Network on the Free Movement of Workers within the European Union

Ireland

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INTRODUCTION

The purpose of this Report is to identify developments in Ireland in relation to the free movement of persons in 2006. Reference is also made to material developments in early 2007.

Research for the Report has focussed on publicly available sources, largely found on the Internet, supplemented where possible with contacts with relevant officials.

There have been a number of major developments in relation to free movement which should be singled out in this introduction.

First, Directive 2004/38 has been implemented by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006.

Second, in contrast to the liberal position taken by Ireland in relation to nationals of the 2004 Accession States, Ireland has decided not to extend full free movement rights to nationals of Bulgaria and Romania.

Third, in relation to access to the public service, it is noteworthy that access to the police service – *An Garda Síochána* – has recently been opened up not only to nationals of the other EU Member States but also to resident third-country nationals.

Fourth, immigration in all its aspects has been the subject of an intensive public debate. Although this largely relates to third country nationals, the position of new Member State nationals has also come into focus. The influx of persons from Poland and the Baltic States has raised concerns about equality of treatment and access to social welfare payments. Concerns about unlawful residence by Romanian nationals have also recently surfaced, with the first recorded instance of multiple deportations of EU citizens. A scheme of heads for a comprehensive new Immigration, Residence and Protection Bill replacing a panoply of measures dating back to 1935 was published in September 2006 and the Bill itself was introduced in April 2007.

CHAPTER I. ENTRY, RESIDENCE AND DEPARTURE

General

The Framework for Beneficiaries of the EU Rules on Free Movement of Persons

The Aliens Act 1935 and Orders made pursuant to this Act regulate the entry and presence of nationals who are not citizens of Ireland. Nationals of the United Kingdom were removed from the scope of the Aliens Act by the Aliens (Exemption) Order 1999.[1]

In April 2006, the European Communities (Free Movement of Persons) Regulations 2006 came into force, providing for the entry, residence and removal of nationals of other EU Member States and their dependents in accordance with Directive 2004/38/EC. These Regulations were revoked and replaced by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006[2] (described as the "2006 Regulations") with effect from 1 January 2007 to take account of the accession of Romania and Bulgaria.[3]

The 2006 Regulations replace the special regime set out in the European Communities (Aliens) Regulations 1977[4] and the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997[5] (as amended) in so far as EU citizens and their dependents are concerned. Regulation 3 of these Regulations provides that the 1977 and 1997 Regulations will continue to apply with respect to the entry and residence of nationals of EEA countries which are not Member States of the EU.[6]

Workers, self-employed persons, service providers/recipients, students, retired persons and a residual class of non-economically active persons in addition to the qualifying dependents of such persons are thus covered by the 2006 Regulations in the case of nationals of EU Member States and by the 1977 and 1997 Regulations in the case of nationals of other EEA member States.

The 2006 Regulations widen the concept of who is considered a dependent family member and introduce two classes of dependents. **'Qualifying family members'** refer to the dependents defined in Article 2 (2) (a) and (c) of the Directive, i.e., the spouse of the EU national and dependent direct descendents under the age of 21. **'Permitted family members'** refer to the dependents defined in Article 2 (2) (b) and (d) including, i.e., any family member irrespective of nationality who is not a qualifying family member and is either dependent on the EU national, a member of the EU national's household, requires the personal care of the EU national on health grounds or is in an attested durable relationship with the EU national in the country of origin or country of habitual or country of previous residence of the EU national. Partners of either sex fall within this category of dependents.

The Regulations do not generally apply (save for the obligation to apply for a residence document for a third country national dependent) to UK nationals.

With regard to non-EEA nationals, the Immigration Act 2004 currently sets out the main elements of State control over the entry and presence of non-nationals in the State. Section 2 of the Act expressly provides that nothing in the Act is to derogate from 'any of the obligations of the State under the Treaties governing the European Communities' and any act adopted by an institution of those Communities.

The Immigration Act 1999[7] sets out the principles and procedures regulating the removal of foreign nationals.

It should be noted that the Immigration, Residence and Protection Bill, introduced in April 2007, provides for the replacement of the existing immigration legislation by a single

1 S. I. No. 97 of 1999.
2 S.I. No. 656 of 2006. http://www.inis.gov.ie/en/INIS/SI656of2006.pdf/Files/SI656of2006.pdf.
3 The Report focuses on the 2006 Regulations, rather than the earlier Regulations made in 2006.
4 S. I. No. 393 of 1977.
5 S. I. No. 57 of 1997.
6 The European Communities (Amendment) Act 1993 extended the scope of the 1977 & 1997 Regulations to other EEA nationals and their dependents.
7 Act No. 22 of 1999.

measure. This will not apply to persons covered by Directive 2004/38/EC and is to be subject to the provisions of the EU Treaties. This will be covered in detail in the 2007 Report.

