

REPORT
on the Free Movement of Workers
in Ireland in 2008-2009

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Dublin

October 2009

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Introduction

As a result of the July 2008 judgment of the Court of Justice in *Metock*, there is no longer a requirement that third country national spouses (and other family members) of Union citizens show prior lawful residence in another EU Member State as a condition of exercising rights of residence in Ireland. This requirement was used as a tool to combat marriages of convenience and what have been described as ‘opportunistic marriages’. Although the relevant Irish legislation makes it clear that ‘spouse’ does not include a party to a marriage of convenience, there have been few established cases of abuse. This is clearly an issue that will have to be addressed in the aftermath of *Metock*.

Although it affects a relatively small number of people, the removal of the compulsory language requirement for Irish-qualified solicitors and barristers is also significant (although those availing of establishment rights were not subject to such requirements). The compulsory system has been replaced by a system designed to ensure that all lawyers can identify cases where there is a need to Irish and that there are enough lawyers who have voluntarily decided to obtain the necessary Irish-language qualification.

Third, the Government decided in December 2008 to continue restrictions on the employment of Romanian and Bulgarian citizens. This was perhaps understandable given the economic situation and the rise in unemployment, and has been broadly endorsed by unions and employers’ groups. Although Romanian and Bulgarian workers do enjoy preference over others in the employment permit regime, it is noteworthy that there is a much higher than average rate of refusals for employment permit applications by nationals of these two Member States.

Finally, the economic downturn has thrown up issues, especially in relation to nationals of the 2004 Accession Member States. Whether in terms of levels of pays, or treatment during dismissal/redundancy procedures, such nationals have often found themselves disadvantaged vis-à-vis Irish nationals (and, indeed, nationals of the older Member States). There seems to be an increase in recourse to equality tribunals, where such claims have been substantiated. Huge public spending cuts have already prejudiced the work of equality agencies and could also jeopardise attempts to strengthen the powers of employment rights bodies.

Chapter I

Entry, Residence, Departure

TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS: ART. 7(1A); ART. 7 (3)(A)-(D); ART. 8(3A); ART.14 (4) (A)-(B), ART.17 AND ART. 24 (2) OF THE RESIDENCE DIRECTIVE.

Article 7(1)(a) of the Residence Directive provides that all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they are workers or self-employed persons in the host Member State.

Regulation 6(2) of the 2006 Regulations provides that, subject to Regulation 20 (on removal from the State), a Union citizen may reside in the State for a period longer than 3 months if, amongst other matters, he or she is in employment or is self-employed in the State.

Article 7(3) sets out four sets of circumstances in which, for the purposes of Article 7(1)(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person.

These are addressed in Regulation 6(2)(c)(i)-(iv) of the 2006 Regulations. These provisions, somewhat curiously, do not expressly maintain the status of worker or self-employed person, but rather the right to remain. Subject to this, the first two sets of circumstances (relating to temporary inability to find work resulting from illness or accident and involuntary unemployment after being employed for more than one year) are correctly transposed. The third set covers involuntary unemployment after completing a fixed-term employment contract of less than a year or being involuntarily employed during the first twelve months. The Directive provides that, in this case, the status of worker shall be retained for no less than six months; Regulation 6(2)(d) provides, rather differently, that ‘the right to remain shall expire 6 months after the cessation of the activity concerned unless the person concerned enters into employment within that period’. The fourth set of circumstances covers persons embarking on vocational training where, save in the case of involuntary unemployment, the retention of the status of worker requires the training to be related to the previous employment. This is transposed by the provision ‘except where he or she is involuntarily unemployed, he or she takes up vocational training related to the previous employment’. Although a little ambiguous, it seems to be intended that persons who are involuntarily unemployed have the right to remain whether or not the training is related to their previous employment!

Article 8(3)(a) provides, amongst other matters, that, for a registration certificate to be issued to Union citizens who are workers or self-employed persons in the host Member State, Member States may only require the presentation of a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons.

The 2006 Regulations do not provide for the issuing of a registration certificate. Ireland does not require Union citizens to register and there is therefore no need for a registration certificate.

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Article 14(4) provides that, by way of derogation from Article 14(1) and (2) and without prejudice to the provisions of Chapter VI (restrictions on grounds of public policy, public security and public health), expulsion measures may not be adopted against Union citizens or their family members if the Union citizens are workers or self-employed persons, or the Union citizens entered the territory of the host Member State in order to seek employment (for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being employed).

Article 14(4) has not been explicitly transposed in the 2006 Regulations.

A possible difficulty arises in relation to residence of up to three months, which in Regulation 6(1) of the 2006 Regulations is made conditional on the person concerned not becoming an unreasonable burden on the social welfare system of the State. There is no specific derogation for workers or self-employed persons, or job-seekers.

This difficulty does not arise in respect of workers or self-employed persons enjoying a right of residence for more than three months, since there is no condition that the person concerned does not become an unreasonable burden on the social welfare system. Provided the status is retained, there are no grounds for expulsion under the Regulations other than those provided for in Chapter VI of the Directive. The position of job-seekers is discussed in 2, below.

Article 17 provides for exemptions in relation to the conditions for permanent residence for persons no longer working in the host Member State and their family members.

Article 17 is transposed by Regulation 13 of the 2006 Regulations, which deals with ‘entitlement to permanent residence in the State of Union citizen no longer working in the State and his or her family members’.

The wording used in Regulation 13 is sometimes rather different from that used in Article 17. In most cases, it seems that there has been correct transposition. However, there are two cases where the position is not clear:

First, in relation to the transposition of Article 17(1)(c) of the Directive (frontier workers), Regulation 13(4) provides for return to the State ‘at least once a week’, whereas Article 17(1)(c) provides for return ‘as a rule, each day or at least once a week’. The Irish transposition seems to ignore the need for a measure of flexibility.

Second, in relation to the transposition of Article 17(3) of the Directive (right of permanent residence of family workers), Regulation 13(6) refers to family members of Union citizens who have been in employment or have pursued self-employed activity in the State, whereas Article 17(3) refers to family members of a worker or self-employed person. The Regulation does not appear – at least on its natural interpretation – to cover the position of Union citizens actually in employment or engaged in self-employed activity.

I am not aware of any material developments in 2008 or 2009.

Article 24(2) provides that, by way of derogation from the enjoyment of equal treatment under paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans. This derogation does not apply to persons who are workers, self-employed persons, persons who retain such status and members of their families.

Ireland avails fully of the derogation under Article 24(2) of the Directive.

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Regulation 18(2)(a) of the 2006 Regulations provides that persons covered by the Regulations – other than workers, self-employed persons, or a person who retains such status and members of his or her family, shall not be entitled to receive assistance under the Social Welfare Acts: (i) for three months following his or her entry into the State; or (ii) where the person entered the State as a job-seekers, ‘for such period exceeding 3 months, during which he is continuing to seek employment and has a genuine chance of being engaged’. The term ‘assistance under the Social Welfare Acts’ means assistance under the Social Welfare Consolidation Act 2005 and includes payments or services under the Health Acts 1947 to 2004 and the Housing Acts 1996 to 2004.

