantime, the Immigration, Asylum and Nationality Bill was published in June 2005. It has some limited relevance to the regime governing migration for employment. Having passed through the House of Commons, the Bill is before the House of Lords at the time of writing.

The explicit philosophy underlying the current discussion and proposals is that the benefit to the United Kingdom of economic migration should be maximised. As well as being captured in the subtitle of the each of the three policy documents, 'making migration work for Britain', this approach was set out in detail in the introduction to *Selective Admission*:

> "The purpose of the reforms is to admit people selectively in order to maximise the economic benefit of migration to the UK… Migration makes a substantial contribution to economic growth, helps fill gaps in the labour market, including key public services such as health and education, and increases investment, innovation and entrepreneurship in the UK…. The system should … be focused primarily on bringing migrants to do key jobs that cannot be filled from the domestic labour force. It should focus on the skilled workers we need most, like doctors, engineers, finance experts, nurses and teachers, and be supported by measures to limit the impact of migration on public services and the public purse, and to manage its impact on communities."[33]

What this approach tends to underestimate, however, is the legitimate interests of economic migrants, particularly as regards their treatment once they have been admitted to the labour market.

The new proposals in relation to admission for employment

In relation to labour migration, the focus of the Government's 2005-2006 announcements has been on a rationalisation of the framework governing admission. Within the new structure, as elaborated in *Selective Admission*, there would be a number of 'tiers', which loosely correspond to the current categories of admission for employment. These are as follows:

- The intended Tier 1 would be a points-based system of admission for 'highly skilled' workers.[34] This would essentially involve the reformulation of the current points-based Highly Skilled Migrants Programme. It appears that the points system will be simplified, with points awarded for level of qualification, previous salary and youth.[35]
- The intended Tier 2 would be for 'skilled' workers with a job offer, and would replace the current work permits system and other permit-free employment categories.[36] In the case of work permits, it is intended that a new Skills Advisory Body would advise on shortage occupations. In other cases, a 'resident labour market' test would have to be satisfied. In either case, a new point

32 By B. Ryan, University of Kent.
33 *Selective Admission*, p 1.
34 *Selective Admission*, pp 18-19 and *A Points-Based System*, pp 21-24.
35 A detailed model is suggested at p 23 of *A Points-Based System*.
36 *Selective Admission*, pp 19-21 and *A Points-Based System*, pp 25-29.

system would operate, with points being awarded for qualifications, prospective earnings and whether the employment is in a 'shortage occupation' or not.

- The intended Tier 3 would cover low paid schemes.[37] In *Controlling Our Borders*, the Government indicated its general view that such schemes are unnecessary, because of the labour supply possibilities arising from the 1 May 2004 enlargement of the European Union.[38] The Government has announced its intention to bring the existing schemes to an end, but to retain the flexibility to introduce new schemes as the situation requires. (Further information on recent developments with respect to the existing schemes is provided below.)
- The intended Tier 4 would cover the admission of students. No change appears to be contemplated with respect to the employment of students however. Students will continue to be permitted to take part-time employment during their studies. After their studies, graduates will be permitted to switch into employment categories only in limited circumstances.[39]
- The intended Tier 5 would cover cases of temporary employment in the UK, and employment as part of a cultural exchange. It is specifically proposed that a new 'youth mobility' scheme be created, with foreign governments as sponsors of participants.[40] Among other things, this youth mobility scheme would replace the current working holidaymakers scheme, which is confined to Commonwealth states.

In addition to this new rationalisation of the framework governing admission, a number of reforms were proposed in the two 2005 documents as regards the treatment of economic migrants and their employers. The main proposals are as follows:

- Employers in Tiers 2 and 3 would become the sponsors of those admitted to the United Kingdom for employment.[41] Employers would first apply to be recognised as sponsors, on the basis of which they would have the power to issue certificates of sponsorship. As sponsors, they would be expected to ensure that migrants comply with the legal requirements upon them, and also to report that the migrant had left employment. Employers who are designated as sponsors will have advantages when it comes to the recruitment within the Tier 2 work permit system.
- Financial securities may be introduced for certain categories or countries in order to ensure that workers leave the UK at the end of a period of permitted stay.[42]
- A single procedure is to be introduced to cover both employment and immigration checks upon intending migrants.[43] At present, employment permissions are given by Work Permits UK to those who require it (highly skilled migrants, work permits and those on special schemes). Separately, workers must meet relevant immigration requirements, such as visas, or entry clearance in all cases where they coming to the UK for six months or more. The intention is that in future both employment and immigration issues should be dealt with together, by WPUK in the case of persons within the UK, and by the entry clearance process in the case of persons outside the UK.
- Appeal rights in relation to admission for employment are to be removed.[44] At the time of writing, this proposal is being implemented through clause 4 of the Immigration Asylum and Nationality Bill 2005. Under the prior position, appeals can arise in the employment context in two ways. The first is in the case of categories for which all of the relevant conditions are set out in the immigration rules, so that an 'immigration employment document' is not required to be obtained from WPUK.[45] These categories are: permit-free employment, Commonwealth working holidaymakers, and Commonwealth citizens with a UK-born grandparent. The second case is where a person is refused entry clearance or entry for a general immigration reason unrelated to the fact that they are seeking admission for employment. In each of these cases, a right of appeal exists at present, but would be removed by clause 4 of the Bill.

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37 *Selective Admission*, pp 22-23 and *A Points-Based System*, pp 29-31.
38 *Controlling our Borders*, p 22.
39 See *A Points-Based System*, pp 15 and 32.
40 See *A Points-Based System*, pp 33-34.
41 See *A Points-Based System*, pp 19-20.
42 *Selective Admission*, p 28 and *A Points-Based System*, p 21.
43 *Controlling our Borders*, p 17 and *Selective Admission*, p 17.
44 *Controlling our Borders*, p 19. This proposal is not developed in *Selective Admission*.
45 For the exclusion of a right of appeal where an 'immigration employment document' is required, see section 88 of the Nationality, Immigration and Asylum Act 2002.

- For those who eligible to obtain indefinite leave to remain – highly skilled migrants, work permit workers and those in permit-free employment – the residence period required would be increased from 4 years to 5 years.[46] The significance of this proposal for employment is that it would in lengthen the period within which a work permit holder is restricted in their choice of employer. While those on a work permit are at present permitted to change employer, this depends on the making of a fresh work permit application by an employer, is not an entitlement, and is limited to the given occupation.

Developments in relation to existing lower-paid schemes

As was indicated above, the Government's general view is that lower paid labour migration schemes have been rendered unnecessary by the availability of workers from the central and Eastern European states which joined the EU on 1 May 2004. There are two systems of this kind currently in operation – the Seasonal Agricultural Workers Scheme (SAWS), and the Sectors Based Scheme (SBS). Recent developments with respect to those schemes are discussed here.

Seasonal agricultural workers scheme
The Seasonal Agricultural Workers' Scheme (SAWS) is a quota system through which individuals (mainly students) from outside the EEA are recruited by 'designated operators' for agricultural work for a maximum of 6 months a year. In recent years, SAWS workers have mainly come from Central and Eastern Europe, including from new member states. Accordingly, the EU enlargement was followed by a reduction in the SAWS quota from 25000 in 2003 and 2004 to 16250 in 2005.

Following the *Controlling our Borders* policy document, a review of SAWS arrangements was announced by the Government in June 2005.[47] According to *A Points-Based System*, the result of this review is that the SAWS scheme will be phased out by the end of 2010.[48]

Sectors Based Scheme
A separate quota system, known as the 'sectors based scheme' (SBS), was introduced with effect from May 2003 in the food processing and hospitality sectors. The SBS is effectively a form of lower-skilled work permit, and enables workers to be employed for up to 12 months at a time, provided they leave the UK at the end of the given period.

As with SAWS, there was a reduction in the size of the SBS quota after the enlargement of the EU on 1 May 2004. The quota for the period starting on 1 June 2004 was reduced from 20,000 to 15,000 permits, made up of 9,000 permits for hospitality and 6,000 for food processing. The outcome of a review of the SBS arrangements was announced in June 2005.[49] In the hospitality sector, the scheme was terminated with effect from the end of July 2005. The scheme has continued in the food processing sector, with a reduced quota in 2005-2006 of 'at least 3500'. More recently, it was announced in *A Points-Based System* that the SBS will be brought to an end by the end of 2006.[50]

Developments in relation to irregular employment

A final area in which significant developments have occurred is in relation to irregular employment. Two aspects of that are considered here – administrative penalties for employers, and the planned introduction of the Gangmasters Licensing Act.

Administrative fines
A criminal offence of employing a non-EEA national who lacks permission to work under immigration laws was first introduced in the UK by section 8 of the Asylum and Immigration Act 1996.[51] It is

46 *Controlling our Borders*, p 22. This proposal is not mentioned in *Selective Admission*.
47 Written answer by Home Office Minister, Baroness Scotland, *House of Lords Debates*, 7 June 2005.
48 *A Points-Based System*, p 30.
49 Written answer by Home Office Minister, Baroness Scotland, *House of Lords Debates* 23 June 2005.
50 *A Points-Based System*, p 30.
51 Note that there is a parallel offence with respect to A8 nationals in Reg 9 of the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004 No, 1219)

well known that prosecutions and convictions for this offence have been very rare since section 8 came into force in January 1997.[52] The framework governing irregular employment was already the subject of a significant reform in 2004, when the list of documents which an employer could rely upon to provide a defence was made more restrictive. Since 1 May 2004, employers have had to copy a document bearing a photograph which gives evidence of immigration status, or else copies of an employment-related document and an immigration-related document.[53]

Controlling our Borders announced a new departure: 'on the spot' fines for employers found to be employing irregular workers.[54] The underlying idea behind these fines is to strengthen the potential sanctions upon employers by avoiding the need for a criminal prosecution. The legal basis for these penalties is in the process of being introduced through the Immigration, Asylum and Nationality Bill 2005/2006.[55] The proposal is that 'penalty notices' may be served on behalf of the Secretary of State upon employers found to have employed someone in breach of immigration law. The intention is that the penalties will be of up to £2,000 per unauthorised employee, with the precise amount to be determined in accordance with a code of practice.[56] When a penalty notice is served, an employer must challenge the penalty within 28 days, through an objection to the Secretary of State, or of an appeal to the county court. The employer has the defence either that there was no breach of immigration law, or else that that they complied with 'prescribed requirements' relating to the checking and copying of documents. Where the employer does not challenge, or fails in a challenge, the penalty is enforceable as a debt on the part of the Secretary of State.

