

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

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Introduction

In 2008, the three major developments relate to the implementation of the *Free Movement of European Union Nationals and their Family Members Order*, Malta's joining of the Schengen area and the entry into force of the *Recognition of Professional Qualifications Regulations* which implement the provisions of Commission Directive 2005/36 EC as amended by Commission Directive 2006/100 EC.

The *Free Movement of European Union Nationals and their Family Members Order 2007* (Legal Notice 191/2007), published on 20 July 2007, transposes the content of the provisions of the Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which amends Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (2004/38/EC).

It revokes and replaces Part II of the Immigration Regulations with respect to nationals of the EU only, with effect from the day it is published. The Immigration Regulations shall continue to apply to those countries whose nationals have freedom of movement in the European Union, but in respect of whom the provisions of Directive 2004/38/EC are not yet in force.

The *Recognition of Professional Qualifications Regulations* (LN 422/2007) were published under the Mutual Recognition of Qualifications Act (Cap.451). These Regulations came into force on 1st January 2008. These Regulations implement the provisions of Commission Directive 2005/36 EC as amended by Commission Directive 2006/100 EC. These Regulations apply to all nationals of a Member State and citizens otherwise legally entitled and authorised, wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualification, on either self employed or employed basis.

The recognition of professional qualifications allows the migrant to gain access to, and pursue in Malta the same profession as that for which he is qualified in the home Member State under the same conditions as nationals. These Regulations shall also apply to a third country citizen in possession of the status of long term resident within a Member State or on being a family member of a citizen of a Member State exercising the right to free movement within Member States. Any person benefiting from the recognition of professional qualifications shall have the knowledge of languages necessary for practising the profession in Malta.

Following the lifting by Malta of its land and sea borders on 21st of December 2007, the benefits of Schengen membership became even more evident when the air borders were lifted in March 2008, thereby facilitating travel to up to 23 destinations. Malta's geographical position as an island state on the periphery of the EU mandated more stringent preparations as Malta's borders would have eventually become part of the EU's external borders.

Chapter I

Entry, Residence, Departure

Texts in force

20 July 2007 saw the publication of the *Free Movement of European Union Nationals and their Family Members Order 2007* (Legal Notice 191/2007). This Legal Notice transposes the content of the provisions of the Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which amends Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (2004/38/EC).

LN 191/2007, issued by virtue of the powers conferred by article 4(2) of the European Union Act, revokes and replaces Part II of the Immigration Regulations with respect to nationals of the EU only, with effect from the day it is published. The Immigration Regulations shall continue to apply to those countries whose nationals have freedom of movement in the European Union, but in respect of whom the provisions of Directive 2004/38/EC are not yet in force.

1. TRANSPOSITION OF PROVISIONS RELATING TO WORKERS

By virtue of section 3(1) of LN 191/2007, a Union citizen may enter, remain and reside in Malta, seek and take up employment or self-employment therein, and shall enjoy equal treatment as Maltese nationals within the scope of the Treaty. Such right is also applicable to family members accompanying or joining the Union citizen, including those who are not nationals of a Member State. The Director for Citizenship and Expatriate Affairs may refuse, terminate or withdraw any such right in the case of abuse of rights or fraud.

A Union citizen and his family members accompanying or joining him may reside and move freely within Malta on the same conditions as Maltese nationals for a period of three months without any conditions or any formalities, commencing on the date of entry. This three-month period is extendable to a six-month period, in the case of a person who provides evidence that he is genuinely seeking employment and has a genuine prospect of securing employment by the end of the said period of six months. Provided that a Union citizen and his family members shall so reside as long as they do not become an unreasonable burden on the Maltese social assistance system.

An EU citizen shall not be entitled to social assistance during the first three months of residence; where a person provides evidence that he is genuinely seeking employment and has a genuine prospect of securing employment within six months, the said period is extended to six months. This shall not apply in the case of workers, self-employed persons, persons who retain such status and members of their families. Neither shall an EU citizen be entitled, prior to the acquisition of the right of permanent residence, to maintenance aid for studies, including vocational training, consisting in student grants or student loans.

Section 6(5) of LN 191/2007 then provides a list of persons who shall enjoy permanent residence in Malta prior to the completion of the continuous period of five years of residence. These are:

- a) a worker or self-employed person who, at the time of his termination of employment, has reached retirement age, provided that such person has been working in Malta for at least

- twelve months prior to the termination of his employment and has resided in Malta continuously for more than three years;
- b) a worker who has ceased paid employment to take early retirement, provided that such worker has been working in Malta for at least twelve months prior to the termination of his employment and has resided in Malta continuously for more than three years;
 - c) a worker or self-employed person who has resided continuously in Malta for more than two years and has stopped working as a result of permanent incapacity to work, provided that the required minimum residence period shall not apply if such incapacity is the result of an accident at work or an occupational disease entitling him to a pension for which an institution or body in Malta is wholly or partially responsible;
 - d) a worker or self-employed person who, after three years of continuous employment and residence in Malta, works in an employed or self-employed capacity in another Member State, while retaining his place of residence in Malta to which he returns, as a rule, at least once a week.

Periods of employment spent in another Member State in which such person concerned has worked or is working, shall be regarded as having been spent in Malta. Furthermore, periods of inactivity for reasons beyond one's control, periods of inactivity due to illness or accident, and periods of involuntary unemployment duly recorded by the employment agency, shall be treated as periods of activity as a worker or self-employed person.

The right of residence of Union citizens who are workers or self-employed in Malta, as the host Member State, is tackled by section 8 of LN 191/2007. Section 8(1) however provides that no such employment can be undertaken unless a licence has been issued, adding that '*...such licence shall not, subject to what is stated herein, be withheld*'.