Regulation 18(2)(b) provides that, prior to the acquisition of permanent residence in the State, a person covered by Regulation 18(2)(a) shall not be entitled to receive maintenance grants for students (including those undertaking vocational training). Notwithstanding this, permanent residence does not appear in fact to be required in order to receive a maintenance grant (see Chapter III, 4.5, below): the purpose of Regulation 18(2)(b) appears to be to ensure that the right to receive a grant remains a national one, rather than an obligation under the Directive..

2. SITUATION OF JOB-SEEKERS

The position of job-seekers who enter the State in this capacity is very unclear in Ireland. There is little on official web sites. There is no legislative provision expressly applying to job-seekers, save for Regulation 18(2)(a)(ii) of the 2006 Regulations that denies assistance to them under the Social Welfare Act (see above).

In practice, there is no obstacle to ‘genuine’ job-seekers entering Ireland in their own right (the position of third-country national family members is not so clear – see Chapter VI). Since there is no requirement to register, and no entitlement to social assistance, the individual concerned does not have to prove his or her status with the immigration authorities. It seems that a job-seeker will not be initially entitled to social assistance. He or she can transfer unemployment benefit from the Member State of origin for up to 3 months (and up to six months in some cases: after that period, the job-seeker may qualify for Job-seeker’s Allowance if conditions, including the habitual residence condition, are satisfied. It is clear from operational guidelines issued by the Department of Social and Family Affairs¹ that, apart from the production of identification (a passport or national identity card) to confirm EU/EEA Member State nationality, the Deciding Officer will need evidence of a permanent address showing that the person is resident and available for employment in Ireland, that the person has a good command of English and that the reason for coming and the actual place of residence is consistent with a genuine search for work. It is specifically stated that ‘special care should be taken to ensure that all EU Nationals have genuinely come to Ireland with the intention of seeking employment’.

¹ http://www.welfare.ie/EN/OperationalGuidelines/Pages/ja_jobseekall.aspx.

Chapter II Access to Employment

EQUAL TREATMENT IN ACCESS TO EMPLOYMENT OUTSIDE THE PUBLIC SECTOR

Nationals of other Member States enjoy equal treatment in relation to access to employment as a matter of law. This has now been made clearer in Regulation 18(1)(a) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006,² which provides that nationals of other Member States and qualifying family members ‘shall be entitled ... to seek and enter employment in the State in the like manner and to the like extent in all respects as Irish citizens’.

This includes full access to the services provided by FÁS as the National Training and Employment Authority.³ Through a regional network of 66 offices and 20 training centres, FÁS operates training and employment programmes, provides a recruitment service to job-seekers and employers, provides an advisory service for industry, and supports community-based enterprises.

The rapporteur is not aware of any issues in relation to equal treatment in relation to access for employment as regards FÁS.

2. LANGUAGE REQUIREMENT

As far as concerns the private sector, there is no general legal requirement that English and/or Irish be spoken. However, in practice, employers in Ireland will require employees to speak the language that is needed to do the job.

The question of linguistic proficiency of workers coming from other Member States has arisen in relation to a number of professions, including nurses, pharmacists, teachers and lawyers (where there was a major legislative change in 2008).

In relation to *nurses*, a 2007 Circular issued by the Irish Nursing Board stated that the Board itself was precluded from assessing the English language competence of nurses coming from other EU Member States. However, it recognised that employers had the responsibility to patients and their families of ensuring that employees had the necessary language skills.

In relation to *pharmacists*, Section 14 of the Pharmacy Act 2007 provides that the Council of the Pharmaceutical Council of Ireland is to register a person who is a national of Ireland or another Member State if he or she lacks the linguistic competence necessary to be a registered pharmacist in the State provided he or she undertakes to acquire it.

There is no statutory Irish language requirement for access to teaching posts in Ireland. A good level of English will as a matter of fact be required. Naturally, some posts will require teaching through Irish.

The most significant development in 2008 relates to barristers and solicitors.

2 See n. 2, above.

3 See, generally, www.fas.ie.

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Until the entry into force of the Legal Practitioners (Irish Language) Act 2008⁴ in July 2008, most barristers and solicitors had to demonstrate Irish language competence before they could be admitted to practice. A person wishing to be admitted as a barrister in Ireland had to satisfy the Chief Justice that he/she possessed a competent knowledge of the Irish language.⁵ Would-be *solicitors* had to pass two Irish examinations, the first before entering into training and the second before admission as a solicitor.⁶ These requirements applied to all persons irrespective of nationality who wished to be admitted to one of the two branches of the Irish legal profession. However, these requirements did *not* apply to lawyers from other Member States seeking to practise under Directive 89/48 and to lawyers covered by other reciprocal arrangements. In reality, barristers and solicitors satisfying the Irish language requirements have not always been able to conduct legal business satisfactorily in Irish.

The 2008 Act, enacted in July 2008, repeals the 1929 Act, and related legislation concerning solicitors.

It requires the professional bodies concerned (the Honorable Society of King's Inn for barristers and the Law Society of Ireland for solicitors):

- To have regard to the status of the Irish language as the first official language and to seek to ensure that an adequate number of barristers/solicitors are competent in the Irish language so as to be able to practise law through the Irish language as well as through the English language.
- To provide a non-examinable course of instruction in Irish legal terminology and the understanding of legal texts in Irish in order to enable the identification through the medium of Irish of a legal service that is required and to facilitate referral to a practitioner who can conduct the case through Irish.
- To provide an advanced course for the practice of law through Irish as an optional course and to hold examinations of those who have undertaken the course.
- To establish and maintain a register of barristers/solicitors who have passed this examination.
- To report (in Irish and in English) on the operation of the system, including the numbers of people who have taken the advanced course and who have passed the advanced examination.

4 Legal Practitioners (Irish Language) Act 2008 (No. 12 of 2008)

5 Legal Practitioners (Qualification) Act 1929 (No. 16/1929), Section 3.

6 Legal Practitioners (Qualification) Act 1929 (No. 16/1929), Section 4.

Chapter III

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS

The Employment Equality Acts 1998-2008 cover employees in both the public and private sectors including people employed through employment agencies and applicants for employment and training. It outlaws discrimination in all areas relevant to employment, on a number of specified grounds including race, colour, nationality or ethnic or national origins (together described as the ‘race’ ground). It should be noted that Section there are exemptions from the application of the non-discrimination principle in relation to employment in the public service, linguistic requirements for teachers in primary and post-primary schools and requirements to hold particular educational, technical or professional qualifications.