At the same time, section 8 of the 1996 Act is to be replaced by a new criminal offence of *knowingly* employing a person without authorisation.[57] Formally, the element of knowledge distinguishes the intended offence from that in section 8, and makes the checking and copying of documents irrelevant. It should be appreciated however that, already under the section 8 offence, the employer's knowledge of the worker's breach of immigration law prevents reliance upon the defence that they checked and copied documents which evidenced an entitlement to work.

The licensing of gangmasters

A second set of developments in 2005 concerned the planned system of licensing for gangmasters – that is, labour intermediaries in agriculture and shell-fishing. This system is based on the Gangmasters Licensing Act 2004, and was described in outline in the report for 2004. One of the objectives of this system is to make it harder for employment in breach of immigration law to be organised through intermediaries.

The Gangmasters Licensing Authority was established on 1 April 2005. The current year also saw a series of consultations on key aspects of the future licensing scheme. The Department for the Environment, Food and Rural Affairs (DEFRA) has consulted twice on the intended coverage of the licensing system.[58] The most complex issue has been the application of the licensing system to food processing: DEFRA wishes it to apply to 'initial' processing only, while others have argued that a distinction between 'initial' and 'second stage' processing is unworkable. The Authority has meanwhile set out its proposed approach to licensing, which will involve audits of applicants only where these are indicated to be necessary by risk assessments.[59] It is expected that licences will be issued from the first half of 2006. The criminal offences – principally those of operating without a licence and of hiring labour through an unlicensed gangmaster - will come into force later in 2006.

52 See the discussion in House of Commons Library, *The Immigration, Asylum and Asylum Bill,* Research Paper 05/52, pp 28-30.

53 See Immigration (Restrictions on Employment) Order 2004, SI 2004 No. 755, discussed in the report for 2004.

54 *Controlling our Borders*, p 26.

55 See clauses 15-20 of the Bill as approved by the House of Lords at report stage (2005-06 *House of Lords Bills* 74).

56 *Selective Admission*, p 29.

57 Clause 21 of the Bill as approved by the House of Lords at report stage.

58 DEFRA, Consultation on the draft Gangmasters (Exclusions) Regulations 2005 (February 2005) and Second consultation on the draft Gangmasters (Exclusions) Regulations 2005 (October 2005).

59 Gangmasters Licensing Consultation (October 2005).

Chapter VIII
EU enlargement[60]

Texts in force

- Asylum and Immigration Act 1996, section 8
- Immigration (European Economic Area) Regulations 2000, SI 2000, no. 2326 (amended by SI 2001/865, SI 2003/549, SI 2003/3188, SI 2004/1236 and SI 2005/47)
- Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219 (amended by SI 2005 no 2400)

The Legal Framework

Background

The 2003 Accession Treaty allowed Member States to derogate from granting full free movement rights to workers from the 8 new EU Member States from Central and Eastern Europe for a period of a maximum of 7 years. The United Kingdom decided not to make use of this permission to derogate and to grant, subject to certain conditions, free movement rights to the nationals of these countries from 1 May 2004. This choice was based on the UK Government's belief that the UK economy would benefit from the movement of new EU citizens. As a Government Minister noted a week before the opening of the UK labour market to accession nationals:

> 'It makes sense for citizens of the new member states to be able to work, contribute to the economy and pay taxes. They will expand the range of skills and supply of workers in the UK economy. It is true that some other member states will not open their labour markets. It is because their markets are les open and less flexible than ours that they perform less well'.[61]

The Accession (Immigration and Worker Registration) Regulations 2004

The 2004 Regulations constitute the primary legal framework for the movement of workers of the 8 new Member States from Central and Eastern Europe (A8 nationals) to the UK. The main elements of the Regulations are:

Scope
The Regulations apply primarily to A8 workers who arrive in the UK after the 1st of May 2004. A8 nationals who had leave to enter or remain in the UK on 30 April 2004 and that leave was not subject to any condition restricting their employment are not affected. Similarly, A8 nationals legally working in the UK on 30 April 2004 and who had been legally working in the UK without interruption throughout the period of 12 months ending on that date (or those for whom this period would end after 30 April) are not affected. (Regulation 2(2)-(4)).

Moreover, the Regulations do not apply to posted workers or A8 nationals who are family members of a Swiss or an EEA national who are in the UK as workers (other than those falling within these Regulations), self-sufficient persons, retired persons or students (Regulation 2(6)).

Job seekers
As mentioned in the 2004 Report, there are no restrictions to A8 national travelling to the UK in order to look for work. The Immigration (European Economic Area) Regulations 2000 do not contain any special provisions on admission of EEA nationals, and the 2004 Regulations amended the definition

60 By Valsamis Mitsilegas, Queen Mary University.
61 Baroness Scotland of Asthal, House of Lords debate of 23 April 2004, col. 481.

of an EEA national to include nationals of new EU Member Sates (Regulation 3). However, the 2004 Regulations specifically state that A8 nationals falling within their scope who are looking for work in the UK are not entitled to a right of residence – with the ultimate aim, as we mentioned before, to deny these people social assistance. However, this does not limit the residence rights of A8 nationals who are self-sufficient while seeking work in the UK (Regulation 4(2) and (3) respectively).

The registration scheme

While there are no substantive limits on the employment of A8 nationals, they must go through a special procedure of registration in order to be authorised to work in the UK. The 2004 Regulations impose an obligation to A8 nationals, within one month from starting a job, to apply to register under the 'Workers Registration Scheme'. This process leads to the issuing of a 'registration certificate' and a 'registration card'. It must be noted that Registration relates not to a specific worker, but to a specific job/employer. Thus a Registration Certificate is invalid if the worker is no longer working for the employer specified therein and expires on the date on which the worker ceases working for that employer (Regulation 7, in particular paragraph 5). This would mean that an A8 worker would have to reapply for a certificate if (s)he changes employment.

The registration fee

The application for a registration certificate is not cost-free. Section 8(4) of the 2004 Regulations stated that applications must be accompanied by a registration fee of £50. This has been increased to £70 for applications made after 1 October 2005 by the Accession (Immigration and Worker Registration) (Amendment) Regulations 2005 (SI 2005/2400 – for further comment see below).

Employer sanctions

Section 9 of the 2004 Regulations makes it a criminal offence to employ an A8 national who is obliged to register but has not done so. This is in line with the general offence of hiring unauthorised workers in section 8 of the Asylum and Immigration Act 1996 and aims to ensure further compliance with the registration requirements by ensuring that employers are also vigilant. Section 9 also contains a series of defences, which include proof that the employer was shown a document during the first month of employment that appeared to establish either that the worker was not an accession State worker requiring registration or that the worker had applied for a registration certificate. It is also necessary that the employer retain a copy of the document in question (section 9(3) and (4)).

The situation on the ground

A major consequence of the registration scheme established by the 2004 Regulations is that the flows of A8 workers in the UK can be monitored. Accession monitoring reports (produced jointly by the Home Office, the Department of Work and Pensions, HM Revenue and Customs and the Office of the Deputy Prime Minister) have been published regularly since 2004, and the latest of them has been published on 28 February 2006: the Accession Monitoring Report May 2004-December 2005.

The Report confirms the sustained flows of A8 workers to the UK. In total, there were 345,000 applicants to the Worker Registration Scheme between 1 May 2004 and 31 December 2005, 329,000 of whom were issued with registration certificates and cards.[62] Greater detail on registrations will be provided in the statistics chapter. Here it is important to note that the vast majority of A8 workers are young- 83% aged between 18-34. Nationality-wise, the vast majority are Polish (59% of the total, more than 200,000 applications for the period covered), followed by Lithuanian (13%) and Slovak (11%) applicants. As regards sectors of employment, A8 nationals were working primarily in Administration, Business and Management (32%), Hospitality and Catering (22%), Agriculture (12%), Manufacturing (8%) and Food, Fish and Meat Processing (5%). Administration, Business and Management applications increased substantially in 2005, and the sector has overtaken Hospitality (where applications have been falling) as the most popular sector for A8 workers. Agriculture also has seen considerable change, but this reflects the seasonal nature of agriculture work.

62 It must be reminded here that it is one application for one job, so the actual number of A8 workers is less than the number of registration certificates. In fact the number of re-registrations reaches 82,235 in this period.

Overall, the assessment of the situation on the ground of the Accession Monitoring Report has been very positive, by stressing that accession workers continue to go where the work is, helping to fill the gaps in the labour market, and supporting the provision of public services in communities across the UK (working as bus, lorry and coach drivers and care workers, but also as doctors, nurses and health specialists). At the same time, the numbers applying for tax-funded income related benefits, child benefit, tax credits and housing support remain very low- only 3,270 applications for Income Support and Jobseekers Allowance were processed between may 2004 and December 2005, and of these only 195 were allowed to proceed for further consideration.