Article 7(3) of Directive 2004/38, which provides for the retention of the status of worker, is transposed by the provisions of section 8(8) of LN 191/2007. The provisions of article 8(8) shall apply mutatis mutandis to self-employed persons who shall, in such case, retain the status of self-employed persons.

By virtue of section 13 of LN 191/2007, a person who ceases to have the right to reside or who becomes an unreasonable burden on the social assistance system, may be removed from Malta, provided that a removal order shall not be the automatic consequence of the person's recourse to the social assistance system of Malta. A removal order shall not be issued in the case of a worker, or self-employed person, or job-seeker who can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged. Where a decision for removal on grounds of public policy or public security is being taken, the Principal Immigration Officer shall take into account a number of considerations which may include the period of residence in Malta of the person to be removed; the age of such person; the person's state of health; his family and economic situation; his social and cultural integration in Malta; the extent of his links with his country of origin.

2. SITUATION OF JOB-SEEKERS

Malta provides for a favourable treatment of jobseekers without formalities in relation to the right of residence under Article 6 in the light of Recital 9. Any Union citizen, including a job-seeker, may reside and move freely within Malta on the same conditions as Maltese nationals for a period of three months without any conditions or any formalities, commencing on the date of entry. No registration is required and this aforementioned period is extendable to a six-month period, in the case of a person who provides evidence that he is genuinely seeking

employment and has a genuine prospect of securing employment by the end of the said period of six months. It is also important for the jobseeker to have registered as such with the Employment and Training Corporation (ETC).

Section 13(1) of LN 191/2007 further provides that without prejudice to the provisions of the Legal Notice, a removal order shall not be issued in the case of a worker, or self-employed person, or job-seeker who can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged.

Chapter II Access to Employment

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

Under the Employment and Industrial Relations Act (2002) (hereinafter 'EIRA'), Chapter 452 of the Laws of Malta, protection from discrimination is granted to an employee or prospective employee against his employer or prospective employer by virtue of the ordinary law of the land.

Part IV of the EIRA, 2002 is entitled 'Protection Against Discrimination Related to Employment'. Section 2 of the EIRA defines discriminatory treatment as

'any distinction, exclusion, or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association.'

It is immediately evident that the definition of discriminatory treatment for the purposes of this Act does not include any reference to nationality. However, the definition provided is not exhaustive.

The Employment and Training Services Act (Chapter 343 of the Laws of Malta) has always been in line with EU Regulation 1612/68 as it does not specifically limit the number of foreigners that employers can hire and it does not discriminate against expatriates. The Act, particularly Sections 13 and 15 thereof, obliges the Employment and Training Corporation (ETC) to refer, amongst other things, persons for employment according to their registration priority. The Act requires companies to refer their vacancies to the ETC or through a public examination duly advertised in the Government Gazette.

2. LANGUAGE REQUIREMENTS & THE PRIVATE SECTOR

There are no particular language requirements with regard to employment in the private sector. Although Maltese legislation does not stipulate that employees must have a good command of the Maltese and English languages, in practice, for certain jobs, it is necessary to have a good command of both languages, while for most jobs, having a good command of either language would be sufficient.

Chapter III

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS

Freedom of movement entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work. Migrant workers from Member States are to be treated on an equal footing with Maltese employees, especially with regards to working conditions and social security.

2. SOCIAL AND TAX ADVANTAGES

Income Tax Considerations

An individual holding a residence permit (EU/EEA nationals) and qualifying as resident in Malta for Maltese income tax purposes, is subject to the normal income tax rules and rates applicable for every Maltese resident person. The current marginal tax rate is 35% and the tax is calculated on chargeable income and capital gains arising in Malta and on foreign income (excluding capital gains) remitted to Malta, for as long as the individual is deemed not to be domiciled in Malta for Maltese income tax purposes.

Social Security

Social Security in Malta is regulated by the Social Security Act 1987 (Chapter 318 of the Laws of Malta). The Social Security Act is undoubtedly one of the most complicated statutes in Maltese legislation. It lists the benefits that persons who satisfy the conditions stipulated thereunder would become eligible to and could therefore claim. The Act does not discriminate on the basis of nationality. Eligibility for benefits normally depends on the contributions made by a person to the social security system in Malta. Non-contributory benefits are conditional on other factors depending on the benefit being sought, but no nationality requirement is included.

In the light of the above coupled with the fact that the provisions of Regulations 1408/71 and 574/72 became directly applicable in Malta by virtue of the Malta-EU Accession Treaty (signed in Athens on 16th April 2003), no amendments to the Act were effected post-accession. In other words, in the event that a Union citizen claims a conflict between the Social Security Act and Regulation 1408/71 (with respect to the issue of the co-ordination of social security systems) (s)he would have to rely on the direct applicability of the Regulation/s in question.

The Equal Treatment in Occupational Social Security Schemes Regulations¹ were published on 13 September 2005 and have been in force since that date. These Regulations give effect to the relevant provisions of Directive 86/378 EEC as amended by Directive 96/97 EC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

1 Legal Notice 317/2005.

Equality of treatment in the case of social security is provided for by virtue of the European Social Charter Order (Legal Notice 204/1999). Section 2 of this Legal Notice extended the application of the provisions of the Social Security Act to nationals of countries which are party to the European Social Charter and who have their ordinary residence in Malta.

Education of Children of Migrant Workers

Access to education for non-Maltese EU nationals is subject to the same conditions as those for nationals. Legal Notice 220/2003 regulates the education of children of migrant workers. For the purposes of these Regulations, a migrant worker means any person who carries out or has carried out an activity in Malta, in an employed or self-employed capacity, and who is a citizen of an Agreement State.² The Migrant Workers (Child Education) Regulations, through section 3(1) ensure equal access to free tuition³ in State schools as well as the teaching, as adapted to the specific needs of such children, of any of the official languages Malta. By virtue of these Regulations, children of migrant workers must be residing in Malta, and they must be of compulsory school age as well as dependents of a migrant worker.