A key provision on equality, introduced ‘for the avoidance of doubt’, is contained in Section 20 of the Protection of Employees (Part-Time Work) Act 2001 which provides that a series of enactments conferring rights on an employee applies, and shall be deemed always to have applied to, a posted worker (within the meaning of Directive 96/71) and

‘a person, irrespective of his nationality or his place of residence, who

- i. has entered into a contract of employment that provides for his or her being employed in the State;
- ii. works in the State under a contract of employment; or
- iii. where the contract has ceased, entered into the contract of employment or worked in the State under a contract of employment,

in the same manner, and subject to the like exceptions not inconsistent with this subsection, as it applies and applied to any other type of employee.’ (emphasis added)

The full range of employee protection legislation thus formally applies to foreign workers, posted or otherwise, and irrespective of origin.

As reported in the 2007 Report, there have been concerns that, as a matter of practice, the equality principle was not being applied to third-country national workers and to workers from the Member States that acceded in 2004 (in particular, Poland and the Baltic States). There have been focused attempts by trade unions and others to improve awareness of employment rights among these more vulnerable categories of workers through the publication of handbooks in various languages and conferences. These initiatives were bolstered by the political commitments in the Social Partnership Agreement *Towards 2016*.⁷

The National Employment Rights Authority (NERA) was set up on an interim basis in February 2007, in order to secure compliance with employment rights legislation, including the principle of non-discrimination, and to foster a culture of compliance in Ireland. In March 2008, the Employment Law Compliance Bill was introduced, to put NERA on a formal legislative footing, as well as to strengthen inspection and enforcement powers.

The Equality Tribunal is an impartial and independent quasi-judicial body charged with hearing or mediating claims of alleged discrimination under the Employment Equality Acts and other legislation. During 2008 and 2009, a number of decisions were taken on complaints made on grounds of race. A number of these should be mentioned here:

⁷ Towards 2016: Ten Year Framework Social Partnership Agreement 2006-2015 http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf.

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In *Gorys v Igor Kurakin Transport*,⁸ a Lithuanian national was not provided with a contract of employment, timesheets and payslips. Although there was a prima facie case of less favourable treatment, he failed to establish that he was discriminated against on grounds of race since the company concerned – an Irish company run and staffed by Lithuanians - was recently established and would not have treated a (hypothetical) Irish national worker differently.

In *58 Named Complainants v Goode Concrete*,⁹ a large number of non-Irish nationals employed as truck drivers, mechanics or general operatives claimed that they had been discriminated against on grounds of race. It was held that they had been discriminated against in relation to their contracts of employment and safety documentation, on the basis that these had not been provided in a language they could understand, or had been otherwise properly explained to them. The respondent was ordered to put in place clear procedures for ensuring that non-national employees understood their terms and conditions of employment and safety documentation, maintained better records of disciplinary meetings, and provided training to management on the legislation.

In *A Worker v An Engineering Company*,¹⁰ it was established that the company had discriminated against the complainant (an UK national) in relation to his conditions of employment by not taking reasonable and practicable steps to prevent his harassment on ground of race.

In *Ilko Jaremukcs v Maughan Construction*,¹¹ it was held that a Latvian construction worker had been dismissed in a manner that would not have applied to an Irish national who would have a greater capability to stand on his legal rights, and he had thus been discriminated against in his conditions of employment on grounds of race. As similar approach applied in *Viktoras Gedmintas v Edward McNamara*,¹² where a Lithuanian national was discriminated against on grounds of race in relation to levels of pay.

2. SOCIAL AND TAX ADVANTAGES

The 2007 report considered the application of the ‘habitual residence’ test introduced in 2004 for access to social welfare payments. This originally caused significant problems in relation to free movement which now appear to have been resolved.

Operational Guidelines on the habitual residence condition,¹³ updated in June 2009, make it clear that those entitled to social advantages under Article 7(2) of Regulation 1612/68 – which covers many but not all social welfare benefits¹⁴ – cannot be subject to the condition. However, the authorities will need to be satisfied that the person concerned qualifies as a ‘worker’ in EU law (applying the tests laid down by the European Court of Justice).

It is stated that job-seekers benefit from equal treatment under Regulation 1612/68 only as regards access to employment. First-time job-seekers do not qualify for equal treatment as regards social and tax advantages under Article 7(2).

8 DEC-E2008-014, 4 April 2008.

9 DEC-E2008-020, 30 April 2008.

10 DEC-E2008-038, 7 July 2008.

11 DEC-E2008-056, 17 October 2008.

12 DEC-E2008-070, 22 December 2008

13 http://www.welfare.ie/EN/OperationalGuidelines/Pages/swa_habres.aspx.

14 A number – such as Unemployment Assistance and Old Age Pension - are covered by Regulation 1408/71, which takes precedence over Regulation 1612/68.

3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS

Nothing identified.

4. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES), SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

4.1 Frontier workers

The relevant frontier here is that between Ireland and Northern Ireland. A study on obstacles to mobility, under the aegis of the North/South Ministerial Council, was published in November 2001.¹⁵ The study identified obstacles in relation to taxation, social security, pensions, healthcare, childcare, housing, recognition of qualifications and employment. This study did not specifically focus on obstacles to the free movement of workers under Community law and, so far as the reporter is aware, a comprehensive study in this regard has not been undertaken.¹⁶

Those moving between North and South have clearly encountered difficulties in relation to matters such as employment, enjoyment of social insurance right, access to social welfare, and healthcare. The Cross Border Mobility Project has been launched by the North/South Ministerial Council and its website is designed to act as a 'one-stop' shop for all who move across the border (including frontier workers) in detailing their position in the two Member States.¹⁷ It also acts as an 'advice centre' for people with specific mobility-related issues.

In May 2004, a 'habitual residence' condition was introduced for obtaining certain social assistance payments. Although the relevant legislation does not specifically exclude those benefiting from the EU free movement rules from having to satisfy this condition, it is recognised that persons now entitled to these payments under EU free movement rules do not have to satisfy this condition.

The general rule for frontier workers is set out in guidelines and other documents issued by the Department of Social and Family Affairs.¹⁸ The general rule appears to relate to frontier workers having the nationality of another EU Member State and having a third-country nationality alike. This means that, *subject to any exceptions arising by virtue of EU migrant worker status*, a frontier worker who lives (say) in Northern Ireland but works in Ireland and who has his/her main centre of interest abroad will generally not be regarded as habitually resident in Ireland. However, it is clear that EC law takes precedence over national law and that EEA frontier workers working in Ireland are entitled to family benefits without needing to satisfy the habitual residence condition. It appears that the guidelines in this regard were

15 North/South Ministerial Council *Study of Obstacles to Mobility* (November 2001) (PriceWaterhouseCoopers & Indecon Economic Consultants).

16 In the light of remarks in the 2006 Report for the UK indicating that many of the obstacles identified in 2001 had not been addressed, there may be scope for an up to date study to revisit the issue.

17 <http://www.borderpeople.info>.