A. Entry

UK Nationals & the Common Travel Area Arrangements

The Common Travel Area arrangements enable citizens of the UK and of Ireland to move between their respective jurisdictions without the requirement to carry a passport and to establish themselves and enter the labour market in either jurisdiction as if they were citizens. There is no formal agreement between Ireland and UK regarding the common travel area, although the Common Travel Area is provided for in the UK Immigration Act 1971. The passport-free travel arrangements also apply as between these jurisdictions and the Isle of Man and Channel Islands.

Under the Aliens (Amendment) (No. 3) Order 1997,[8] Immigration Officers are permitted to carry out checks on persons arriving in the State from Great Britain or Northern Ireland, in order to identify non-UK nationals who are not entitled to enter Ireland. In practice, persons coming from the UK through the main airports are expected to produce a passport at immigration control (though a driving licence or equivalent is accepted): this appears to reflect the fact that the airport gates servicing UK-originating flights are not currently separated from flights coming from elsewhere.

The Amsterdam Protocol and The Retention of Border Controls

In a Protocol agreed in the context of the Amsterdam Treaty, Ireland (together with the UK) is able to retain internal border controls – notwithstanding Article 14 of the EC Treaty – as long as it retains the Common Travel Area. At least as far as Ireland is concerned, the stated reason for this is the need to protect the integrity of the Common Travel Area. Ireland has "reluctantly" gone this route and, in a Declaration to the Final Act of the Amsterdam Treaty, it has declared its readiness to participate in the EC regime to the maximum extent compatible with the maintenance of the Common Travel Area.

Text(s) in Force

Directive 2004/38/EC & European Communities (Free Movement of Persons) Regulations (No. 2) 2006

The European Communities (Free Movement of Persons) Regulations 2006 were made on 28 April 2006 to implement 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. These Regulations were revoked and replaced in December 2006[9] by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (the "2006 Regulations") to take account of the accession of Bulgaria and Romania. The 2006 Regulations are used as the basis for the commentary below.

- *Entry of EU nationals and qualifying family members*
  Regulation 4 provides that a Union Citizen falling within the scope of the 2006 Regulations and a qualifying family member who produces a valid identity card or passport as evidence of nationality and identity may not be refused leave to land unless he/she suffers from a specified disease or his/her personal conduct has been such that it would be contrary to public policy or would endanger public security to grant him/her leave to land.
  An immigration officer may refuse permission to enter the State to a non-national qualifying family member where the person does not have a valid passport or, if re-

8 S.I. No. 277 of 1997.
9 S.I. No. 656 of 2006.

quired, the necessary visa so long as the person has been given every reasonable opportunity to obtain and present the relevant documents to the officer or to prove by other means their entitlement to enter the State under the Regulations.

- *Entry of permitted family members of EU nationals*
  A permitted family member who produces a valid identity card or passport as evidence of nationality and identity, together with the relevant certification proving that he or she is a dependent within the meaning of the 2006 Regulations, may not be refused leave to land unless the authorities are not satisfied that the person is a permitted family member following an examination of the circumstances or where he/she suffers from a specified disease or disability or his/her personal conduct has been such that it would be contrary to public policy or would endanger public security to grant him/her leave to land. Reasons must be given to the person concerned where entry is refused. Permission to enter may be refused by an immigration officer on the same terms as for qualifying family members.
- *Entry of EEA nationals*
  Persons falling within the scope of the 1977 and 1997 Regulations who produce a valid identity card or passport as evidence of nationality and identity may not be refused leave to land unless he/she suffers from a specified disease or disability or his/her personal conduct has been such that it would be contrary to public policy or would endanger public security to grant him/her leave to land.
  The Department of Justice has advised that it may take steps to extend the scope of the 2006 Regulations to cover EEA nationals and their dependents as soon as the European Commission has concluded its analysis on how Directive 2004/38/EC should apply to these EEA States outside of the EU.

Refugee Act 1996

Section 9 of the Refugee Act 1996[10] (as amended) requires that where a person arriving claims asylum, he or she must be given leave to enter.