This positive assessment is shared by a recent Report commissioned by the Department of Work and Pensions on the impact of the free movement of workers from Central and Eastern Europe on the UK Labour Market.[63] The Report has found no discernible statistical evidence to suggest that A8 migration has been a contributor to the rise in claimant unemployment in the UK. On the contrary, the authors note that the primary impact of such migration on the UK labour market appears to have been to increase output and total employment. At the sectoral level the most pronounced impact has been in the agriculture and fishing sector. The authors conclude that the overall economic impact of labour migration of A8 nationals to the UK has been modest, but broadly positive, reflecting the flexibility and speed of adjustment of the UK labour market.

A similarly positive view can be discerned in a recent Report commissioned by the Home Office on employers' use of migrant labour.[64] The Report covered migrant workers in the UK in general and was based on interviews with employers on recruitment and employment of migrants in the UK. The A8 Worker Registration Scheme was widely used in the Agriculture (as supplementary to the seasonal agriculture workers scheme), Hotels and Catering, and Administration, Business and Management sectors, mainly in low-skilled and some semi-skilled jobs. Although for most employers this was the first time of using this scheme, they were more prepared to train and develop A8 workers as they were seen as more likely to stay, and they viewed the scheme favourably 'particularly through its provision of hardworking East European workers' (p.8).

However, employers expressed concerns as regards the practical operation of the Workers Registration Scheme. They pointed out the administration difficulties of registration applications – the greater the number of workers the more demanding the associated documentation, registration and legality checks. It is reported that some employers had extensive administration and monitoring systems to make appropriate checks. However, employers had difficulty in verifying that documents or passports were not forgeries, and registration processes were thought to be lengthy and unsatisfactory, meaning workers were without passports – often their only means of identification – for at least 3 months. Moreover, the associated administration fees were deemed unfairly costly to the low-paid workers. Finally, the Report notes that some employers were not highly involved in checking worker legality, something regarded in some cases as the responsibility of the employment agency – however, 'even when it was clear that this was part of their responsibility some were vague about the details' (p.8).

Assessment and proposals for reform

Reports stressing the beneficial impact of A8 workers on the UK labour market, along with decisions by other EU Member States to lift restrictions to the free movement of these workers in 2006, have made the UK Government feel vindicated about its legislative and policy choice on the matter. With the exception of the increase in the registration application fee, there have been no major changes to the 2004 Regulations in recent months, and no major changes (at least towards tightening the regime) are envisaged for the near future. The current system not only allows for free movement of A8 workers under certain conditions, but also presents two further advantages for the UK Government: it is a source of income stemming from the payment of the registration fee (345,000 applications multiplied by 50 and now 70 pounds); and, more importantly, it provides with an invaluable source of data which enables to monitor in detail the movement and employment of A8 workers in the UK. This gives a

63 Published in February 2006. Authors: Jonathan Portes, Nicola Gilpin, Sara Lemos, Matthew Henty and Chris Bullen.

64 Home Office Online Report 03/06, authors: Sally Dench, Jennifer Hurstfield, Darcy Hill and Karen Akroyd (Institute for Employment Studies).

much better picture of the employment of Central and Eastern European workers in the UK, especially in comparison with other EU nationals, who do not have to register in order to work in the UK.

The continuation of the workers registration scheme has been questioned. The arguments stem from both the successes of the current system but also from its shortcomings. Success lies in the sustained flow of A8 nationals to the UK. It has been shown that these workers generally benefit the UK economy, contribute towards the creation of employment and are not a burden to the UK social security system. There is no evidence to demonstrate that the situation will change if the Workers Registration Scheme is abolished. On the other hand, as evidenced in recent Reports, the Scheme does have its shortcomings.[65] Employers complain that the registration application process is too bureaucratic and lengthy. They also seem confused about their precise obligations under the 2004 Regulations, which may lead to distortions in the application in practice of both the registration requirements and the employer sanctions.

Another point raised by the employers is the issue of the registration application fee – they note that this is burdensome for low-wage workers. In the 2004 Report, we have also raised doubts regarding the consistency of the fee with the 1961 Council of Europe Social Charter. These concerns remain, especially in view of the increase of the fee from £50 to £70 from 1 October 2005.

Further sources

Home Office, Department of Work and Pensions, HM Revenue and Customs, Office of the Deputy Prime Minister, *Accession Monitoring Report May 2004- December 2005*, 28 February 2006

Department of Work and Pensions, *The Impact of Free Movement of Workers from Central and Eastern Europe on the UK Labour Market* (authors: Portes, Gilpin, Lemos, Henty and Bullen), February 2006

Home Office, *Employers' Use of Migrant Labour*, Home Office Online Report 03/06, (authors: Dench, Hurstfield, Hill and Akroyd- Institute for Employment Studies)

65 We understand that there is currently a case underway before English courts where the issue of whether the registration requirement per se constitutes an obstacle to free movement rights and is thus incompatible with Community law is being examined.

Chapter IX
Statistics[66]

General comments

Obtaining a clear picture of the numbers of EU nationals exercising EU free movement rights in the UK is a challenging task. UK law does not impose in principle an obligation to EU nationals to register for residence or employment purposes in the country. The exception is nationals of the 8 Member States who must register in order to be employed in the UK under the Workers Registration Scheme A clear picture of movement for this category of EU nationals can be provided via the regular Accession Monitoring Reports that UK Government departments compile on the basis of registration applications (see also chapter on enlargement).

For the rest of EU nationals, data can be provided from a number of quite diverse sources. These include the Report on National Insurance Number (NINo) Allocations to overseas nationals entering the UK (previously Migrant Workers Statistics), produced by the Department for Work and Pensions and the Office of National Statistics; the Labour Force Survey, a survey of a representative sample of all of the households on the Royal Mail postcode database; Home Office data on issue and refusal of residence documentation to EEA nationals; the Annual statistics on control of immigration by the Office of National Statistics; Home Office statistics on persons granted British citizenship; and Home Office data on asylum.

These sources are diverse and cover different categories of individuals. National insurance data has a wider coverage than the Home Office data, as it covers people allocated a NINo for all types of work – including students working part-time and whatever the length of stay in the UK. It also overlaps with the Accession Monitoring Report, but numbers may be different as the Worker Registration Scheme may include applications of people already resident in the UK prior to 1 May 2004, and thus already being allocated a NINo. The Labour Force Survey on the other hand only applies to those resident in the UK for 6 months or more, and the Annual Immigration statistics Report deals with EU nationals only peripherally. Taking into account these disparities, this chapter will present the most recent statistical findings concerning the free movement of EU nationals in the UK.

The Accession Monitoring Report May 2004- December 2005

The Report confirms the sustained flows of A8 workers to the UK. In total, there were 345,000 applicants to the Worker Registration Scheme between 1 May 2004 and 31 December 2005, 329,000 of whom were issued with registration certificates and cards.[67] Here it is important to note that the vast majority of A8 workers are young- 83% aged between 18-34. Nationality-wise, the vast majority are Polish (59% of the total, more than 200,000 applications for the period covered), followed by Lithuanian (13%) and Slovak (11%) applicants. As regards sectors of employment, A8 nationals were working primarily in Administration, Business and Management (32%), Hospitality and Catering (22%), Agriculture (12%), Manufacturing (8%) and Food, Fish and Meat Processing (5%). Administration, Business and Management applications increased substantially in 2005, and the sector has overtaken Hospitality (where applications have been falling)as the most popular sector for A8 workers. Agriculture also has seen considerable change, but this reflects the seasonal nature of agriculture work.

66 By Valsamis Mitsilegas, Queen Mary University.

67 It must be reminded here that it is one application for one job, so the actual number of A8 workers is less than the number of registration certificates. In fact the number of re-registrations reaches 82,235 in this period.

1. Applicants

Chart 1: Applicants applied by month applied. May 2004 – December 2005

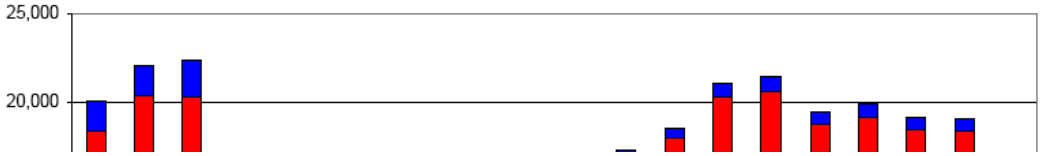


Table 1.a.: Multiple applications and Re-registrations. May 2004 – December 2005.

Period	Multiple	Re-registration	Multiple Re-registration	TOTAL
Q2 2004	1,075	540	920	**2,535**
Q3 2004	560	2,940	1,350	**4,850**
Q4 2004	395	6,650	1,585	**8,625**
Q1 2005	305	9,755	2,395	**12,455**
Q2 2005	340	13,240	3,425	**17,005**
Q3 2005	445	13,400	3,995	**17,840**
Q4 2005	305	14,620	4,000	**18,925**
TOTAL	**3,045**	**61,140**	**17,665**	**82,235**

Note: Please see Introduction: Technical Note on WRS data

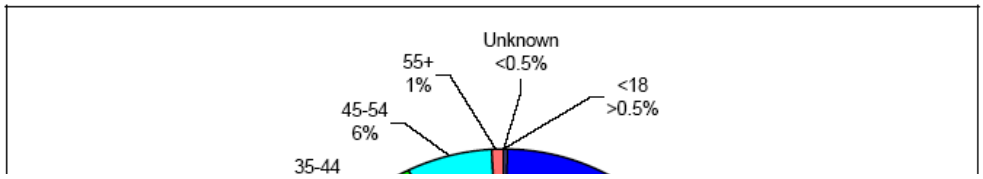
2. Nationality of applicants

Table 2: Nationality of applicants by quarter applied. May 2004 – December 2005.