18 See 2006 Guidelines for determining habitual residence for the purposes of Supplementary Welfare Allowance (http://www.welfare.ie/foi/swa_habres.html) and 2008 Guidelines for Deciding Officers on the determination of habitual residence (<http://www.welfare.ie/foi/habres.html>).

updated in June 2008 to take account of concerns expressed by the Social Welfare Appeals Office that the relevant EU provisions were not adequately covered.¹⁹

The *Hartmann* and *Geven* cases are each generally concerned with the entitlement of frontier workers to receive child-raising allowance in the State of employment, rather than that of residence as a social advantage under Article 7(2) of Regulation 1612/68 in circumstances where the regime under Regulation 1408/71 does not apply (in the first case because the claimant did not work and her husband – a civil servant – fell outside the scope of Regulation 1408/71, in the second case, because the claimant was in only minor employment).

There has been no explicit recognition in Irish practice that a frontier worker who does not fall within the regime of Regulation 1408/71 is able to claim the benefits of Article 7(2) of Regulation 1612/68 in the circumstances that obtained in the *Hartmann* case.

There is a general recognition, in relation to Supplementary Welfare Allowance, which is affected by Article 7(2) of Regulation 1612/68, that workers within the meaning of Article 39 EC do not have to establish habitual residence. This approach should extend to cover the *Hartmann* and *Geven* scenarios. However, in discussions with an official in the Department of Social and Family Affairs, it appears that the issues in *Hartmann* and *Geven* have not arisen in the Irish context, but that if they did, those cases would be applied in deciding whether to dispense with any residence condition.

4.2 Sportsmen/sportswomen

As far as can be ascertained, there are no nationality restrictions as regards participation in sporting activities as far as competitions within Ireland are concerned. Although several sports have rules on transfers, these rules appear to be designed to ensure that players seeking to transfer have honoured their obligations, rather than to set any limits on the mobility of players from elsewhere.

It should be noted that the Football Association of Ireland (FAI) explicitly endorses an all-embracing anti-discrimination policy, specifically applying to selection for representative teams, including nationality and ethnic origin as prohibited grounds.

There are a number of rules and regulations – reflecting European and International rules on representation on national teams in international competitions. The Irish Rugby Football Union (IRFU), for example, follows IRB rules which require that to play for a national representative team, a player must have been born in the country, or one parent or grandparent must have been born in the country, or the player must have completed 36 consecutive months of residence immediately preceding the time of playing.

It should perhaps be noted that, in the area of Gaelic sports, the question does not arise since these activities are reserved to amateurs. Although the emphasis is on the sports' 'Irishness', there is no nationality restriction with interested players drawn from the local level (or from an institutional base, such as a university).

There have been no particular developments in this area in 2008 and 2009.

¹⁹ See Social Welfare Appeals Office, Annual Report 2007 (<http://www.socialwelfareappeals.ie/pubs/report2007.html>).

4.3 The Maritime sector

Seafarers on *Irish-flagged ships* are entitled to equal treatment in terms of pay and other terms and conditions of employment irrespective of nationality. This arises from the Employment Equality Acts 1998-2007 and the Protection of Employees (Part-Time Work) Act 2001.

As has been mentioned in earlier reports, concerns about the application of this basic principle surfaced in 2004/2005 in relation to Irish Ferries. At that stage, flagged in Ireland, Irish Ferries sought to reduce its operating costs by replacing its Irish crew by seafarers from the Baltic States. It also appears to have paid individual workers on board its vessels – such as hairdressers – very low hourly rates of pay. It unilaterally terminated its arrangements with the trade union, SIPTU and, after considerable industrial unrest, made its Irish workers redundant and outsourced its crewing requirements

Subsequently, Irish Ferries decided to reflag its vessels. A number of vessels are currently flagged in Cyprus and its most recently acquired vessel is flagged in the Bahamas. The Irish Government has made it clear²⁰ that ‘it is as a matter of international law clear (as reflected in United Nations Convention on the Law of the Sea – UNCLOS) that the terms and conditions of the employed seafarers on such vessels is to be decided exclusively by the flag State’. It was also clear that Ireland could not prevent a re-flagging that occurred as an integral part of exercising a right of establishment in another Member State.

There have been no material developments in this sector in 2008/2009. Indeed, in contrast to the enormous press and other coverage in 2004/2005, little of relevance has appeared in the public domain.

4.4 Researchers/artists

The important issue in this regard is whether foreign EU nationals are treated equally ie are considered to have the same legal status as national researchers / artists.

It appears that nationals of other EU Member States working as researchers and artists are treated equally to their counterparts who have Irish nationality.

As noted in the 2007 report, income earned by artists, writers, composers and sculptors from the sale of their works is in certain cases exempt from tax in Ireland.²¹ There is no nationality requirement, but claimants for this exemption must be resident, or ordinarily resident and domiciled, in the State and not resident elsewhere.

4.5 Access to study grants

Regulation 18(1)(c) of the European Communities (Free Movement of Workers) No. 2) Regulations entitles persons covered by the Regulations to access to education and training in the State in the like manner and the like extent as Irish citizens.

20 See Statement by Minister Martin to Dáil Eireann Re Irish Ferries, 20 November 2005. <http://www.entemp.ie/press/2005/20051129a.htm>.

21 See <http://www.revenue.ie/en/tax/it/artists-exemption.html>.

Educational Fees

In relation to the fees charged by third-level institutions, ‘EU’ fees, which are set at a substantially lower level than ‘non-EU’ fees, apply to all those who satisfy residence requirements in any EU Member States, and in some cases are nationals of an EU Member State. As the 2007 Report made clear, the precise requirements seems to differ as between institutions. The largest third-level institution in the State, University College Dublin, imposes no nationality condition and requires that the parent/s of the student (or, in the case of mature students, the student him/herself) has/have been ordinarily resident in a EU Member State for three of the five years prior to entry. EU fees are also payable by students born in Ireland who do not meet these residency requirements but have received all their education in Ireland.

Another institution, Dublin City University, provides that students will qualify for EU fees where they are: (a) nationals of an EU Member State and have been ordinarily resident in an EU Member State for three of the five years prior to commencement of the programme; (b) nationals of an EU Member State and have receive all their post-primary education within an EU Member State; (c) where they are mature students (over the age of 23) and have been *in full time employment* in an EU Member State for three of the five years prior to commencement; or (d) where they are under 23 and have been ordinarily resident in a EU Member State for three of the five years prior to commencement and their parent/s has/have been in full-time employment in an EU Member State for three of the five years prior to commencement.

Financial Support

The Free Fees Scheme, under which the Exchequer meets the tuition fees of students attending approved third-level courses, applies to first-time undergraduates who hold the nationality of an EU Member States and have been ordinarily resident for at least three of the five years preceding entry to the course.

There are four student maintenance grant schemes funded by the Irish Government and administered by local authorities (for the University sector) and Vocational Education Committees (VECs).²² Applicants for such schemes must themselves satisfy one of a number of ‘nationality’ conditions, including: (a) the holding of EU nationality; (b) not holding EU nationality, have permission to remain as a spouse or child of a resident Irish national; and (c) not holding such nationality, having permission to remain as a spouse or child of a national of another EU Member State who is residing in the State and who is/or has been employed or self-employed. In addition, the parents or guardians of the applicant (or the applicant in the case of an ‘independent mature candidate’) must be ordinarily resident in the administrative area of the local authority/VEC concerned from 1 October in the preceding year, although this requirement may be waived in exceptional cases.