In response to asylum applications continuing to be made from Romanian nationals following Romanian accession,[11] in January 2007, the Department of Justice, Equality and Law Reform issued an information note advising that in the light of the *EU Treaty Protocol on Asylum for Nationals of Member States of the European Union*, the Office of the Refugee Applications Commissioner (which is the first instance decision making body in the Irish Asylum System) will not accept asylum applications from nationals of all EU Member States.

Immigration Act 2004 (Visas)(No. 2) Order 2006[12]

Section 17 of the Immigration Act 2004 provided a new statutory basis for the making of visa orders. The Immigration Act 2004 (Visas) (No. 2) Order 2006 specifies the classes of non-nationals who are not required to have a valid Irish visa when landing in the State and classes non-nationals required to have a valid Irish transit visa when landing in the State. The States whose citizens do not require a visa include all 27 EU Member States, the remaining EEA Member States and Switzerland. This Order was introduced in December 2006 and came into operation on 1 January 2007. It updated the Immigration Act 2004 (Visas) Order 2006[13] to take account of the accession of Romania and Bulgaria.

Draft legislation, circulars, etc.

Scheme for Immigration, Residence & Protection Bill (discussed below in Chapter VII).

10 Act No. 17 of 1996.
11 The Irish Times, New EU citizens not able to claim refugee status, 19 January 2007.
12 S. I. No. 657 of 2006.
13 S. I. No. 227 of 2006.

Judicial practice

Nothing to report.

Miscellaneous (administrative practices, etc.)

Nothing to report.

Recent legal literature

Nothing to report.

B. Residence

Background

The 1977 and 1997 Regulations contain provisions on applications for residence permits, the issue of a first residence permit and the validity of residence permits. However in practice, residence permits have been seen as optional and only a very small proportion of persons eligible to do so have in fact applied for a permit.[14]

The 2006 Regulations provide that an EU national coming within the scope of the Regulations does not require a residence permit. However all non-EEA national dependents of the EU national are required to apply for a residence card within 3 months of their arrival in the State.

Text(s) in force

Directive 2004/38/EC and the European Communities (Free Movement of Persons) (No. 2) Regulations 2006
Regulations 6 to 11 of the 2006 Regulations implement the Directive's provisions on the right of residence (Articles 6 to 15), and Regulations 12 to 16 implement the provisions on the right of permanent residence (Articles 16 to 21).

In relation to the right of residence:

- Regulation 6(1), implementing Article 6 on the right of residence for *up to three months*, imposes the additional condition, not foreseen in the Directive, that the person concerned "does not become an unreasonable burden on the social welfare system of the State".
- Regulation 6(2)(c) covers cases of cessation of activity addressed in Article 7(3) of the Directive which will lead to the retention of the status of worker or self-employed person. In relation to Article 7(3)(d) (vocational training), Regulation 6 provides that the status is to be retained "except where he or she is involuntarily employed, he or she takes up vocational training relating to the previous employment": this is somewhat ambiguous wording, but it can be read to conform to the requirements of the Directive.
- The position as regards residence of job-seekers is not addressed in the 2006 Regulations. Recital 9 in the preamble to the Directive refers to the "more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice". Article 14(4) of the Directive addresses the special position of job-seekers in the context of *retention* of the right of residence by providing that job-seeking Union citizens and family members cannot be expelled for as long as the Union citizens "can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged": the 2006 Regulations contain no specific provision to this effect. Indeed, the only reference in he Regulations to the position of job-seekers is made in Regulation 18(2) which provides:

14 In practice, non-national residents will register for the PPS number, giving entitlement to social welfare allowances.

> "(2)(a) A person to whom these Regulations apply, other than a worker, self-employed person, 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 for the purposes of seeking employment, for such period exceeding 3 months, during which he or she is continuing to seek employment and has a genuine chance of being engaged.
>
> By implication, the job seeker enjoys the right of residence for more than six months recognised in *Antonissen*, but the position could have been made clearer.