Period	Czech Rep	Estonia	Hungary	Latvia	Lithuania	Poland	Slovakia	Slovenia	Other	TOTAL
Q2 2004	2,520	660	1,090	2,930	7,720	23,465	3,730	50	30	**42,200**
Q3 2004	3,510	770	1,315	3,660	7,595	28,070	5,240	65	40	**50,260**
Q4 2004	3,020	615	1,430	2,770	5,360	23,920	4,875	55	30	**42,075**
Q1 2005	2,840	730	1,460	3,150	5,915	23,805	4,950	55	35	**42,940**
Q2 2005	2,825	740	1,650	4,340	7,685	33,700	6,025	30	30	**57,030**
Q3 2005	2,980	630	1,720	3,455	5,985	39,375	6,545	35	50	**60,775**
Q4 2005	2,310	535	1,670	2,720	4,460	32,560	4,995	55	45	**49,355**
TOTAL	**20,005**	**4,680**	**10,345**	**23,030**	**44,715**	**204,895**	**36,355**	**340**	**265**	**344,635**
As % of Total	6%	1%	3%	7%	13%	59%	11%	<0.5%	<0.5%	**100%**

This table shows applicants rather than the number of applications made. The figures are for initial applications only (not multiple applications, where an individual is doing more than one job simultaneously, nor re-registrations, where an individual has changed employers).
Note: Please see Introduction: Technical Note on WRS data

Chart 4: Age of registered workers. May 2004 – December 2005.



Sector	Q2 2004	Q3 2004	Q4 2004	Q1 2005	Q2 2005	Q3 2005	Q4 2005	TOTAL
Admin, bus & man services	6,590	11,110	13,535	14,155	17,165	21,000	21,360	**104,915**
Hospitality and catering	12,000	12,980	9,325	8,085	10,475	11,300	8,420	**72,590**
Agriculture activities	8,240	5,660	3,005	4,000	9,295	6,685	2,645	**39,525**
Manufacturing	2,360	3,750	3,640	3,550	4,280	4,250	3,410	**25,245**
Food/fish/meat processing	1,590	2,545	2,345	2,215	2,815	2,935	2,550	**16,995**
Health & medical services	1,170	2,220	2,160	2,300	2,580	3,290	2,660	**16,380**
Retail & related services	1,545	1,950	1,860	1,815	2,120	2,525	2,220	**14,035**
Construction & land services	1,710	1,995	1,480	1,610	1,905	2,090	1,575	**12,365**
Transport	600	910	1,210	1,505	1,890	1,815	1,400	**9,330**
Ent & leisure services	790	950	450	890	1,195	1,135	430	**5,840**
Education & cultural act.	460	545	490	445	480	510	485	**3,400**
Real est & prop services	155	205	170	240	240	255	190	**1,450**
Secur & protect services	95	115	130	100	110	195	140	**890**
Financial services	135	160	130	115	110	135	95	**880**
Extraction industries	75	145	145	85	110	125	115	**805**
Computer services	130	120	135	100	95	125	95	**800**
Telecommunications	55	60	60	80	30	45	30	**365**
Utilities-elec,gas,water	35	50	40	35	35	50	35	**280**
Sporting activities	45	60	45	40	15	35	30	**265**
Government	20	30	25	25	30	40	35	**205**
Law related services	35	30	25	20	15	20	20	**160**
Not stated	990	850	195	85	80	135	45	**2,375**
TOTAL	**38,830**	**46,440**	**40,600**	**41,480**	**55,065**	**58,690**	**47,985**	**329,090**

Occupation	Q3 2004	Q4 2004	Q1 2005	Q2 2005	Q3 2005	Q4 2005	TOTAL
Process operative (other Factory worker)	8,135	9,835	9,995	13,090	14,915	14,590	**70,555**
Packer	2,610	2,905	3,045	3,270	3,710	3,230	**18,765**
Kitchen and catering assistants	3,245	2,695	2,465	3,490	3,575	2,790	**18,255**
Warehouse Operative	1,505	2,305	2,440	2,560	4,080	4,535	**17,430**
Cleaner, domestic staff	2,340	2,015	2,135	2,470	3,015	2,465	**14,440**
Farm worker/ Farm hand	2,215	1,130	1,705	4,170	2,420	1,005	**12,645**
Waiter, waitress	2,910	2,070	1,705	2,030	2,255	1,630	**12,600**
Maid / Room attendant (hotel)	1,865	1,505	1,305	1,905	2,135	1,650	**10,370**
Care assistants and home carers	1,215	1,360	1,380	1,585	2,070	1,765	**9,380**
Sales and retail assistants	1,325	1,215	1,105	1,400	1,605	1,260	**7,905**
Labourer, building	1,170	910	1,140	1,440	1,540	1,105	**7,305**
Crop harvester	955	280	610	2,205	1,655	270	**5,975**
Food processing operative (fruit / veg)	805	795	705	1,010	895	740	**4,950**
Bar staff	1,150	795	665	810	885	600	**4,905**
Food processing operative (meat)	805	720	565	675	650	635	**4,045**
Chef, other	800	580	545	625	690	515	**3,755**
Driver, HGV (Heavy Goods Vehicle)	300	435	570	635	555	445	**2,930**
Fruit picker (farming)	450	100	125	1,170	855	150	**2,850**
Administrator, general	540	460	400	465	480	420	**2,760**
Driver, delivery van	265	320	340	410	420	345	**2,090**
TOTAL 20	**34,605**	**32,430**	**32,945**	**45,415**	**48,405**	**40,145**	**233,945**
Other	11,835	8,170	8,535	9,650	10,285	7,840	**56,315**
GRAND TOTAL	**46,440**	**40,600**	**41,480**	**55,065**	**58,690**	**47,985**	**290,260**

	2004	2004	2004	2005	2005	2005	2005	TOTAL
Applications for Income Support								
Disallowed*	43	60	101	134	123	251	237	**949**
Allowed to proceed for further processing	0	3	2	7	4	5	22	**43**
TOTAL	**43**	**63**	**103**	**141**	**127**	**256**	**259**	**992**
Applications for income-based Jobseeker's Allowance								
Disallowed*	191	162	184	268	358	497	423	**2,083**
Allowed to proceed for further processing	6	8	4	5	12	43	71	**149**
TOTAL	**197**	**170**	**188**	**273**	**370**	**540**	**494**	**2,232**
Applications for State Pension Credit								
Disallowed*	0	1	3	7	5	13	15	**44**
Allowed to proceed for further processing	0	0	0	0	0	1	1	**2**
TOTAL	**0**	**1**	**3**	**7**	**5**	**14**	**16**	**46**
Total disallowed*	**234**	**223**	**288**	**409**	**486**	**761**	**675**	**3,076**
Total allowed to proceed for further processing	**6**	**11**	**6**	**12**	**16**	**49**	**94**	**194**
TOTAL	**240**	**234**	**294**	**421**	**502**	**810**	**769**	**3,270**

Table 16: Applications for Child benefit (Great Britain and Northern Ireland[11]). May 2004 – December 2005

	Applications Received	Applications Approved	Applications Rejected	Applications Terminated
Q2 2004	1,161	190	30	2
Q3 2004	1,628	828	441	2
Q4 2004	2,300	1,068	436	19
Q1 2005	3,059	1,484	362	21
Q2 2005	4,074	1,451	602	16
Q3 2005	6,834	3,466	993	39
Q4 2005	8,523	3,962	1,205	121
TOTAL	**27,579**	**12,449**	**4,069**	**220**

Table 17: Applications for Tax Credits. May 2004 – December 2005

	Applications Received	Applications Approved	Applications Rejected	Applications Terminated
Q2 2004	80	0	0	0
Q3 2004	234	51	72	0
Q4 2004	626	201	113	0
Q1 2005	1,184	502	126	0
Q2 2005	1,320	1,027	100	0
Q3 2005	1,815	1,179	229	0
Q4 2005	2,775	1,836	164	0
TOTAL	**8,034**	**4,796**	**804**	**0**

20. Homelessness assistance

- The May 2004 to September 2005 total of 874 decisions on A8 applications for homelessness assistance represents just 0.2% of the average number of homelessness decisions over a typical 17 month period.

Table 19: Decisions on applications for assistance[13],[14]. England.

	Main duty owed to Applicant	Applicant not owed a main duty	TOTAL
2004 Q2*	42	122	**164**
Q3	66	102	**168**
Q4	70	53	**123**
2005 Q1	38	88	**126**
Q2	34	74	**108**
Q3	66	119	**185**
TOTAL	**316**	**558**	**874**

** Please note – 2004 Q2 is May and June. All Figures are provisional.*

The Labour Force Survey

According to the Autumn 2005 Labour Force Survey (LFS) there are currently 1.11 million people of working age in the UK who were born elsewhere in the European Union (EU). Of these, 790,000 are from the other countries of the EU15 (a figure roughly unchanged since Spring 2001) and 320,000 from the newly acceded EU10, more than double the number who were in the UK in Spring 2001.

The largest EU populations in the UK come from the Republic of Ireland (255,000), Germany (190,000), Poland (140,000) and France (80,000).

51.7% of the UK born are male, compared to 52.3% of EU10 born and 45.5% of EU15 born.