²² These are: the Higher Education Grants Scheme (HEG); the Vocational Education Committees’ Scholarship Scheme (VEC); the Third Level Maintenance Grants Scheme (TLT); and the Maintenance Grants Scheme for Students attending ESF-aided Post Leaving Certificate Courses.

Chapter IV

Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68

In the 2007 Report, it was stated that it had not been possible to identify any concrete cases where the relationship between Regulation 1408/71 and the equality rules in Regulation 1612/68 has been in issue. This question was raised in discussions with the Department of Social and Family Affairs in relation to the application of the *Hartmann* and other rulings (see below). There had clearly been concerns about the application of the ‘habitual residence’ condition to social security and social assistance payments, which may now be of largely historical importance. The Department made a clear distinction between payments caught by the Regulation 1408/71 regime, which (with certain exceptions) are payable by the Member State of employment and social welfare payments which are caught by Regulation 1612/68, so that the habitual residence condition cannot apply to frontier workers and others benefiting from the free movement provisions.

It has not been possible to identify any developments in individual cases. However, the Department of Social and Family Affairs has published detailed Guidelines on EU Social Security Regulations,²³ a section of which addresses the scope of Regulation 1408/71 and the position of persons outside the scope of that Regulation.

It is recognised that certain persons will fall outside the scope of Regulation 1612/68. First, those seeking social assistance. Second, family members and survivors, who cannot rely on the Regulation where the benefit applies *exclusively* to the employed person.

A number of points are made in relation to the regime under the Article 39 EC/Regulation 1612/68 regime.

First, Article 7(2) of Regulation 1612/68 does not benefit workers who are Irish nationals (see Joined Cases 35/82 & 36/82 *Morson and Jhanjan*).

Second, the person concerned must be a worker according to the definitions set out in ECJ case law. It is pointed out that a worker is not necessarily the same as a person within the scope of Regulation 1408/71.

Third, the worker must have employment in Ireland, which excludes job-seekers. It is recognised that there are a number of Community law exception to the requirement to be employed.

Fourth, family members will receive benefits under Article 7(2) only where this involves a social advantage pertaining to the employed person. In contrast to the test to be applied when determining the rights of family members and survivors under Regulation 1408/71, the employed person must actually support the family members in question. Family members will not benefit from the derived right where the worker is an Irish national or a non-EEA national.

Finally, the benefit must be a social advantage as defined by the Court of Justice.

²³ <http://www.welfare.ie/EN/Policy/EU/Euguide>.

Chapter V

Employment in the Public Sector

A detailed survey of the position with regard to employment in the public sector was provided in the 2007 Report. There have been no material developments (at least in the public domain) in 2008 and 2009. Only a summary of the current position is provided here.

1. ACCESS TO THE PUBLIC SECTOR

1.1. Nationality condition for access to positions in the public sector

In relation to access to positions for posts in the civil service, most posts are open to nationals of the other EU Member States. However, some posts are reserved to Irish nationals on national interest grounds: these include all posts in the Irish Diplomatic Service requiring the holding of a diplomatic passport and posts in the Department of An Taoiseach (Prime Minister), the Office of the Revenue Commissioners, the Department of Defence, the Department of Justice, Equality and Law Reform and the Department of Foreign Affairs. There is no available list of such posts – the nationality condition is set for individual competitions.

There are no nationality requirements for employment in the health, education and marine sectors.

In relation to the Defence Forces, Irish citizenship is normally required for recruitment to commissioned officer ranks. However, an exception is made for ‘specialists’ such as doctors. Other EEA nationals are eligible to join the Defence Forces below commissioned officer rank.

Nationals of other EU/EEA Member States are eligible to join An Garda Síochána, the national police service.

1.2. Language requirement

English language competence is required for virtually all posts in the public sector.

Save for the primary education sector, there is no formal Irish language requirement applying to all applicants. However, applicants for certain Irish-speaking posts may have to show that they have the necessary qualifications/competence. In addition, as part of the State’s policy to ensure that services are available in Irish, applicants may be assessed for Irish language ability and Irish-speakers may be favoured in the selection process.

A certain advantage is given to applicants for posts in the Civil Service who may take an optional Irish language test and are awarded extra marks which may give them a higher ranking in a competition. Some posts – for example, in the Department of Community, Rural and Gaeltacht Affairs – require a competency in Irish.

There is no general requirement for Irish language competency in the Health Service. However, in order to ensure that services can be provided in Irish, an assessment of ability to speak in English and Irish may be carried out at interview, and this may result in preference given to Irish speakers.

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Access to the Defence Forces is not dependent on Irish language qualifications. There is 'on the job' training in Irish.

In the education sector, all teachers trained in Ireland will possess Irish language qualifications, as this is a compulsory part of the training curriculum. Teachers trained in other EU Member States will need to have Irish to teach in mainstream national schools (primary education), but they are given an adaptation period of five years (save, of course, for posts that require the teaching of a subject through Irish). In secondary schools, there is no obligation to know Irish, except for posts in the *Gaeltacht* (Irish-speaking localities) and where Irish is the medium of instruction. Efforts have been made, under the auspices of the North South Ministerial Council, to promote seminars for student teachers to provide information on the Irish language requirements for teaching in Southern schools. There is no requirement for Irish in third-level posts, save where it is needed as a medium of instruction.

There are no Irish language conditions for access to posts in the marine sector.

In relation to An Garda Síochána, the national police service, there are no Irish language requirements for access. However, all recruits are required to achieve an appropriate standard before becoming full members. Recruits without an Irish language qualification will undergo basic training in that language.

1.3. Recognition of professional experience for access to the public sector

The position in Ireland has been set out in the Irish section of the 2006 Commission Report on the cross-border mobility of public sector worker and this appears to set out the position as it continued to apply in 2008 and 2009.

In relation to access to public sector employment, previous professional experience may be taken into account where such experience is specified as being relevant to a particular post. Credit will then be given for such experience. This will be the case for competitions for certain technical and professional posts.

It should be noted that incremental credit for previous experience in the public service does not play a part in establishing an order of merit in the selection process, but may be relevant for salary purposes (see 2, below).

2. WORKING CONDITIONS

The question of incremental credit for previous public sector service has been addressed in agreements between the Minister for Finance and trade unions. Examples of such agreements include an April 2006 agreement providing for incremental credit for previous service for entry levels at Tax Officer and Higher Tax Officer grades and a December 2007 agreement covering entry levels at Clerical Officer and Executive Officer grades.

These agreements apply only to adjust pay and do not affect seniority. They apply to persons who have been previously employed within the public service in Ireland or equivalent bodies in the EU Member States. Employment in the public service in EFTA countries and the European Commission will be considered relevant.