In relation to the right of permanent residence:

- Regulation 13 provides for the entitlement to permanent residence in the State of Union citizens no longer working in the State and their family members (Article 17 of the Directive). The right is stated to be enjoyed by a qualifying person "whether or not he or she has been resident in the State for a continuous period of 5 years". This is somewhat broader than the derogation provided for in Article 17(1);
- In relation to workers or self-employed persons who work in another Member State whilst retaining their residence in the host Member State. Regulation 13(4) envisages return to the State "at least once a week" whereas Article 17(1)(c) of the Directive provides for the return to the place of residence to be "as a rule, each day or at least once a week". The words "as a rule" in the Directive suggest that there ought to be a certain flexibility in applying what is a general rule that the person returns once a week. The absence of such an expression in the implementing Regulations may deprive beneficiaries of such flexibility.

Regulations 19 to 23 implement the provisions of the Directive relating to restrictions on the right of entry and the right to residence on grounds of public policy, public security or public health.

Draft legislation, circulars, etc.

Scheme for an Immigration, Residence & Protection Bill (discussed at Chapter VII).

Judicial practice

Nothing to report.

Miscellaneous (administrative practices, etc.)

As noted above, under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006, EU nationals are not required to register their presence in the State. Normally to be eligible for naturalisation, evidence of residence permits are required to prove the length of legal residence in the State. The Department of Justice, Equality and Law Reform has advised that other evidence can be used to prove length of residence in the State such as statement from an employer, evidence of mortgage or bank accounts and evidence of taxes paid.

C. Departure

Background

There have been no reported cases of required departure of persons covered by the free movement rules in recent years. Indeed, there appears to have been only one case in the past few years known to the Department of Justice, and this did not involve formal deportation

proceedings. (This position seems to have changed in 2007 when a number of Romanian nationals without means of support were deported: see Chapter VIII, below.)

Persons failing to qualify as free-movers will cease to be covered by the 1977, 1997 and 2006 Regulations. Those Regulations also provide for departure, and deportation, on grounds of public policy or public security (or, before the grant of a first permit, public health grounds).

With regard to Romanian and Bulgarian nationals now covered by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006, the Department of Justice, Equality and Law Reform has confirmed that deportation orders previously issued remain in force. However, it has said that a person who is the subject of such an order may apply in writing to the Minister for Justice, Equality and Law Reform for the order to be revoked. When considering such applications the circumstances in which the order was made will be taken into account and it is anticipated that those deported for non-compliance with immigration rules may be reviewed more favourably by the Department in contrast to those who have committed a criminal offence.[15]

Text(s) in force

Directive 2004/38 and the European Communities (Free Movement of Persons) (No. 2) Regulations 2006

Regulations 19 to 23 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006[16] implement the provisions of the Directive relating to restrictions on the right of entry and the right to residence on grounds of public policy, public security or public health. A number of specific points may be made:

- There are very detailed provisions on removal from the State and on the making of exclusion orders;
- In implementing Article 28(1), Regulation 20(3)(a) limits the considerations to be taken into account before taking an expulsion decision to those examples listed in Article 28(1); and
- In relation to the expulsion of minors, Regulation 20(6)(c) implements Article 28(3)(b) in referring to expulsion as being necessary in the best interests of the child. However, no express reference is made to the 1989 UN Convention on the Rights of the Child.

Draft legislation, circulars, etc.

Scheme for an Immigration, Residence & Protection Bill (discussed at Chapter VII).

Judicial practice

No case law to report.

Miscellaneous

In light of the requirement of habitual residence, in effect since 1 May 2004, to access certain social welfare benefits, a person – whether a Community or third-country national – who is not eligible for benefit will not be left destitute, but will, if he or she is otherwise not entitled to stay in Ireland, be able to avail of voluntary return.

On foot of a Government Decision dated 2 March 2004, the Reception and Integration Agency was assigned responsibility for supporting the repatriation, on an agency basis for the Department of Social and Family Affairs, of nationals of the ten new EU Member States who fail the habitual residency condition attaching to social assistance payments (the requirement of habitual residence is discussed further in Chapter X). In general, cases are re-

15 Department of Justice, Equality and Law Reform Press Release. http://www.justice.ie/80256E010039C5AF/vWeb/pcJUSQ6X5LL9-en.

16 See note 4.

ferred to the Reception and Integration Agency by Community Welfare Officers (Health Service Executive) who have refused access to the Basic Supplementary Welfare Allowance because they failed to fulfil the habitual residence condition.[17] The Reception and Integration Agency makes contact with the person and books their flight home. The returnees must sign a form agreeing to avail of the service only once and a copy of their passport is taken. The Agency also books and pays for temporary accommodation in Dublin until the flight leaves.[18]

Provisional figures from the Reception and Integration Agency indicate that 646 nationals from the countries that joined the EU in 2004 were repatriated by it on a voluntary basis in 2006. This number has increased from a total of 149 for 2004 and 318 in 2005. [19] The majority of persons affected are Polish nationals.