Over the period Spring 2001 to Autumn 2005, employment rates of the UK born, EU15 migrants and other migrants have remained stable. In contrast, the employment rate of those from the EU10 has increased from 62.7% to 79.8% (see figure 1).

Employment rates

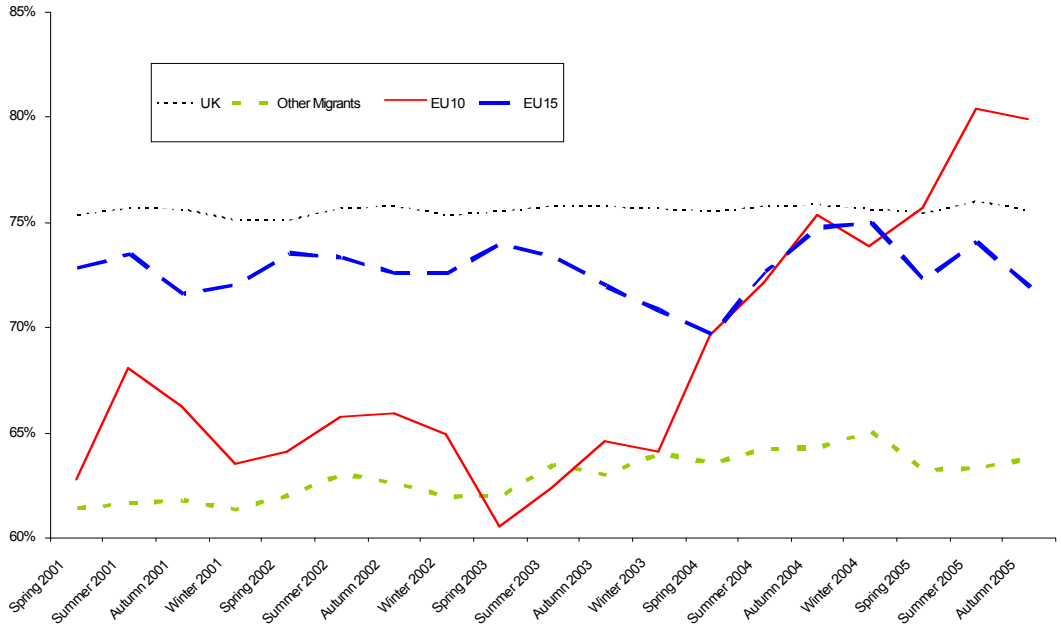
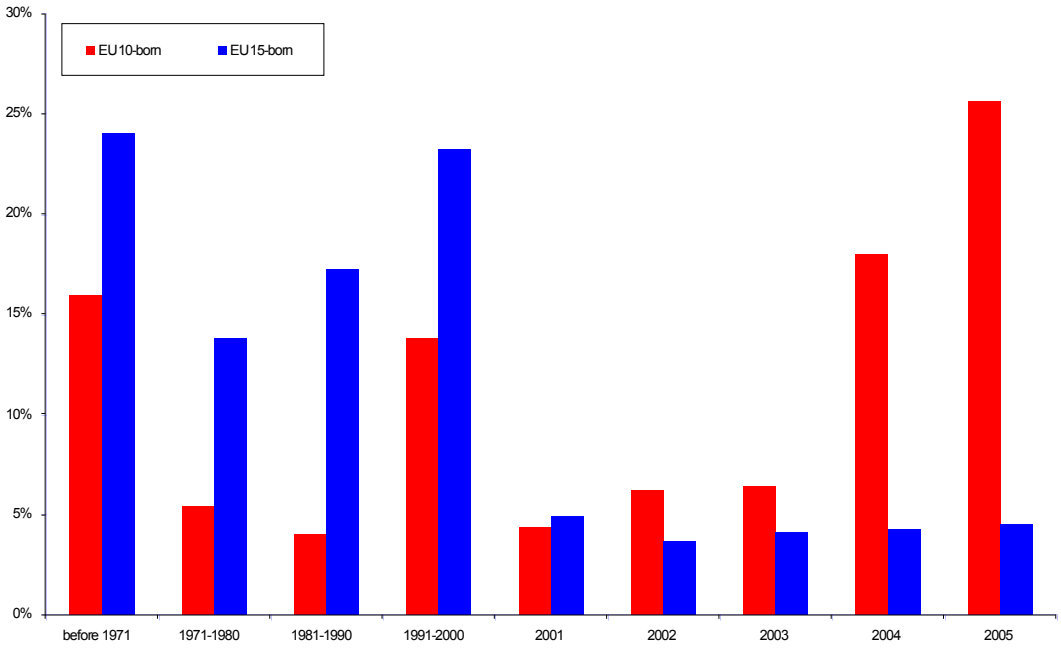


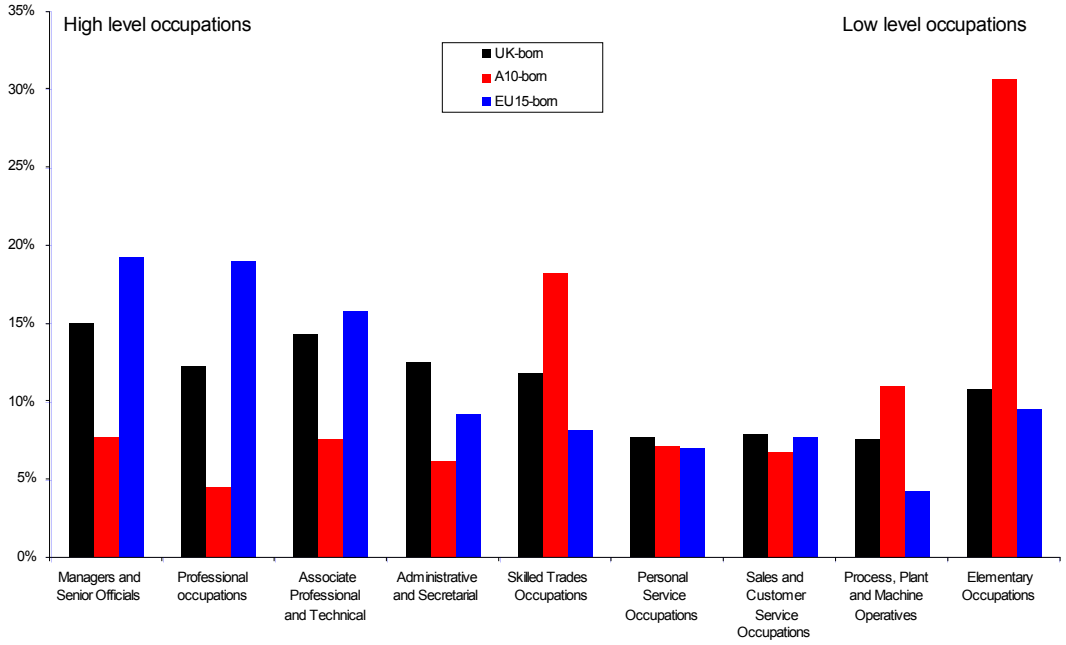
Figure 2 – Migrant populations by year of arrival (Autumn 2005 LFS)



Source: Labour Force Survey – Autumn 2005

UK and EU15 born workers are quite evenly distributed across the occupation levels, with a slight bias towards higher levels (see figure 3). In contrast, there is a significant bias towards the elementary occupations amongst EU10 migrants, but with a noticeable 'bulge' in the skilled trades.

Figure 3 – Distribution of occupation levels (Autumn 2005)



Source: Labour Force Survey – Autumn 2005

Table 3 - Occupation of employment - Autumn 2005 LFS				
	UK-born	Other Migrants	EU10-born	EU15-born
Managers and Senior Officials	15.0%	13.7%	7.7%	19.2%
Professional occupations	12.3%	17.6%	4.6%	19.0%
Associate Professional and Technical	14.3%	15.8%	7.6%	15.8%
Administrative and Secretarial	12.5%	9.4%	6.2%	9.2%
Skilled Trades Occupations	11.8%	7.1%	18.2%	8.2%
Personal Service Occupations	7.7%	7.9%	7.2%	7.0%
Sales and Customer Service Occupations	7.9%	7.7%	6.8%	7.7%
Process, Plant and Machine Operatives	7.6%	8.3%	11.1%	4.3%
Elementary Occupations	10.8%	12.5%	30.7%	9.6%

Table 4 - Sector of employment - Autumn 2005 LFS				
	United Kingdom	Other	EU10	EU15
Agriculture & fishing	1.39%	0.44%	*	1.01%
Energy & water	1.06%	0.50%	*	0.85%
Manufacturing	13.39%	10.53%	18.67%	12.25%
Construction	8.43%	3.70%	12.71%	5.69%
Distribution, hotels & restaurants	19.00%	21.06%	24.79%	18.52%
Transport & communication	6.86%	8.68%	8.65%	6.06%
Banking, finance & insurance etc	15.55%	18.92%	12.21%	21.46%
Public admin, educ & health	28.41%	29.56%	16.21%	29.49%
Other services	5.90%	6.44%	5.30%	4.36%

*Values too small to be statistically significant are marked with **

National Insurance Number Allocations to Overseas Nationals entering in the UK (2005)
The registrations figures include registrations in 2004/05, whereas the arrivals series only covers tax years up to and including 2003/04. This is because it may take several months between arrival and NINo application and then registration.

The main feature concerning EU nationals is the steep increase in registrations and arrivals by the new EU Member States. Numbers regarding the 'old' 15 have remained relatively stable over the past 3 years.