In general, recognition is not given for experience in the private sector.

There appear to have been no developments in this regard in 2008 or 2009.

Chapter VI

Members of the Worker's Family and Treatment of Third Country Family Members

1. RESIDENCE RIGHTS - TRANSPOSITION OF DIRECTIVE 2004/38/EC

1.1. Situation of family members of job-seekers

There is an almost total lack of transparency on this issue. In practice, it seems that family members of job-seekers are in principle able to enter and avail of residence rights corresponding to those of the job-seeker. It should be noted that there is no right to social assistance during the period where the job-seeker is seeking employment and has a genuine chance of being engaged (see Chapter 1). This is at least the position for family members who are themselves Union citizens and they are, of course, entitled to exercise any rights of free movement they themselves possess apart from enjoying their derivative status.

The position of third-country national family members is less clear. Since there is a requirement to apply for a residence card, the question of status may arise at the time such application is made. However, I am not aware of any individual cases where a residence card has been refused, at least to a family member of a bona fide job-seeker.

1.2. Application of Metock judgment

The Irish Government adopted Regulations amending the offending part of the 2006 Regulations only four working days after the Court delivered its Judgment.²⁴ In respect of family members who are not Union citizens, the requirement of prior lawful residence has now been removed and it is now stated that the Regulations apply to 'qualifying family members'²⁵ of Union citizens, who are not themselves Union citizens' who seek either: (i) to enter the State in the company of the Union citizen family member/s; or (ii) 'to join those Union citizens, in respect of whom they are family members, who are lawfully in the State'.²⁶ The same approach is now taken to 'permitted' family members,²⁷ including those who are not Union citizens.²⁸

The Department of Justice, Equality and Law Reform stated that all applicants who had applied since 28 April 2006 for a residence card and had been refused because they did not have prior lawful residence would have their applications reviewed. It was envisaged that this process would take three or four months to complete.²⁹

Although the Irish Government therefore sought to address the *Metock* ruling in an impressively short timeframe, it also started to campaign for an amendment to amend the Directive. It was joined in this campaign by Denmark and the issue has been debated the JHA

²⁴ European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (S.I. No. 310 of 2008).

²⁵ Those covered by Article 2(2) of the Directive.

²⁶ Regulation 3(2)(b) of the 2006 Regulations, as amended.

²⁷ Those other family members covered by Article 3(2) of the Directive.

²⁸ Regulation 3(2)(c) of the 2006 Regulations, as amended

²⁹ See the August 2008 notice 'European Court Judgment on Free Movement of Persons (the 'Metock' case) (<http://www.inis.gov.ie/en/INIS/print/PR08000027>).

Counciland is the subject of a Council Resolution. This has culminated in the recent Commission Communication:³⁰ it is too early to judge how Ireland will take matters forward, taking account of the Communication.

1.3. How the problems of abuse of rights (marriages of convenience) are tackled

Concerns about abuse of rights have been addressed by a provision in the 2006 Regulations that the term ‘spouse’ do not include a party to a marriage of convenience and, more generally, by a provision that a person found to have acquired rights or entitlements by fraudulent means – including marriages of convenience – would immediately cease to enjoy them.

It is, however, difficult to establish marriages of convenience. Indeed, the prior lawful residence test has been seen as a useful means of avoiding the issue.

A short document entitled ‘The Irish experience – statistics and issues’ was prepared for the JHA Council meeting in September 2008. Part of this paper sets out the results of a statistical analysis of the 4,600 applications for the first residence card received since the Directive came into effect. 2,000 of these did not satisfy the ‘prior legal residence’ requirements. In relation to immigration status, 15% of the 4,600 applicants had entered the State as asylum seekers (and tended to marry at ‘points of jeopardy’ in the asylum/deportation process) and 15% were students (with a ‘precarious status’), or former students who were now ‘illegal’. In relation to nationality, over 600 were Nigerians (seen as ‘statistically disproportionate’), mainly failed asylum-seekers. Nearly 600 applications were from Pakistani nationals (‘again statistically very unlikely’), who were students, or former students who were now ‘illegal’. The analysis then looked at ‘unusual marriage patterns’: of the 4,600 applicants, 10% of all the EU spouses were Latvian, 33% of the Latvians were married to Pakistanis and 50% of the Latvians were married to Pakistanis, Bangladeshis or Indians. In contrast, 39% of the Latvians married non-EU nationals who were ‘closer to home’ (comprising ‘Latvian Aliens’, Ukrainians, Belarusians and Russians). The figures had been subjected to statistical analysis – including comparison with registration figures and data on EU nationals residing in Ireland. The authors commented: ‘the high incidence of applications from certain nationalities and the marriages involving Latvians/Pakistanis etc are so statistically abnormal that they cannot have occurred by chance’. The data strongly suggested that the free movement directive had been exploited by persons who were illegally in the State or whose presence there was ‘precarious’. The pattern of applications received strongly suggested that, even before *Metock*, the Directive was seen as a route to regularisation and was being systematically abused. After *Metock*, the State’s capacity to deal effectively with such applications was limited. Ireland shared Danish concerns about the implications of *Metock* for the capacity of Member States to combat illegal immigration and its encouragement of marriages of convenience.

Turning specifically to marriages of convenience, it was stated that they were ‘part of the problem, but proving them is very resource-intensive and can be intrusive’. It was extremely difficult to prove marriages of convenience. A distinction was drawn between ‘opportunistic’ rather than ‘convenience’ marriages: ‘one party to the marriage sees a chance for regularisation while the other is duped’. There was often co-habitation and ‘perhaps even a child’.

30 COM(2009) 313 final.

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The recent Commission Communication addresses these issues, but it is too early to say how Irish practice will change as a result.

2. ACCESS TO WORK

Regulation 18(1)(b) of the European Communities (Free Movement of Workers) (No. 2) Regulations provides that 'subject to the other provisions of these Regulations, a person to whom these Regulations apply shall be entitled ... without prejudice to any restriction on that entitlement contained in the Employment Permits Acts 2003 and 2006, to seek and enter employment in the State in the like manner and to the like extent in all respects as Irish citizens'.

Regulation 18(1)(c) provides that a person to whom the Regulations apply shall, subject to the other provisions of these Regulations, be entitled 'to carry on any business, trade or profession ... in the like manner and to the like extent in all respects as Irish citizens'.

In relation to employment, non-EEA nationals are, as a rule, required to seek employment permits. The position of third-country national 'family members' within the meaning of Article 2(2) of the 2004 Directive remains rather unclear. As far as a non-EEA national married to an EU national is concerned, the Department of Enterprise, Trade and Employment has expressly stated that a work permit will not be required once he/she has received a residence card. In the intervening period, which can take several months, a work permit will be required, though the fee for such permit will be waived.