With regard to training, the Employment and Training Services Act does not preclude children of non-Maltese EU nationals from being admitted to apprenticeship and vocational training courses.

3. OTHER OBSTACLES TO FREE MOVEMENT

In this section, specific reference will be made to the purchase of immovable property

With regard to the acquisition of immovable property by non-Maltese EU citizens, Malta was the only country in the 2004 enlargement to negotiate and obtain a permanent arrangement retaining restrictions on the acquisition of property in Malta by non-Maltese residents. This is reflected in a Protocol annexed to Malta's EU Accession Treaty. By virtue of this arrangement, Maltese and other EU citizens, on a non-discriminatory basis, will not be granted authorization to purchase a second property in Malta, unless they have resided in Malta for at least five years prior to acquisition and obtained the necessary permit. In accordance with section 6(1) of the Immovable Property (Acquisition by Non-Residents) Act (Chapter 246 of the Laws of Malta), this permit may be granted by the Minister if in the opinion of the Minister, it is in the public interest or is otherwise appropriate to grant such permit. With regard to the acquisition of the first property, both Maltese and non-Maltese EU citizens who have resided in Malta for a continuous period of five years do not require any permit.

This permanent derogation has been reflected in amendments introduced to the Immovable Property (Acquisition by Non-Residents) Act, by virtue of the Various Laws (Amendment) Act (Act 9 of 2003). Section 2 of the Immovable Property (Acquisition by Non-Residents) Act defines a resident of Malta as an individual who is a citizen of Malta or another Member State who has been resident in Malta for a minimum continuous period of five years at any time preceding the date of acquisition; or the spouse, of whatever nationality and wherever resident, of a citizen of Malta or another Member State where such spouses are acquiring together on the same deed.

2 By virtue of the definition in section 2 of these Regulations, an Agreement would include the Malta-EU Accession Treaty, insofar as the latter grants reciprocal rights of entry, residence and general rights of free movement to the respective citizens of the participating countries.

3 In Malta, the education of Maltese citizens who are of compulsory school age is free in the case of State schools.

The law also makes clear⁴ that any person (whether Maltese or any other EU citizen) not fulfilling the five-year continuous residence requirement is to be considered as a non-resident for the purpose of the acquisition of immovable property in Malta by such person. The fact that such Maltese or other EU citizen are in possession of a valid residence permit is irrelevant.

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

4.1. Frontier workers

With regard to frontier workers, the author has nothing to report, since the issue of frontier workers does not apply to Malta.

4.2 Sportsmen/Sportswomen

With regard to *football*, the provisions of article 9 of the Competition Rules of the Malta Football Association (MFA) were for a while, the subject of controversy due to claims that these rules contravene the principles of free movement of persons enshrined in the EU Treaties. This rule has been interpreted to the effect that while non-Maltese football players, including those from EU Member States, can register with local football clubs without any limit, this is subject to a requirement that at least eight home-grown players must be playing on the field at any point in time during a football match in local competitions. Assuming that home-grown players are likely to be Maltese nationals, this means that, in practice, under current Malta Football Association rules, no more than three ‘foreign’ players can play at any point in time during a football match.

This rule substantially reflects the UEFA’s rule on home-grown players which, according to the European Commission, following the publication of an independent study in 2008, seems to comply with the principle of free movement of workers while promoting the training of young European players. This rule requires clubs participating in the Champions League and the UEFA Cup to have a minimum number of home-grown players in their squads.

With regard to *waterpolo*, in 2008, the European Commission stated that Malta sports transfer rules abide by EU laws. The European Commission did not find anything wrong with rules governing the transfer of waterpolo players and the same applies to other sports as long as the transfers are between one Maltese club and another. Commissioner Vladimir Spidla made the declaration in reply to a question by Eluned Morgan MEP, on the rules of the Malta Aquatic Sports Association (MASA). and their compatibility with EU legislation, particularly that related to the free movement of workers. MASA rules stipulate that a Maltese team wanting to acquire the services of a player whose contract with another Maltese team has expired must pay a transfer fee to the latter, allegedly high by Maltese standards according to the MEP.

4 In section 2 of the said Act, a ‘non-resident person’ is defined as including:
 (a) any individual who is not a citizen of Malta or of another Member State; or
 (b) a citizen of Malta or of another Member State, even in either case, if in possession of a valid residence-permit, who has not been resident in Malta for a minimum continuous period of five years at any time preceding the date of acquisition...’

Mr Spidla said that although EU legislation on free movement regulates the transfer of players, this is only applicable to transfers between clubs in different Member States. Responding directly on the Maltese situation, Mr Spidla said the case raised by the British MEP involves a purely internal situation where a Maltese player in a club in Malta wishes to move to another club in Malta.

With regard to *basketball*, in the case of both the first and second divisions of the Men and Women championships, only one male or female (as the case may be) non-Maltese player is allowed.

As for *volleyball*, for both the first and second divisions of the Men and Women championships, only up to two male or female (as the case may be) non-Maltese EU national players are allowed.

In the case of *handball*, for both the first and second divisions of the Men and Women championships, up to three 'foreign' players can play at any point in time during a game.

With regard to the rules for the *rugby* national league, there are no limits in the first and second divisions of both Men and Women championships. In the case of a player for the national team, s/he has to have parents or grandparents who are Maltese national or must have resided in Malta for the previous thirty-six months.

4.3. The maritime sector

The next point concerns the *nationality condition for captains of ships*. It is the Merchant Shipping Act (Chapter 234 of the Laws of Malta) which regulates access to the posts of Master and Seaman of sea vessels flying the Maltese flag. A 'Master' is defined as including every person (except a pilot) having command or charge of a ship; a 'Seaman' is defined as including every person (except masters, pilots and apprentices) employed or engaged in any capacity on board a ship.