Table 6
Overseas Nationals entering the UK and allocated a NINo, by Year of Arrival and Continent of Origin

Thousands

	2000/01	2001/02	2002/03	2003/04
All	**273.9**	**279.3**	**306.0**	**306.4**
Europe - EU Accession Countries	9.7	13.1	19.6	31.3
Europe - EU excluding Accession Countries	72.1	63.0	71.5	76.4
Europe - non-EU	18.7	15.4	15.2	18.1
Asia and Middle East	83.0	88.5	92.8	90.0
Australasia and Oceania	21.7	22.6	23.1	21.4
The Americas	20.7	21.9	24.0	19.6
Africa	45.0	52.6	57.7	47.9
Others and Unknown	3.0	2.4	2.2	1.7

Source: 100% extract from National Insurance Recording System at 25th June2005.
Figures are rounded to the nearest hundred and may not sum due to rounding.
Arrivals figures subject to change as some migrants may take several months or years between arrival and NINo application/registration.

Overseas Nationals entering the UK and allocated a NINo, by Year of Registration and Continent of Origin

Thousands

	2002/03	2003/04	2004/05
All	**349.3**	**370.8**	**439.8**
Europe - EU Accession Countries	11.7	20.0	110.5
Europe - EU excluding Accession Countries	80.7	84.9	81.3
Europe - non-EU	21.0	24.5	22.8
Asia and Middle East	114.5	115.0	110.0
Australasia and Oceania	27.3	24.2	23.4
The Americas	26.6	31.2	26.7
Africa	66.7	70.1	64.5
Others and Unknown	0.8	0.8	0.6

Source: 100% extract from National Insurance Recording System at 25th June2005.
Figures are rounded to the nearest hundred and may not sum due to rounding.

Registrations to nationals from the EU Accession countries increased by 91 thousand between 2003/04 and 2004/05: from 20 thousand to 111 thousand. Over half of this increase in registrations to Accession nationals was due to Polish arrivals, who made up 57% (62 thousand) of 2004/05 registrations to nationals from the Accession countries. Lithuanians made up 14% (16 thousand) and Slovakians 9% (10 thousand) of registrations to Accession nationals in 2004/05.

Registrations to non-Accession nationals decreased by 22 thousand between 2003/04 and 2004/05: from 351 thousand to 329 thousand.

IND- Issue and refusal of residence documentation for 2004

According to the IND data, 21,380 decisions were made regarding 'old' EEA States and 3,230 regarding 'new' Member States in 2004. These involved applications for both limited period and settled status. There were 4,090 refusals for 'old' EEA nationals and 290 refusals for 'new' EEA nationals. The majority of applications from 'old' Member States came from Portugal and France, followed by some distance by Germany, Italy and the Netherlands. As regards 'new' Member States, Poland leads the way by far, with Lithuania following.

European Community Association Agreements with Bulgaria, Romania and Turkey – statistics for 2005 - 28 February 2006

The implementation of the above Association Agreements by the UK has been a matter of controversy. On the one hand, there are concerns that there are significant obstacles in practice in efforts by nationals of countries covered by Association Agreements to claim their rights under Community law. On the other hand, the UK media have been reporting maladministration in the handling of ECAA applications from Bulgaria and Romania. As the Home Office report notes:

On 30 March 2004, following press and media allegations about the handling of Bulgarian and Romanian ECAA applications, the consideration of all these cases was suspended on the instructions of the then Home Secretary, David Blunkett. A report of the investigation into these allegations made 15 recommendations on how the existing process could be improved. Although the allegations did not relate to Turkish applications, consideration of these was then also suspended because the last recommendation referred to Turkish cases. Following the implementation of these recommendations our

Embassies in Sofia and Bucharest started to deal with ECAA applications again from 23 August 2004 (Bucharest) and 1 September 2004 (Sofia), and reconsideration of outstanding "switching" cases commenced on 1 October 2004. Consideration of further and indefinite leave to remain applications resumed in mid-February 2005. Turkish applications began to be re-considered from 9 May 2005. Revised case-work guidance was used for all cases considered after these dates.

This publication details those decisions made since the consideration of ECAA applications was re-started up until the end of December 2005.

The Home Office statistics do not paint an overtly optimistic picture regarding the success of ECAA applications – the success rate in particular of Turkish applicants is extremely low:

- Out of 6,815 applications for pre-entry ECAA, 5,345 from Bulgaria and 1,470 from Romania, 470 (9%) were granted for Bulgaria, and 430 (29%) for Romania.
- Out of 370 appeals of pre-entry ECAA decisions from Bulgaria and Romania, 35 (9%) were allowed.
- There were five applications for on-entry ECAA at ports in 2005.
- Out of 1,910 in-country applications to switch to ECAA from another entry category, 990 by Bulgarian nationals and 920 by Romanian nationals, five (fewer than 1%) were granted for both countries.
- Out of 2,680 in-country applications for further leave to remain under ECAA, 1,830 by Bulgarian nationals and 850 by Romanian nationals, 1,255 (69%) were granted for Bulgarians and 625 (74%) for Romanians.
- Out of 455 in-country applications for indefinite leave to remain under ECAA, 380 by Bulgarian nationals and 75 by Romanian nationals, 325 (86%) were granted for Bulgarians and 60 (80%) for Romanians.
- Out of 1,030 applications by Turkish nationals for leave to remain, further leave to remain, leave to enter and leave to switch into the Turkish ECAA employed category,

40 (4%) were granted.

Out of five applications for indefinite leave to remain by Turkish nationals, none was granted.

The Report also does justice to concerns regarding the handling of applications, in particular delays:

The total number of ECAA applications, from all three nationalities and all applicable categories, outstanding as at 31 December 2005, was 10,645. The average waiting time for all ECAA applications decided in 2005 from the Date of Application to the Date of Decision12 was 270 calendar days. The ECAA Team in Sheffield is currently working on ECAA applications lodged in February 2004 for Turkish ECAA applications, October 2004 for Bulgarian and Romanian further leave to remain applications and November 2004 for Bulgarian and Romanian indefinite leave to remain applications. In May 2005, when consideration of Turkish cases was resumed, the backlog of Turkish applications was approximately 2,700.

But the following steps are being taken to remedy the situation:

For reasons of fairness, and pending allocation of additional resources, case-workers have been working through the cases in the various categories in strict order of date of application, unless operational reasons or exceptional circumstances necessitate more urgent consideration. Where there is hard evidence of an urgent need to travel, for example for verifiable compassionate reasons relating to birth, death, marriage or terminal illness, IND is prepared to consider prioritising applications, on a case by case basis. Applicants will be required to provide evidence of the compassionate reasons for their request. There can be no guarantee that all such cases will be given priority treatment.

Following recent allocation of additional resources to ECAA work the decision has been taken that newly trained case-workers will deal with applications received after 12 January 2005, the date from which the new application forms appeared on the IND website. Cases received prior to that date, where the necessary interim pre-consideration work has been undertaken, will continue to be dealt with by the original ECAA team. This will allow for streamlining of the training for new case-workers who can then concentrate on robust consideration of applications submitted on the new application forms, which will maximise impact on the backlog. Further resource

increases are planned to clear the remaining pre-12th January cases, with the overall ECAA resource aiming to reduce the backlogs to frictional levels by the end of 2006.

Progress will be closely monitored and steps taken will be highlighted in our Report for next year.

Persons granted British Citizenship 2004

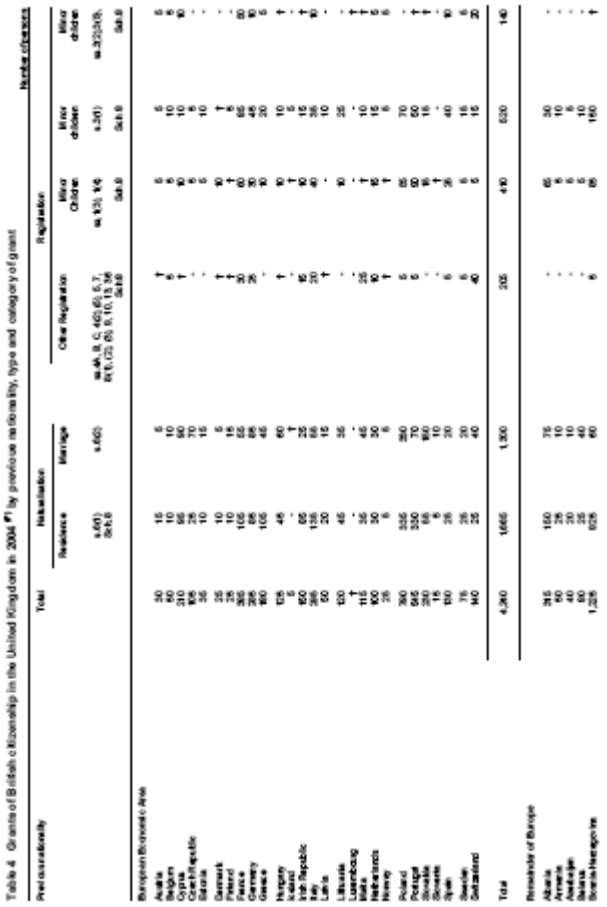
EEA nationals amounted to 2% of those granted British citizenship in 2004. The percentage of EEA nationals who, after six years or more in the UK, had obtained British citizenship by 2004 was around 55%.