Other non-EEA national family members do not need a permit once they have received a residence card under the 2006 Regulations, though there has been no express recognition of this. In the meantime, they must apply for a dependant work permit. According to information given by officials in the Department, a dependant child will only be recognised as such if he/she enters the State before his/her 18th birthday. If entry is after that age, the child will not be regarded as 'dependant' and will thus have to apply for an independent work permit.

3. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

It has not been possible to obtain a clear indication on the question of access to work by third-country national family members of job-seekers.

4. OTHER ISSUES CONCERNING EQUAL TREATMENT (SOCIAL AND TAX ADVANTAGES).

Nothing to report.

Chapter VII

Relevance/Influence/Follow-up of recent Court of Justice Judgments

C-287/05 Hendrix

In the *Hendrix* judgment,³¹ the Court of Justice held:

1. A benefit such as that provided under the Dutch Law on provision of incapacity benefit to disabled young people had to be regarded as a special non-contributory benefit within the meaning of Article 4(2a) of Regulation 1408/71 (as amended), with the result that only the coordinating provision in Article 10a must be applied to persons in the situation of the applicant and that payment may validly be reserved to persons who reside on the territory of the Member State providing the benefit.
2. Article 39 EC and Article 7 of Regulation 1612/68 is interpreted not to preclude national legislation which applies Article 4(2a) and Article 10a of Regulation 1408/71 (as amended) and provides that a special non-contributory benefit listed in Annex IIa to Regulation 1408/71 may be granted only to persons who are resident in the national territory. Implementation of that legislation may not entail an infringement of rights which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. The national court must, so far as possible, interpret the national legislation in conformity with Community law, to take account, in particular, of the fact that the worker in question has maintained all of his economic or social links to the Member State of origin.

As stated in the 2007 Report, there is no benefit in Ireland which is analogous to the Wajong benefit in the *Hendrix* case. The situation in that case has not apparently arisen in the Irish context.

C-527/06 Renneberg

In the *Renneberg* judgment, the Court of Justice held that Article 39 EC precluded national legislation pursuant to which a Community national who was not resident in the Member State in which he received all or almost all of his taxable income could not, for the purposes of determining the basis of assessment of that income in that Member State, deduct national income relating to a house owned by him and used as a dwelling in another Member State, whereas a resident of the first Member State might deduct such negative income for the purposes of determining the basis of assessment of taxation of his income.

The specific circumstances obtaining in the *Renneberg* case do not obtain in Ireland, since taxable income does not include the advantage which the taxpayer derives from occupying his own dwelling (and as a result will not enjoy the benefit of any tax deduction in respect of a negative amount). There is currently no property tax in Ireland (although it is proposed to introduce a tax on second homes, and a future tax on principal dwellings cannot be excluded).

³¹ See also Chapter IV.

C-94/07 Raccanelli

In the *Raccanelli* judgment³² the Court held, amongst other matters, that:

1. A researcher preparing a doctoral thesis on the basis of a grant contract concluded with the Max-Planck Institute was to be regarded as a worker under Article 39 EC only if his activities were performed for a certain period of time under the direction of that Institute and if, in return, he received remuneration.
2. A private law association, such as the Max-Planck Institute must observe the principle of non-discrimination in relation to workers within the meaning of Article 39 EC. (The referring court had the responsibility of establishing whether there had in the circumstances been inequality.)

These problems have not, to my knowledge, come up in the Irish context.

³² See also under Chapter III 4.4.

Chapter VIII

Application of Transitional Measures

1. GENERAL INFORMATION

Ireland decided, prior to the accession of Bulgaria and Romania, to require Bulgarian and Romanian citizens to obtain work permits under the Employment Permits Acts 2003-2006. This requirement did not apply to workers who had already been resident in Ireland for 12 months prior to access, spouses of EU nationals who did not need an employment permit, self-employed persons resident in the State, resident students working less than 20 hours a week, or those explicitly permitted to reside and work in the State without a permit. Preference was to be given to Bulgarian and Romanian applicants over non-EEA nationals.

On 17 December 2008, the Government announced that it would, from 1 January 2009, continue to restrict access to the Irish labour market for nationals of Bulgaria and Romania. The existing exceptions to the requirement for a work permit would continue to apply and preference continues to be given to such nationals over nationals of non-EEA member States. The decision to maintain the restrictions is being kept under continuous review and is to be assessed comprehensively before the end of 2011.

In justifying the decision, the Minister for Labour Affairs stated that it had been influenced by the challenges posed by the downturn in the global economic environment and the direct impact this had had on the labour market. It seems that this position is supported by the trade unions and the employers' body, IBEC.

Some data on employment permits for Bulgarian and Romanian nationals is officially available, as follows:

Year	Nationality	New Permits	Renewals	Total issued	Refused	Withdrawn ³³
2007	Bulgaria	33	5	38	15	-
	Romania	94	25	119	57	-
2008	Bulgaria	22	0	22	23	-
	Romania	120	6	126	67	-
2009 (Jan-Feb)	Bulgaria	0	0	0	1	0
	Romania	16	1	17	4	0

There is a high rate of refusals compared to the average. In 2007, close to one-third of applications for Bulgarian and Romanian nationals were refused, compared to an average of 9%. In 2008, the average was 14%, whilst around 50% of Bulgarian and 35% of Romanian applications were refused. A similar pattern, at least for Romanians, appears to be developing for 2009.

³³ Data on withdrawals is not available for 2007 and 2008.

Chapter IX Miscellaneous

General

The Immigration, Residence and Protection Bill was introduced in January 2008 and was still in Committee Stage in July 2009. It seems unlikely that it will reach Report Stage – when a vote will be taken – until Autumn 2009 at the earliest. A ‘saver’ provision in the Bill makes it clear that the provisions of the Bill – in particular those relating to entry, residence and expulsion – will not apply to persons covered by the EU free movement rules.

Studies, seminars, reports, legal literature

Fahey, Elaine, ‘Third Country National Spouses and the Citizens Rights Directive in Irish Law’, (2008) 11(2) *Irish Journal of Family Law* 32. Addresses position of third-country national spouses under Directive 2004/38 in Irish courts *before* Metock case.

Handoll, John, ‘Metock: family reunion and Union citizenship’, *Law Society Gazette*, Jan-Feb, 2009, p. 61-64. An outline of the judgment of the European Court of Justice in the *Metock* case and some comments on the issues arising.

Murphy, Cliodna, ‘Immigration, integration and citizenship in EU law: the position of third country nationals’, (2008) 8(1) *Hibernian Law Journal* 155. Strong focus on link between integration policy and EU instruments on third country nationals.

O’Connell, Philip J. and McGinnity, Frances, *Immigrants at Work: Ethnicity and Nationality in the Irish Labour Market*, Equality Authority/ESRI, 2008.

Quinn, Emma et al., *Handbook on Immigration and Asylum in Ireland 2007*, ESRI, 2008. A reference tool for people working in the area of immigration and asylum in Ireland. Includes some references to EU free movement rules.