As an open register, Malta does not impose any nationality restrictions on crews of ships registered under its flag. This is reflected in the provisions of the Act which do not restrict access to these posts to Maltese nationals. It therefore appears that Maltese legislation in this field conforms to the pronouncements of the European Court of Justice in Case C-405/01 (*Colegio de Oficiales de la Marina Mercante Española v. Administración del Estado*) and Case C-47/02 (*Albert Anker, Klaas Raas, Albertus Snoek v. Bundesrepublik Deutschland*).

4.4. Researchers/artists

With regard to EU *researchers*, the same rights as those applicable to other EU nationals are applied. With regard to the admittance of third country nationals for scientific research purposes, the Third Country Nationals for Scientific Research Purposes (Specific Admittance Procedure) Regulations, published in 2008 determine the conditions for the admission of third country researchers to Malta for a period of more than three months for the purposes of carrying out a research project under a hosting agreement with a research organization. These regulations transpose the provisions of Council Directive 2005/71/EC on a Specific procedure for admitting third-country nationals for the purposes of scientific research.

In the case of *entertainers and other performers*, applications for a work permit must be received at least ten days before the performer/s is/are due to start working in Malta, and application for extension must be submitted one month before it is due to expire.

4.5. Access to study grants

Training grants granted under the Business Promotion Act (Chapter 325 of the Laws of Malta) do not discriminate against foreign nationals. Similarly, the Employment and Training Services Act does not discriminate against foreign nationals in the provision of vocational training services. With regard to access to vocational training, it was formerly the practice not to allow foreign nationals to participate in courses and apprenticeships run by the ETC. However post-accession, EU nationals can participate in the training schemes organised by the ETC and may notify their intention to work in Malta through the ETC.

Chapter IV

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

Texts in force

Social Security in Malta is regulated by the Social Security Act 1987 (Chapter 318 of the Laws of Malta). The Social Security Act is undoubtedly one of the most complicated statutes in Maltese legislation. It lists the benefits that persons who satisfy the conditions stipulated thereunder would become eligible to and could therefore claim. The Act does not discriminate on the basis of nationality. Eligibility for benefits normally depends on the contributions made by a person to the social security system in Malta. Non-contributory benefits are conditional on other factors depending on the benefit being sought, but no nationality requirement is included.

In the light of the above coupled with the fact that the provisions of Regulations 1408/71 and 574/72 became directly applicable in Malta by virtue of the Malta-EU Accession Treaty (signed in Athens on 16th April 2003), no amendments to the Act were effected post-accession. In other words, in the event that a Union citizen claims a conflict between the Social Security Act and Regulation 1408/71 (with respect to the issue of the co-ordination of social security systems) (s)he would have to rely on the direct applicability of the Regulation/s in question.

The Equal Treatment in Occupational Social Security Schemes Regulations⁵ have been in force since 13 September 2005. These Regulations give effect to the relevant provisions of Directive 86/378 EEC as amended by Directive 96/97 EC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

The Benefits

The benefits that may be claimed, by virtue of the EU's social security regulations, from Malta's Department of Social Security are sickness and maternity benefits, invalidity benefits, old age and survivors' pensions, benefits and pensions relating to accidents at work and occupational diseases, death grants, unemployment benefits, family benefits and family allowances for employed and unemployed persons, and benefits for dependent children of pensioners and for orphans.

These aforementioned social security benefits paid by the Department of Social Security in cash. However, sickness and maternity benefits also include benefits in kind. These refer to medical assistance: persons covered by L.N. 201/04 are entitled to free treatment under the Maltese National Health Scheme. Given that in 1979 there was a statement of policy in Parliament that declared that payment of the Maltese social security contribution gives right to the services provided under our health scheme, such services fall under the provisions of EU Regulation 1408/71. All others need to pay for their healthcare

This also means that the provisions of Maltese legislation create obligations on the Department of Health and the Department of Social Security to provide for health care or benefits to persons insured under the Maltese scheme, whether they are working in Malta or in another EU country. Moreover, it is to be noted that by virtue of EU Regulation 859/03, with

5 Legal Notice 317/2005.

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effect from the 1st June 2003, third country nationals who were legally residing in an EU Member State are now also covered by the provisions of Regulation 1408/71. The implementation of Regulation 1408/71 has so far proceeded quite smoothly in Malta.

A particular case which continues to arise is that of companies which establish themselves in Malta and try to recruit workers from one Member State and post them to a third Member State. In such circumstances, where there is the least doubt that such company is attempting to bypass the system, a thorough investigation is carried out by the Maltese authorities. It has often been found that, at that point in time, such companies do not 'habitually carry out significant activities in Malta' and the employment is therefore considered not to be a posting falling within the scope of art. 14(1) of Regulation 1408/71.

Chapter V

Employment in the Public Sector

1. ACCESS TO THE PUBLIC SECTOR

There have been no changes in the rules applicable during 2008.

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

All recruitment is open to Maltese and EU nationals, subject to the exceptions stipulated under article 39(4) EC, in accordance with the criteria set out by the jurisprudence of the European Court of Justice, namely:

- posts which involve the exercise of powers conferred by public law; and
- posts which involve responsibility for the safeguarding of the general interest of the State.

A list of posts which meet these criteria has been drawn up centrally and determines when a Maltese-only nationality requirement is inserted in a call for applications. So far, the posts which, on this basis, have been restricted to Maltese nationals include the Armed Forces; the Police Force; the Judiciary; Tax Authorities; the Diplomatic Corps; Staff at sensitive offices such as the Cabinet Office, the Office of the Principal Permanent Secretary, the Management and Personnel Office, offices of Permanent Secretaries and Ministerial Secretariats.