Recent legal literature

Quinn, E., *Return Migration: The Irish Case* (Research study completed by the Irish National Contact Point of the European Migration Network, published 26 February 2007).[20]

This report describes the definitions of return and the systems of assisted voluntary return and forced return from Ireland including deportations, removals and Dublin II transfers. It deals largely with third-country nationals, but also addresses questions relating to the return of Accession Member State nationals.

17 Department of Social and Family Affairs, Internal Review of the Operation of the Habitual Residence Condition, July 2006. http://www.welfare.ie/publications/hrcreview06.pdf.

18 Emma Quinn *Return Migration: The Irish Case* (Research study completed by the Irish National Contact Point of the European Migration Network, published 26 February 2007, p. 10. http://www.esri.ie/UserFiles/publications/20070726111026/BKMNEXT087.pdf

19 *Ibid.*, p. 8; 12; The Irish Times, State pays to repatriate 646 destitute immigrants, 15 January 2007..

20 See n. 18.

CHAPTER II. ACCESS TO EMPLOYMENT

1. Equal treatment in access to employment (e.g., assistance of employment agencies)

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,[21] 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.[22] Through a regional network of 66 offices and 20 training centres, FÁS operates training and employment programmes, provides a recruitment service to jobseekers and employers, provides an advisory service for industry, and supports community-based enterprises.

2. Language requirement in the private sector

General

As far as the private sector is concerned, there is no general legislative requirement that English and/or Irish be spoken. However, in practice, employers throughout Ireland are likely to require the linguistic competency that is necessary for the position to be filled and, in certain areas, notably the *Gaeltacht* (Irish-speaking localities) Irish is more likely to be required.

Legal Profession

The position differs for the two branches of the legal professions. A person, irrespective of nationality, wishing to be admitted as a barrister in Ireland must satisfy the Chief Justice that he/she possesses a competent knowledge of the Irish language.[23] Would-be solicitors must pass two Irish examinations, the first before entering into training and the second before admission as a solicitor.[24] These requirements apply to all persons irrespective of nationality who wish to become lawyers in Ireland. However, these requirements do not apply to lawyers from other Member States seeking to practise under Directive 89/48 and to lawyers covered by other reciprocal arrangements.

Doctors

In relation to doctors, there is no statutory requirement that English/Irish be spoken. There is no language requirement for EU nationals seeking recognition as Irish doctors. However, third-country nationals seeking temporary registration must demonstrate the requisite language proficiency, having passed either the Academic International English Language Testing System or the US Medical Licensing Examination.

21 See n. 2, above.
22 See, generally, www.fas.ie.
23 Legal Practitioners (Qualification) Act 1929 (No. 16/1929), Section 3.
24 Legal Practitioners (Qualification) Act 1929 (No. 16/1929), Section 4.

Nurses

In relation to nurses, the Irish Nursing Board has issued Circular 02/07 on English language competence of nurses and midwives from EU Member States.[25] It is recognised that the Board is itself prohibited from assessing the English language competence of nurses or midwives from EU Member States meeting certain EU requirements. However, it is stated that employers may assess the English language competence of nurses or midwives from other Member States whom they are considering employing, and, indeed, that employers have a responsibility to patients/clients and their families to ensure that employees have the necessary English language competence to perform core nursing/midwifery tasks. (At the same time, the Board issued Circular 3/2007, introducing changes to its standards in relation to proof of English language competence of non-EU applicants for registration.)

Pharmacists

The Pharmacy Act 2007, enacted on 21 April 2007, contains new provisions on registration of pharmacists in the State.[26] Section 14 provides that the newly established Council of The Pharmaceutical Society of Ireland is to register a person in the pharmacists' register if the person concerned:

> "(g) not being a national of the State or another Member State, satisfies the Council that he or she has the linguistic competence necessary to be a registered pharmacist in the State,
> (h) being a national of the State or another Member State and lacking that competence, undertakes to acquire it."

Private Education

There is no statutory Irish language requirement for access to teaching posts in the private education sector (though, to the extent that the national curriculum is taught, there must be lessons in Irish). Save for posts requiring the use of Irish or another language (such as teaching modern Irish), there is no formal language requirement.
The question of language requirements for access to public employment is discussed in Chapter IV.