Quinn, Emma, *The Organisation of Asylum and Migration Policies in Ireland*, ESRI, 2009. A reference document providing a ‘map’ of immigration and asylum-related policy in Ireland, with a focus on non-EU immigration.

References to national organisation, bodies where citizens can launch complaints for violation of Community law on free movement for workers (apart from SOLVIT centres).

Apart from SOLVIT, there is no fully-fledged complaints mechanism in Ireland which enables alleged violations of Community law to be properly addressed without the need to go to court or to EU institutions. However, reference should be made to the provision of a Euro-jus consultant lawyer under the auspices of the European Commission Representation in Ireland and to the work done by the Immigrant Council of Ireland,³⁴ which provides guidance and advice on free movement issues.

34 www.immigrantcouncil.ie.

Annex on Frontier Workers

There are no specific administrative or legal schemes for frontier workers. The position of frontier workers is regulated by EU rules as applied by national authorities.

I have not been able to identify any official guidelines specifically directed at frontier workers, though guidelines issued by the Department of Social and Family Affairs to make reference to the position of frontier workers under EU law.

There is a certain amount of transnational cooperation under the auspices of the North South Ministerial Council. It launched a Cross-Border Mobility Website in October 2007 (www.borderpeople.ie), which contains some material of relevance to frontier workers. Frontier workers are treated as a specific category in information terms.³⁵

Two working groups have been established: one on the transfer of pension rights on a cross-border basis and the other to examine cross-border banking issues. This work, which is seen as of direct relevance to greater cross-border mobility, is ongoing.

A 2002 Report by PWC and Indecon commissioned by the North South Ministerial Council studied the obstacles to mobility of persons between the two parts of the island of Ireland. This resulted in greater efforts being made to disseminate more public sector information on cross-border mobility.

There is doubtless a continuing debate in relation to mobility. The Centre for Cross Border Studies, in particular, is engaged in a variety of cross-border projects, including those related to mobility.³⁶ I have not been able to identify any particular work in relation to frontier workers or any publicised debate. However, the time is clearly ripe for a review of the position of frontier workers in Ireland.

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<http://www.borderpeople.info/index/commute/browse.htm?by=targetgroup&theme=theme01&targetgroup=targetGroup02>

36 www.crossborder.ie.

National and EU Reports.

Comments by Ireland

Ireland has no objection to the publication of both Reports. The following observations are offered in response to the Commission's invitation to provide comments.

In the **Introduction Section** of the National Report, there is a reference to a much higher than average rate of refusal for employment permit applications by nationals from Bulgaria and Romanian. In general, the refusals from 2007 and 2008 were as a result of applications not fitting the relevant Employment Permit criteria, i.e. ineligible job categories, low wages, no Labour Market Needs Test.

Refusal rates for 2009 are significantly lower. There is a compliance campaign in train in relation to Bulgarian and Romanian nationals currently in employment in the State aimed at regularising the status in Ireland. This campaign has resulted in an increase in applications for employment permits. The campaign in tandem with less onerous processing criteria applicable to Bulgaria and Romania has resulted in a significant reduction in the refusal rate during 2009 for nationals of those States. The refusal rate for Bulgarian nationals to date in 2009 is 12.50% and for Romania nationals 8.33%. The average refusal rate for all employment permit applications in 2009 is 18.61%. Accordingly the refusal rate for nationals from Bulgaria and Romania is now significantly lower than the average for all other nationalities.

Chapter V: Employment in the public sector

Paragraph 1.1 of the Report states

However, some posts are reserved to Irish nationals on national interest grounds: these include all posts in the Irish Diplomatic Service requiring the holding of a diplomatic passport and posts in the Department of An Taoiseach (Prime Minister), the Office of the Revenue Commissioners, the Department of Defence, the Department of Justice, Equality and Law Reform and the Department of Foreign Affairs. There is no available list of such posts – the nationality condition is set for individual competitions.

There are no nationality requirements for employment in the health, education and marine sectors.

It is considered that the following paragraph reflects a clearer reflection of the Irish position: -

Other reserved posts have included posts in the Department of An Taoiseach (Prime Minister), the office of the Revenue Commissioners, the Department of Defence and the Department of Justice, Equality and Law Reform and the Department of Foreign Affairs.

There are no nationality requirements for employment in the health, education and marine sectors.

Some other comments under this chapter are: -

Irish Civil Service

In general, all posts in the Irish Civil Service are open to suitably qualified applicants who are citizens of the EU and the wider European Economic Area (EEA).

Department of Foreign Affairs

On the specific question of diplomatic posts, the Department of Foreign Affairs requires that candidates must be able to claim Irish nationality to be eligible to apply for posts in the diplomatic service.

This is based on the provisions of Article 8 of the Vienna Convention on diplomatic relations, which states "Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State."

Department of Defence - Permanent Defence Forces

Defence Force Regulations have always allowed for the recruitment of foreign-nationals to the Defence Forces. All applicants are required to meet qualifying criteria.

Officers

The special approval of the Minister for Defence must be sought, for a person other than an Irish Citizen, to be appointed as an officer of the Defence Forces. In addition, for applicants from outside of the EEA other conditions such as such residency and work permit conditions must be met. Where all such conditions are met the Minister would normally approve that such a person be appointed.

Other Ranks

For Other Ranks applications from citizens of states other than European Union member states must have a minimum of three years unbroken residency in the State and must meet residency and work permit conditions as laid down by the Department of Justice, Equality and Law Reform and the Department of Enterprise, Trade and Employment.

Incremental credit

The question of incremental credit for previous public sector service for persons being appointed to the Civil Service has been addressed in agreements between the Minister for Finance and the trade unions. There are four Circulars issued by the department of Finance over the last number of years which cover these agreements - copies of the Circulars are attached. Examples of such agreements include an April 2006 agreement providing for incremental credit for previous service for entry levels at Tax Officer and Higher Tax Officer grades and a December 2007 agreement covering entry levels at Clerical Officer and Executive Officer grades.

These agreements apply only to adjust pay and do not affect seniority. They apply to persons who have been previously employed within the public service in Ireland or equivalent bodies in the EU Member States. Employment in the public service in EEA/EFTA countries and the European Commission will be considered relevant.

Chapter V1 of National Report

There is one paragraph at Chapter V1 relating to Ireland's response to the Metock judgement in the National Report that is slightly wrong both in tone and in fact. This is 1.2 in the Ireland Report. The third paragraph reads as follows: -

Although the Irish Government therefore sought to address the Metock ruling in an impressively short timeframe, it also started to campaign for an amendment to amend the Directive. It was joined in this campaign by Denmark and the issue was debated in JHA Council meeting on 25 September 2008.

We believe that a more appropriate phrasing would be:

"The Irish Government therefore sought to address the Metock ruling in an impressively short timeframe. At the same time, it expressed major concerns at the implications of the ruling and was one of 5 Member States to call explicitly for

amendment of the Directive when the issue was debated in JHA Council Meeting on 25 September 2008".