Generally speaking, in addition to citizenship requirements as outlined above, public calls for the filling of posts in the Public Service request that applicants must also:

- be able to communicate in the Maltese and English languages;
- be in possession of a warrant, qualifications, practice or experience, or a combination of more than one, as the case may be;
- be of good moral character. (For this purpose, applicants from within the Public Service, must produce a Service and Leave Record Form; those applying from outside the Public Service must produce a recent Certificate of Conduct, issued by the Police or other competent authority not earlier than six months from the closing date of the applications, and state whether they have ever been in Government Service, giving details.)

Public sector entities outside the Public Service normally function autonomously within the parameters of the law and Government policy where recruitment procedures are concerned.

1.2. Language proficiency requirements

When recruiting, public sector employers in Malta should bear in mind two main issues. Firstly that, although administrative business is largely handled in English, Maltese is the national language and the language of first preference for most citizens. It is a matter of long-standing Government policy that members of the public are entitled to communicate with public officials in Maltese.⁶ Moreover, article 3 of the National Language Act 2004⁷ obliges the State to promote the use of the Maltese language.

⁶ OPM circulars no 52/87 dated 4 June 1987 and 32/96 dated 17 December 1996.

⁷ Chapter 470 of the Laws of Malta.

Secondly, officials whose duties do not involve serving the public on a daily basis may still need to reply to correspondence, deal with requests received through the Government websites, or see to members of the public who are referred with detailed queries on their areas of competence. It is hardly ever possible to restrict all contact with the public to a single office or unit.

It should be noted that where a formal qualification obtainable only locally is required as evidence of linguistic ability, appropriate comparable qualifications obtainable from abroad are also accepted.

1.3. Recognition of Professional Experience for Access to the Public Sector

In its Communication ‘Free Movement of Workers – Achieving the Full Benefits and Potential’ of December 2002, the EU Commission recommends that eligibility for public sector posts should be assessed not on the basis of whether applicants have qualifications equivalent to those required, but whether they are eligible for comparable posts in their own country. When asked how the Maltese Government is proposing to implement this EU Commission recommendation, the reply received was to the effect that, given that this Commission document is not legally binding on Member States, the Maltese Government prefers to continue basing itself directly on the European Community’s relevant *acquis* and jurisprudence of the European Court of Justice.

In cases where the Public Service post concerned requires candidates to possess specific qualifications or to have carried out specific training programmes, recruitment to virtually all posts allows for the recognition of comparable qualifications. Exceptions are limited to instances where the *Burbaud* case does not apply. For instance, the grade of Houseman is normally filled directly by those who obtain the degree of Doctor of Medicine of the University of Malta. The *Burbaud* situation does not arise for the following reasons:

- appointments in this grade are for a fixed term of two years only, at the end of which incumbents have to apply for selection to the grade of Medical Officer/Senior House Officer for employment in the Public Service;
- although the housemanship is considered at law to be an integral part of the requirements for the warrant to practice as a medical doctor in Malta, doctors who qualify elsewhere in the EU can obtain a warrant without going through a local housemanship;
- once the EU-originating applicants hold a local warrant, they can compete on equal grounds for selection to Medical Posts, provided that they meet the necessary requirements.

2. WORKING CONDITIONS

Insofar as the recognition of professional experience and seniority is concerned, the information provided by top officials in the Public Service is to the effect that current practices appear to be in line with requirements of the *Burbaud* judgment.

Over the years, the ECJ, in its jurisprudence, has also considered the recognition of experience for the purpose of salary determination and career progression, again in respect of posts which are *not* covered by article 39(4) ec. The general principle set out by the ECJ is that where an individual’s position in a salary scale, or his/her advancement to a higher level, depends on length of service, comparable employment in another member state should be taken into account for the purpose of determining length of service.

The cases *Commission of the European Communities v. Hellenic Republic*⁸ and *Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v. Republik Österreich*⁹ involved jurisdictions where it is normal practice to recognise service with other employers for the purpose of placement in a grade or salary scale (for instance, a teacher who moves from one regional authority to another in the same country). In such a case it is logical to recognise equivalent service in another member state. These cases do not therefore call into question the practice, common in the Maltese Public Service, as well as in some other government entities, of making progression to a higher salary scale or grade conditional on the attainment of a certain length of service in a particular grade. The other hand, the *Schoning-Kougebetopoulou* case¹⁰ and *Kobler*¹¹ are less clear-cut and therefore require more detailed consideration, although a careful reading of the court's judgments here also appears to support current practice in the Maltese Public Service.

8 Case C-187/96.

9 Case C-195/98.

10 Case C-15/96.

11 Case C-224/01.

Chapter VI

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

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

Texts in force

According to section 3(2) of LN 191/2007, subject to limitations justified on grounds of public policy, public security or public health, family members of a Union citizen accompanying or joining him, may enter and leave Malta simply with a valid identification document if they are Union citizens and a valid passport in the case of third country family members.

Where appropriate, family members who are not nationals of a Member State shall be required to have an entry visa, which shall be issued free of charge as soon as possible and on the basis of an accelerated procedure, unless they are already in possession of a valid residence card, and no entry or exit stamp shall be placed in the passport of such family members in possession of a valid residence card. The Principal Immigration Officer shall give every reasonable opportunity to a Union citizen or a family member who is not a national of a Member State and who does not have the necessary travel documents available, to obtain the necessary documents or have them brought to him or to corroborate or prove by other means that he is covered by the provisions of Part II of LN 191/2007, entitled 'Entry and residence of citizens of the Union, family members and other family members'.