Table 3 Grants of British citizenship in the United Kingdom by previous nationality[1], 2000-2004

Number of persons

Previous nationality	2000	2001	2002	2003 (R)	2004 (P)
European Economic Area[2]	2,075	1,680	1,575	2,225	4,290
Remainder of Europe	9,370	9,405	17,755	17,230	15,905
Americas	6,965	7,245	8,035	10,455	12,115
Africa	21,925	29,790	37,560	40,125	45,160
Indian sub-continent	22,145	23,745	26,685	29,695	33,475
Middle East	6,620	5,330	9,440	6,250	6,985
Remainder of Asia	9,150	8,630	15,355	13,180	16,210
Oceania	1,670	1,515	1,740	3,875	4,630
Other[3]	2,290	2,565	1,985	2,500	2,020
All grants	82,210	90,295	120,125	125,535	140,795

(1) Data from November 2001 include grants of British citizenship in the Channel Islands and Isle of Man.
(2) As constituted now; includes British overseas territories citizens (before February 2002 known as British Dependent Territories citizens) - from Gibraltar.
(3) British overseas territories citizens (before February 2002 known as British Dependent Territories citizens) except from Gibraltar, British Overseas citizens, British subjects, British protected persons, stateless and nationality uncertain.



Asylum Statistics: 4th quarter 2005

The asylum statistics have now minimal interest for EU nationals. In 2005,there were only 1 or 2 applications from the Czech Republic, a 89% decrease from 2004. 5 asylum applications of Czech nationals and 5 of Polish nationals were decided upon in 2005, with no success.

Sources used:

Home Office, Persons Granted British Citizenship United Kingdom 2004, 17 May 2005

Home Office, Asylum Statistics: 4th Quarter 2005, United Kingdom

Home Office, Issue and Refusal of residence documentation (excluding worker registration scheme) to EEA nationals and their family members, by nationality, 2004

Department of Work and Pensions and National Statistics, National Insurance Number Allocations to Overseas nationals entering the UK (previously Migrant Workers Statistics), 2005

Department of Work and Pensions, Home Office, HM Revenue and Customs, Office of the Deputy prime Minister, Accession Monitoring Report May 2004-December 2005, 28 February 2006.

National Statistics, Control of Immigration: Statistics United Kingdom 2004, doc. 14/05, 23 August 2005.

European Community Association Agreements with Bulgaria, Romania and Turkey – statistics for 2005 - 28 February 2006

Chapter X
Social security[68]

Social Security

Legislation in Force

The sheer number of different benefits involved and the volume and complexity of social security legislation in force setting out the conditions of and eligibility for these benefits makes it impossible to specify comprehensively in this brief section of this report. Broadly speaking benefits are of three kinds – contributory, non-contributory, and non-contributory income-related. (Simon Roberts, UK National Report 2005, TRESS network which contains further comprehensive details of individual benefits). Comprehensive details of benefits and entitlements can also be found in publications such as the Welfare Benefits and Tax Credits Handbook 2005/2006 (Child Poverty Action Group).

Current Issues – pending ECJ cases

Two issues in particular are pending – the status of certain benefits as 'Special Non-Contributory Benefits' which are subject to equal treatment but need not be exported, and the question of treatment in other Member States funded by the National Health Service.

Case C-299/05 *Commission v Parliament & Council* was referred to the Court of Justice by the Commission in July 2005 and an answer is awaited. The case concerns Disability Living Allowance, Attendance Allowance and Carers Allowance. These benefits were designated as 'Special Non-Contributory Benefits' – and included as such in Annexe I point 2 of Regulation 647/2005 amending Regulation 1408/71, with the result that they need not be exportable. The Commission had contested this all along when the legislation was being drawn up and instead of taking infringement action against the Member State (a claim which would no doubt simply be answered by the UK pointing to the terms of the Regulation), an annulment action has been commenced to contest the validity of the Regulation in so far as these Benefits are designated as 'Special Non Contributory Benefits' and thus are not exportable. The Commission argues that the benefits are not 'special' benefits within the meaning of Article 4(2a) of the Regulation.

The other major issue is the pending case of Case C-372/04 *Watts v Bedford Primary Healthcare Trust*. Whilst the Court has on several occasions ruled on the possibility of treatment abroad under social insurance systems where benefits are paid in cash or provided in kind by designated providers, (*Kholl/Decker*, *Geraets Smits/Peerbooms*, *Vanbrackel*) a clear answer is yet to be given on the question of how these principles are to be applied where healthcare is provided on a National Health Service basis free at the point of treatment to those entitled. Such is the system in the UK as well as some other Member States. AG Geelhoed gave his Opinion on 15 December and the final judgment is now eagerly awaited during 2006.

UK Case law during 2005

There have been several cases of interest relating to social security in the UK during 2005.

Secretary of State for Work and Pensions v Bobezes, Court of Appeal, 16th February 2005, [2005] EWCZ Civ 111

Mr Bobezes was a migrant Portuguese worker who was incapacitated from working at some point after his arrival in the UK, thus retaining his right to remain here by virtue of Article 7 of Commission Regulation 1251/70. He was in receipt of various benefits – disablement allowance, child benefit, and income support. One of his step-children, Sonia, (the daughter of his wife) spent periods of time in Portugal – in particular, initially the Secretary of State considered that no benefit should have been paid between August 1998 and September 2000, this was varied on appeal to the Appeal Tribunal at which point various periods between August 1998 and march 1999 seem to have been

68 By Helen Toner, Warwick University.

contested. However even on appeal it seems to have been accepted that periods of time in excess of four weeks were could be discounted for the purposes of paying benefits and the main question seemed then to be to clarify the precise dates in question.

The argument then turned to the question of whether the case should be treated as falling under regulation 1612/68 or 1408/71 – the parties finally agreed that it should be dealt with under Regulation 1408/71, given the practical reality that indirect discrimination was prohibited under both continuing to pursue any argument about which was applicable was hypothetical.

The main compliant was that the provisions of the Income Support (general) Regulations 1987 discriminated against Mr Bobezes – by regulation 16(5) it appeared that Sonia was not entitled to be treated as a member of the same household as Mr Bobezes under Regulation 16(1) because of the periods of absence of more than four weeks. She had spent time in Portugal with her grandparents and it was argued that to remove benefit in relation to Sonia for this reason amounted to indirect discrimination against migrant workers on the grounds of their nationality.

There was considerable discussion in the case as to whether certain comments of the Social Security Commissioner ['discrimination is not obviously there but that is not to say that the claimant, given the chance, cannot establish it'] – meant that Mr Bobezes had to produce statistical evidence to prove that there was discrimination against him as a migrant Community worker. In particular any inference was suggested would be countered by the fat that teenagers of domestic resident UK nationals often made trips abroad for study, gap years, etc, and also that there were a significant number of families with British Citizenship who also retained links to their countries of origin, for example in the Carribean, India, Pakistan, Africa or elsewhere. The Court of Appeal, drawing in particular on the judgment in *O'Flynn*, rejects this as unfounded. It considers that the proper approach is that the Commissioners are entitled to take a 'broad approach' and to find that 'indirect discrimination is liable to affect a significant number of migrant workers on the ground of nationality without statistical proof being available'. It goes on to consider the particular case in question and conclude that there is sufficient ground to say that such a requirement is indeed intrinsically more likely to affect migrant workers than British National children whose families are resident here. We are not aware that this case has proceeded any further.

Walker-Fox v Secretary of State for Work and Pensions, Court of Appeal, 29th November 2005, [2005] EWCA Civ 1441

This case, again in the Court of Appeal, concerns time limits. It concerns the Winter Fuel Allowance payments which the Government for some time denied was exportable and a residence condition was imposed on each payment- ie a pensioner who moved abroad lost any subsequent payment. Eventually in 2002 it was announced that the government accepted that this was an exportable old-age benefit under Regulation 1408/71 and that this would continue to be paid in subsequent years to individuals who had become entitled to the payments while resident in the UK. Thus seemingly individuals resident abroad when they first fulfil all other conditions of entitlement would not get the payments but those fulfilling all conditions while resident would not have payments stopped in subsequent years.

The case concerned time limits for these payments in relation to the years 2000/2001 and 2001/2002 – earlier payments were not affected by time limits in regulations from 2000 and later years payments have followed automatically because the claimant is now registered as being entitled. Payments have to be made before a certain time, namely 31st March 2001 and 2002 respectively – before the announcement was made concerning the concession over residence condition. The claimant having heard of the concession made applications for payments in late 2002 for these years (as well as three other years not affected by the time limit) and was refused.

The Commissioner considered that reliance on the time limit would have made the claim impossible or excessively difficult – it would have been rejected on the basis of the residence condition contained in the Winter Fuel Payments Regulations and he thought that the possibility of the claim being made whilst the government still denied the exportability of the benefit and maintained the clear residence condition in the Regulations was theoretical rather than real. A reasonable time after the concession was announced had to be given for claims to be brought forward and the claimant was permitted to advance his claim for the two payments in question. The Court of Appeal however took issue

with this approach. It considers that the approach taken by the Commissioner confuses the impossibility of *making* a claim with the *outcome* of it. Presumably then this implies that it is entirely possible to *make* a claim that one fully expects to be rejected on the face of the law and government policy as it stands. The critical point of the Court of Appeal is that the individual is deemed to know the law – including that contained in Regulation 1408/71. Armed with this (deemed) knowledge, that the winter fuel payment is a form of old age benefit which is in fact exportable, he would be in a perfectly good position to make the claim. The point is that with knowledge of the law 'the arguments in favour of the exportation of the benefit were not excessively difficult to see or to understand and the making of the claim was thus perfectly possible'. The court does concede that 'in the real world' it might be said to be impossible or at least excessively difficult to make the claim 'where the government, whose duty it is to comply with EC regulations, is steadfastly denying their application' but continues that 'in the legal world it is different' and that sadly the legal knowledge that he must be deemed to have makes the claim perfectly possible. So not only does the claimant have to know the law better than the administrators whose duty it is to implement it properly. Again we are not aware that this case has proceeded any further beyond the Court of Appeal judgment.