With regard to other family members, section 3 (5) provides that the Director for Citizenship and Expatriate Affairs shall give due and proper consideration in relation to the admission and residence of another family member, by undertaking an extensive examination of the personal circumstances. Any denial of entry or residence to such other family member shall subsequently be justified to the said family member

Upon the expiry of three months from the date of arrival in Malta, family members who are not citizens of the Union shall apply for a residence card to the Director, who may issue a registration certificate or a residence card to an other family member as applicable. The Director shall issue a residence card to be known as 'Residence card of a family member of a Union citizen' or as applicable, no later than six months from the date of application, provided that a certificate of application for a residence card shall be issued immediately. The validity of such residence card shall be of five years from the date of issue or for the envisaged period of residence of the Union citizen, if such period is less than five years, provided that the validity of the residence card shall not be affected by the absences referred to in article 6(3).

The Director shall issue a family member, who is a third country national, and who is entitled to reside in Malta permanently, with a permanent residence card no later than six months after the date on which an application for such a card and proof that the family member is so entitled has been submitted to the Director. A permanent residence card shall be valid for ten years from the date of issue and shall be renewed automatically by the Director upon application made before the expiry of the said residence card, provided that the validity of the said residence card shall cease upon interruption of residence in Malta for a period exceeding two years. Registration certificates, residence cards, permanent registration certificates and permanent residence cards shall be issued free of charge.

Family members of the EU worker or self-employed person and who are residing with him in Malta, shall have the right of permanent residence if such person has acquired such

right. Provided that, if such worker or self-employed person dies while still working before having acquired the right to remain permanently in Malta, family members shall be entitled to the right of permanent residence in Malta if such person had, on the date of his death, resided continuously in Malta for two years; or if his death resulted from an accident at work or an occupational disease; or if the surviving spouse is a former citizen of Malta and has lost Maltese citizenship by reason of marriage to such person.

The death of the Union citizen, his departure from Malta, his divorce recognised under the Marriage Act, or annulment of his marriage shall not affect the rights of residence of his family members who are nationals of a Member State. The death of the citizen of the Union shall not affect the right of residence of his family members who are third country nationals and who have been residing in Malta as family members for at least one year before the Union citizen's death. The divorce or the annulment of the marriage of the Union citizen shall not affect the rights of residence of his family members who are third country nationals where:

- a) the marriage had lasted for at least three years immediately before the initiation of proceedings for its termination and the parties to the marriage had resided in Malta for at least one year during the duration of the marriage; or
- b) by agreement between the spouses or following a court order, the former spouse has custody of the Union citizen's children; or
- c) the continued right of residence in Malta is warranted by particularly difficult circumstances, including having been victims of domestic violence while the marriage was subsisting; or
- d) by agreement between the spouses or following a court order, the former spouse who is not a national of a Member State has the right of access to a minor child provided that the court has ruled that such access must be in Malta, for as long as is required.

The death of the Union citizen or his departure from Malta, shall not affect the right of residence of his children or of the parent who has actual custody of the children irrespective of nationality, if the children reside in Malta and are enrolled at an educational establishment for the purposes of studying, until the completion of their studies.

Family members who are not nationals of a Member State, and who have legally resided with the Union citizen in Malta for a continuous period of five years, may reside permanently in Malta.

1.1. Situation of family members of job-seekers

Malta provides for a favourable treatment of family members of job-seekers without formalities in relation to the right of residence under Article 6 in the light of Recital 9. Any family members accompanying or joining a Union citizen who is a jobseeker, may reside and move freely within Malta on the same conditions as Maltese nationals for a period of three months without any conditions or any formalities, commencing on the date of entry. No registration is required and this aforementioned period is extendable to a six-month period, in the case of a person who provides evidence that he is genuinely seeking employment and has a genuine prospect of securing employment by the end of the said period of six months. It is also important for the jobseeker to have registered as such with the Employment and Training Corporation (ETC).

1.2. Application of Metock judgment

The Metock judgment, which clarifies the rights of free movement of European Union citizens and their family members throughout the EU, appears to be applied by the Maltese authorities. In the case of a married couple, irrespective of when and where the marriage took place, a non-European Union spouse of a citizen of the European Union can reside with that citizen in Malta without having previously been resident in another Member State.

1.3. How the Problems of Abuse of Rights (Marriages of Convenience) Tackled

The contents of art. 35 of Directive 2004/38 are catered for by the general provisions of section 3(1) of the Maltese Legal Notice. A Union citizen may enter, remain and reside in Malta, seek and take up employment or self-employment therein, and shall enjoy equal treatment with Maltese nationals within the scope of the Treaty, and such right shall be also applicable to family members accompanying or joining the Union citizen, including those who are not nationals of a Member State.

Provided that the Director may refuse, terminate or withdraw any such right in the case of abuse of rights or fraud, such as marriages of convenience. Where a marriage of convenience is suspected, extensive investigations are carried out by the Maltese authorities; in such circumstances, the provisions of Council Resolution 97/C 382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience, are resorted to as administrative guidelines.

2. ACCESS TO WORK

Where a Union citizen is pursuing an activity in Malta, including as a self-employed person, his family members may, even if they are third country nationals, install themselves with such person, and for such purposes, they shall be issued with a registration certificate or a residence card, as the case may be, subject to the same rights and conditions applicable to the Union citizen, including the right to take up an activity as an employed or self-employed person in Malta.

Non-EU citizens always require a work permit in order to work in Malta. In the case of third country nationals, who are not family members of an EU national, their work permits are issued on the basis of labour market requirements. These permits are issued for a maximum period of one year and may be renewed also in accordance with prevailing labour market requirements. The fee for a work permit issued in respect of such persons is currently €139.76.

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

A third country national who has been granted long-term resident status in Malta shall enjoy equal treatment as Maltese nationals with regard to education and vocational training, includ-

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ing study grants.¹² A long-term resident also enjoys equal treatment with regard to the recognition of professional diplomas, certificates and other qualifications¹³.

A third country national who has been granted long-term resident status in Malta shall also enjoy equal treatment as Maltese nationals with regard to social security, social assistance and social protection in accordance with Maltese law.¹⁴ A long-term resident also enjoys equal treatment with regard to tax benefits.¹⁵

12 Section 11(1)c of Status of Long-term Residents (Third Country Nationals), 2006.

13 Section 11(1)d of Status of Long-Term Residents (Third Country Nationals), 2006.

14 Section 11(1)e of Status of Long-Term Residents (Third Country Nationals), 2006.

15 Section 11(1)f of Status of Long-Term Residents (Third Country Nationals), 2006.

Chapter VII

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

Application of Metock Judgment

The *Metock* judgment, which clarifies the rights of free movement of European Union citizens and their family members throughout the EU, appears to be applied by the Maltese authorities. In the case of a married couple, irrespective of when and where the marriage took place, a non-European Union spouse of a citizen of the European Union can reside with that citizen in Malta without having previously been resident in another Member State.

Relevance of Hendrix Judgment

Hendrix concerned frontier workers and special non-contributory benefits. With regard to these type of benefits, Malta has only listed the ‘Supplementary Allowance’ and the ‘Age Pension’ in Annex IIA of Regulation 1408/71. It is however difficult to foresee that this judgment will have an impact on Malta: given its geographical situation, it is very difficult to have a frontier worker who commutes on a daily basis to and from his residence to go to work. Furthermore one of our Annex IIA benefits is related to old-age whereas the other is means-tested. So, again, it is difficult to foresee a situation of a frontier worker who earns less than the established means.

Relevance of Collins Judgment

With regard to *Collins*, so far there have not been any cases arising in relation to the issues involved. The European Court of Justice stated that national legislation is not precluded from making entitlement to jobseekers’ allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions. In Malta, to receive such allowance, any unemployed person must be registered with the Employment and Training Corporation (ETC) and be readily available to take up employment, attend courses to improve his employability, and attend pre-arranged interviews, amongst others. Therefore it is understandable that the benefit is conditional upon a residence requirement.

Relevance of Renneberg Judgment

There is no rule under Maltese law which is equivalent to the Dutch tax rule under examination in the *Renneberg* case.

Relevance of Raccanelli Judgment

At the time of writing, the rapporteur is not yet advised on any particular action or follow-up taken by the Maltese authorities.

Chapter VIII

Application of Transitional Measures

On 27 June 2002, Malta concluded its negotiations in the sensitive area of free movement of persons, securing a special safeguard that may be applied in the event of a big influx of EU workers into Malta. At the same time, however, Maltese citizens are still able to enter and seek work in other EU countries, and this as from the first day of membership

Malta has obtained a deal which is different from that obtained by the other new Member States. For a period of seven years after membership, Malta will be able to apply safeguards on the right of EU nationals to work in Malta. The seven-year safeguard will apply until 2011 and essentially allows Malta to withhold the issue of work permits in the event of a potential disruption to its labour market which is of an urgent and exceptional nature. Restrictions can be imposed if an inflow of EU workers may put a strain on the local labour market, even if in certain sectors only. In such cases, it is up to Malta to determine when such cases arise and when restrictions may be imposed. In imposing restrictions Malta will be able to act *unilaterally*, and does not require prior authorisation from the EU. The safeguard clause primarily gives Malta the possibility to ask the European Commission to suspend EC law on free movement and only in urgent and exceptional cases of labour market disturbances can Malta suspend EC law unilaterally against a reasoned ex-post notification.

Malta has also been allowed to maintain a work permit (also known as employment licence) system, but merely in order for the Maltese authorities to be able to monitor the domestic labour market with a view of anticipating potential disruptions to the labour market as explained in the paragraph above. Work permits are therefore to be issued automatically and work permits should in no way constitute a pre-condition for the taking up of employment. The revised fees for employment licences for EU, EEA and Swiss citizens and their spouses and dependants are as follows: €58.23 for the issue of a new employment licence and €34.94 for the extension of an employment licence.

The transition period will come to an end in April 2011. After this seven-year period, in the event of a disproportionate influx of EU workers, Malta may still seek a remedy, but this time acting through the EU institutions, rather than unilaterally. This arrangement, after the first seven years, would apply indefinitely and would cover Malta's future position at any time, in the event of possible difficulties relating to the free of movement of workers into Malta. This agreement was confirmed in a Joint Declaration between Malta and the EU which is annexed to the Final Act to the Accession Treaty, and which states that, should accession give rise to difficulties relating the free movement of workers, the matter can be brought before the EU institutions in order to obtain a solution to this problem which would, however, be in strict accordance with the particular provisions of EC law on the free movement of workers.

. This special arrangement is also reflected in article 5(7) of the Immigration Regulations (LN205/2004). It must be said that Malta is not the first to get a Declaration of this kind. This declaration has already been used in the case of Austria in 1995. Interestingly, after twelve years of membership, Austria has never felt the need to resort to it.

This means that Malta's requests with regard to the free movement of workers were both accepted by the EU. Malta was the only candidate country that sought and obtained an arrangement of this nature. It must also be noted that restrictions on non-EU nationals who seek work in Malta continue to apply even post-membership. These are not affected by Malta's membership of the EU.

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With regard to the procedure related to the issue of an employment licence, the application must be signed by a Director or a person holding a senior management position in the establishment where the EU/EEA national is to be employed. In the case of entertainers and other performers, applications must be received at least ten days before the performer/s is/are due to start working in Malta, and application for extension must be submitted one month before it is due to expire. The explanatory notes relating to applications for employment licences, issued by ETC, clearly stipulate that a person may not take up employment before he is in possession of an employment licence. This *prima facie* appears to contradict the automaticity of the issuance of a work permit implied earlier. However, even if the issue of a work permit is in fact a pre-condition for the taking up of employment, the work permit is *de facto* issued automatically.