Pending cases – the requirement of a lawful right to reside, and the habitual residence test following on from Collins

We understand that two further cases are pending. The test of having a lawful 'right to reside' for certain means-tested income-related benefits (Income Support, Pension Credit, Jobseekers Allowance, Housing Benefit and Tax Credit), introduced in 2004 alongside the 'habitual residence' test, is currently subject to challenge in court, the question is currently being heard by Social Security Commissioners and an answer should be forthcoming during 2006. We also understand that the *Collins* case is now pending in the Court of Appeal, after a hearing before a Social Security Commissioner during 2004 the lawfulness of the habitual Residence test was accepted on the basis that it was indeed objectively justified, this is being challenged further on appeal.

Chapter XI
Self-employed/business persons under the Ankara Agreement[69]

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 remained extremely controversial in the UK in the past year.

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

After *Savas* the Home Office issued guidance in January 2003 suggesting that the standstill clause only applied to those who sought to lawfully 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. The Secretary of State appealed against the decision of the High Court 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 save where they had engaged in fraud. Therefore nearly 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 (*C-16/05*). A hearing is listed before the ECJ is listed for 18 May 2006.

Pending the outcome of *Tum* the Home Office issued 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

69 By Nicola Rogers, Garden Court Chambers.

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. Statistics for January to December 2005 reveal that only 4% of applications were granted, whereas 67% of applications were rejected and in 25% of cases the application was withdrawn[70].

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*.

The Home Office has 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 clandestine entry or a failed asylum application is to be deemed as fraudulent conduct which would cause the application to 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. The Home Office position on "fraud" is subject of challenges in the Administrative Court now.

There are considerable delays in the processing of applications by self employed Turkish nationals, with the Home Office at February 2006 processing applications made in February 2004.

All applications are treated in strict application order, such that even those Turkish nationals who have already been granted one year's leave to remain in this category are currently waiting as long as two years for their applications for extension of leave to be granted.

Employed Turkish nationals under the Ankara Agreement

As previously reported, it remains the case that there is no reference to the provisions in Association Council Decision 1/80 in UK immigration law.

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 current guidance given to the public and caseworkers on the provisions in Decision 1/80 are contained in Chapter 5, Section 10 of the Immigration Directorate's Instructions. That guidance is regrettably very out of date, having been drafted in 1998. It has not been updated since then although your rapporteurs are aware that the Home Office intends to up-date the guidance.

Of particular to your rapporteurs is a reference in the guidance to the fact that in the Home Office view trainees cannot benefit from the provisions of Article 6(1) of Decision 1/80. This plainly cannot be correct in the light of case-law of the ECJ (see for instance Gunaydin (C-36/96).

70 European Community Association Agreements Statistics for Bulgaria, Romania and Turkey, 28 February 2006, Home Office Statistics

The Home Office further maintains that students and au-pairs cannot benefit from the provisions on Article 6(1). This is subject of an appeal in the cases of Ozturk and Payir[71] which were heard in February 2006. Judgment is pending.

The Home Office guidance further states that the Agreement does not provide for the removal of time limits, only for the freedom to take any employment after 4 years. Applications for indefinite leave to remain should be refused and further leave to remain granted for 12 months at a time.

It is your rapporteurs' view that this is entirely at odds with the spirit, if not the wording of the last indent of Article 6(1) of Decision 1/80. The reference to "free access…. to any paid employment" plainly means access to the labour force without *any* restriction. The ECJ has consistently seen the right of access to the labour force having as its corollary a right of residence (c.f. *Birden v Stadtgemeinde Bremen* [1998] ECR I-7747). If access to the labour is to be free and without any restriction, it is difficult to see how the Secretary of State can justify any restriction on the right of residence once that right has been acquired.

It is our view that the need to apply for leave to remain on an annual basis plainly represents a "restriction" on the right of residence. It means for instance that a Turkish national would not be able to take annual leave or travel for work purposes around the time that his or her leave to remain requires renewal. It means that for several months a year (if not longer) the Turkish national will be without his or her passport as such documents will be with the Home Office whilst the application for further leave to remain is under consideration. The lack of "settled status" impacts upon a person's entitlement to access a range of benefits and services in the UK.

The Home Office guidance further states that applications for dependants to enter or remain should be considered under the Immigration Rules. The Agreement makes no provision for the *admission* of dependants to join Turkish workers in the United Kingdom. Applications from spouses and other dependants for entry clearance when the sponsor is in the United Kingdom *solely by virtue of the Agreement* should be refused.

Your rapporteurs accept that there is no express provision in Decision 1/80 regarding the admission of family members. However the clear principle of family unity that underpins the provision in the first paragraph of Article 7 of Decision 1/80 means that the Member States' powers in this regard are not unfettered by Community law.

Although it is clearly for Member States to lay down the conditions under which family members may enter their territories to join Turkish workers duly registered as belonging to the labour force, the inclusion of Article 7 does presume that Member States will in fact permit family unity of such workers. The ECJ held in *Kadiman* that the system under Article 7 was "designed to create conditions conducive to family unity in the host Member State, first by enabling family members to be with a migrant worker".

In our view it must be inferred from the ECJ judgment in *Kadiman* that Member States should be facilitating entry to family members of workers integrated in their labour forces.

71 C4/2005/1649 *Ezgi Payir v the Secretary of State for the Home Department* and C4/2005/1650 and C4/2005/1651 (1) *Birol Ozturk* and (2) *Burhan Akyuz v the Secretary of State for the Home Department*.

Chapter XII
Miscellaneous[72]

Citizenship

On 1 November 2005 the UK authorities introduced a citizenship test applicable to all persons seeking to naturalise in the UK. Citizenship ceremonies had already been introduced from 1 January 2004. According to the public information about the new citizenship test, its purpose is to provide the applicant with an opportunity to demonstrate that he or she knows about life in the UK. There are two aspects to the test, first language and secondly knowledge of life in the UK. The individual who seeks to naturalise must have a knowledge of English which satisfies a common standard (English for Speakers of other Languages – ESOL Entry 3). If the person does not fulfil this criterion then he or she will have to take language classes before taking the test. Individuals are referred to a website or to local colleges for further assessment and training. These are fee paying.

Although there are three languages in the UK, the test is only available in English. Promises have been made that the test will be available in Welsh and Scottish Gaelic 'in the future'. There is a standard textbook, Life in the United Kingdom: A Journey to Citizenship which is recommended to students seeking to take the exam. It costs £9.99 and contains all the information on which the individual may be questioned. The exam is administered by computer at centres which may be either operated by local authorities or private enterprises. Each test consists of 24 questions which must be answered within 45 minutes. The cost of the test is £34 which is not refundable if the test is failed. The individual may retake the test as often as necessary until he or she passes it. Once he or she is successful, a certificate is issued to the individual which must be attached to any application for naturalisation.

Training

The most important association providing training on EU free movement of persons in the UK is the Immigration Law Practitioners Association. In 2005 it provided the following courses:

19 January	Advanced EU law including the Association Agreements
14 February	Moving Workers and Employees around Europe
2 March	Basic EU Law
16 March	Applications from Bulgaria and Romania, entry clearance and in country switching under the EC Association Agreements
20 April	Basic course on the Turkey Association Agreement: how to assist nationals from Turkey
13/14 May	How Much Freedom, Security and Justice (conference)
6 July	Basic EU law
5 October	A Comprehensive Guide to using the EC Turkey Association Agreement for Turkish nationals
17 October	A Warm Reception? Asylum-seekers rights under European law

Queen Mary University law faculty offers a course on EU law on free movement of persons and a number of other universities are planning to start course at the LLM level.

Websites of Interest

www.ind.homeoffice.gov.uk/ind/ en/home/laws___policy/legislation.html : this is the government's website which contains all the legislation, the immigration rules and the IDIs (immigration directorate instructions).

Lifeintheuktest.gov.uk is the official website relating to the new UK citizenship test.

72 By Elspeth Guild.

www.ind.homeoffice.gov.uk/working_in_the_uk/ and www.workpermit.com/uk/worker_registration_scheme contain official information on the worker registration scheme which applies to nationals of eight EU Member States.

www.ilpa.org.uk : is the website of the Immigration Law Practitioners Association which follows UK implementation of EU law in this field.

www.iasuk.org/ : this is the website of the government funded organisation which provides free immigration and asylum advice to foreigners .

www.refugeecouncil.org.uk/ : the Refugee Council provides information on asylum policy in the UK including implementation of EU asylum law.

Annex – Recommendations

Enlargement

There are compelling arguments in favour of further liberalising the free movement of workers regime involving A8 nationals in the UK, by abolishing the Workers Registration Scheme. This would align conditions of entry into the UK labour market with those applicable to the rest of the EU nationals – thus ending discrimination against A8 nationals - and further facilitate their access to the UK labour market. The Commission could probe the UK regarding their intention in this context.

We recommend that the Commission request UK authorities to provide further information on the application of the Regulations in this context and the difficulties that may arise for employers in applying the Regulations.

We reiterate our Recommendation that the Commission request an explanation from the UK authorities as to the compatibility of the fee (now increased to £70) with the 1961 European Social Charter.

Finally, in the light of the minimal changes in the UK legal framework, we would like to see the follow-up to the Commission's requests (following our Recommendations in the 2004 Report) to the UK Government to

- clarify why they base the 12 month test on actual employment, rather than on permission to work; and
- 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