Member States that joined the EU in 2004 had to face the same questions in 2007 with regard to Bulgaria and Romania, as the EU15 did back in 2004 concerning EU10 workers. Malta restricts access of Bulgarian and Romanian workers due to the small size of its labour market and the structure of its workforce.

Chapter IX

Miscellaneous

The Schengen Agreement

The 21st of December 2007 marked another historical milestone for Malta and Gozo since, on this date, the smallest EU Member State joined the Schengen area along with another eight EU Member States, namely the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. On this day, these countries lifted their land and sea borders, which means that persons travelling between these countries, as well as between these countries and the other Schengen states, are no longer subject to border controls.

However, the advantages brought about by Schengen membership did not come about automatically. Like the other EU Member States seeking to join the Schengen area, Malta had to undergo a rigorous evaluation process, as Schengen is not just about the lifting of the internal borders, but also about maintaining a high level of security and cooperation between the State authorities concerned.

The benefits of Schengen membership became even more evident when the air borders are lifted in March 2008, thereby facilitating travel to up to 23 destinations. Malta's geographical position as an island state on the periphery of the EU mandated more stringent preparations as Malta's borders would have eventually become part of the EU's external borders

The purpose of the Schengen Agreement is to remove all controls on persons at the EU's internal borders and to harmonise controls at its external borders. EU Member States had agreed on a common list of countries requiring a visa. Malta's visa policy had to conform with this list upon accession. As of 1st May 2004, Malta fully adheres to the visa regime laid down in Council Regulation (EC) 539/2001 and third-country nationals may enter and travel to Malta, applying the Schengen provisions since 21 December 2007, for a period of up to three (3) months within a six-month period, provided that they fulfil the entry conditions laid down in the Schengen *acquis*.

Malta's Comments on the National and Consolidated Reports on the Free Movement of Workers for the year 2007

Comments on the National Report

Page 9: Education of Children of Migrant Workers second paragraph:

The following text should be added:

With regard to training, the Employment and Training Services does not preclude children of non-Maltese EU nationals from being admitted to apprenticeship and vocational training courses which are organised by the Employment and Training Corporation.

Page 12: Section 4.5 Access to study grants:

The following text should be added:

Training grants granted under the Business Promotion Act (Chapter 325 of the Laws of Malta) do not discriminate between Maltese and EU/EEA nationals.

Page 20: Section 2. Access to work second paragraph:

As from 1 October 2009, the fee quoted was changed as follows: €150.00 on application and €80 on the issue of the employment licence. This should, therefore, be reflected in the report.

Page 25: Section - The Schengen Agreement last paragraph:

As of 1 May 2004, Malta fully adheres to the visa regime laid down in Council Regulations (EC) 539/2001 and third-country nationals may enter and travel to Malta, applying the Schengen provisions since 21 December 2007 (when border checks were lifted at the seaport followed by the lifting of such checks at the airport on 30 March 2008) for a maximum period of three (3) months within a six-month period, provided that they fulfil the entry conditions laid down in the Schengen *acquis*.

Comments on the Consolidated Report

Page 10: Article 8(3), first indent, second paragraph – In Malta, licence has first to be issued for employment, and although it is stated to be a formality, it may nonetheless constitute an administrative impediment to free movement of workers:

In accordance with the transitional arrangement agreed upon in the Accession Treaty, Malta retained its work permit system in the case of workers for the purpose of monitoring its sensitive labour market. The relative permits, which are issued in the form of an employment licence, are, however, issued automatically. EU nationals are, therefore, required to be in possession of an employment licence when exercising their Treaty right as workers in Malta. As stipulated in Article 8(3), a certificate of employment may be requested when the worker applies for a registration certificate. The said employment licence, which is issued automatically, is considered to constitute such certificate of employment and the worker does not have to produce any other document as evidence in relation to his/her employment in Malta. Malta does not, therefore, see such requirement as an administrative impediment to the free movement of workers.

Page 23 - first paragraph, under the Sections 2-3. Social and Tax Advantages and other obstacles to free movement of workers: In Malta the derogation regarding acquisition of immovable property causes frustration among EU nationals while.....:

Citizens of all European Union Member States, including also Maltese citizens, who have resided in Malta continuously for a minimum period of five years at any time preceding the date of acquisition may freely acquire immovable property without the necessity of obtaining a permit under the Immovable Property (Acquisition by Non-Residents) Act (Cap. 246) of the Laws of Malta.

Citizens of all EU Member States, including also Maltese citizens, who have not resided continuously in Malta for a minimum period of five years may only purchase, without the necessity of obtaining a permit under the Immovable Property (Acquisition by Non-Residents) Act (Cap. 246), their primary residence or any immovable property required for their business activities or supply of services.

Citizens of all EU Member States, including also Maltese citizens, who have not resided continuously in Malta for a minimum period of five years, require a permit under the Immovable Property (Acquisition by Non-Residents) Act (Cap. 246) to acquire immovable property for secondary residence purposes.

The derogation is, therefore, not as rigid.

Page 36: In the public service in Malta there is a common practice of making promotion to a higher salary scale or grade conditional on the attainment of a certain length of service in a particular grade, which may be incompatible with the case law of the ECJ in Schoning and in Kobler"

Malta points out that this is an incorrect interpretation of the European Court of Justice's conclusions on the Schoning-Kougebetopoulou and Kobler cases. Both these cases deal with

mechanisms for the recognition of work experience in collective staff classification systems which, *de jure* (Schoning) or *de facto* (Kobler), cover multiple employers. Nowhere in its case law does the European Court of Justice rule that a *single* employer cannot fill posts by promotion from among its own serving employees.

Page 46 - penultimate paragraph:

As from 1 October 2009, the fee quoted was changed as follows: €150.00 on application and €80 on the issue of the employment licence. This should, therefore, be reflected in the report