3. Recognition of diplomas (including academic diplomas) and initiatives to transpose Directive 2005/36/EC

General

In relation to professional qualifications, there are a number of sectoral directives covering architects, healthcare professionals and lawyers. These directives have been implemented by a number of national legislative provisions. The Department of Education and Science has recently published an updated list of contacts for these and other professions, with information on the designated competent authorities.[27] The above list also covers other regulated professional activities covered by the General System directives.

25 Circular 02/07 to Employers of Nurses and Midwives. See An Bord Altrainas *News* (Spring 2007) (http:// www.nursingboard.ie/GetAttachment.aspx?id=7c3f74a3-db7f-4057-ad6f-cbabad282277).
26 No. 20 of 2007. The relevant provisions are contained in Part 4 of the Act, which is not yet in force. (http://www.oireachtas.ie/documents/bills28/acts/2007/a2007.pdf).
27 See http://www.education.ie/home/home.jsp?maincat=17216&pcategory=17216&ecategory=28970&sectionpage=12251&language=EN&link=link001&page=1&doc=26573 .

The Department of Education and Science is generally responsible for the coordination of actions under the General System. Under its aegis, the Teaching Council is responsible for the recognition of teachers' qualifications.[28]

In relation to unregulated professions, there is no need for professional recognition to work in Ireland. However, applicants and employers seeking to establish equivalence of diplomas and training have access to increasingly sophisticated mechanisms. The National Qualifications Authority of Ireland[29] (NQAI) is the designated Irish centre for the recognition of international qualifications and is the Irish representative of ENIC/NARIC. Its database contains information on foreign qualifications and education and training, listing the foreign qualifications processed to date and stating the advice that has been provided. It has established a National Framework of Qualifications which compares foreign qualifications to Irish qualifications, thereby facilitating the recognition process. In individual cases, an applicant may obtain a recognition application form and details regarding the documentation to be submitted. The service is provided free of charge to job applicants, prospective employers and those undertaking further study in Ireland (but does not include the translation of documents). A "rough guide" has been produced on comparing qualifications in the UK and Ireland. The NQAI is also responsible for the operation of the Europass system.[30]

The regime relating to European Community Certificates of Experience under Directive 99/42 is administered by the Legal Services Department of FÁS.

Directive 99/42 was transposed into Irish law in August 2003 by means of the European Communities (Recognition of Qualifications and Experience) Regulations 2003.[31] Individuals must apply to the designated "competent authority" for recognition of their qualifications. The experience requirements for different activities are set out in the Schedule to the Regulations and match the requirements of Articles 4, 6 and 7 of the 1999 Directive.

Directive 2001/19 was transposed into Irish law by way of the European Communities (General System for the Recognition of Higher Education Diplomas and Professional Education and Training and Second General System for the Recognition of Professional Education and Training) (Amendment) Regulations 2003.[32]

Directive 2005/36 consolidates a number of existing Directives and should be transposed by 20 October 2007 at the latest. The Department of Education has stated that it intends to publish Regulations by statutory instrument, which will consolidate the Irish general system of recognition and provide for the provision of temporary services. Work on these Regulations is ongoing. Specific sectoral measures are referred to below.

Construction

Under the Safety, Health and Welfare at Work (Construction) Regulations 2006,[33] which came into effect on 6 November 2006, the national training and employment agency, FÁS, has been assigned the function of approving equivalent schemes (e.g., Safety Awareness Schemes) in other Member States. In issuing registration cards and maintaining the skills register, FÁS is obliged to comply with Directive 2005/36.

Architects, etc.

Parts 3, 4 and 5 of the Building Control Bill 2005[34] deal with the registration of Architects, Quantity Surveyors and Building Surveyors and take account of Directive 2005/36/EC.

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28 See http://www.education.ie/home/home.jsp?maincat=17216&pcategory=17216&ecategory=28970&section page =12251&language=EN&link=link001&page=1&doc=26574 .

29 www.qualificationsrecognition.ie.

30 http://www.europass.ie.

31 S.I. No. 372 of 2003.

32 S. I. No. 36 of 2004.

33 S. I. No. 504 of 2006.

34 Building Control Act 2007 (No. 21 of 2007) http://www.oireachtas.ie/documents/bills28/acts/2007/a2107.pdf.

Doctors

The Medical Practitioners Act 2007,[35] enacted on 7 May 2007, contains measures to transpose the relevant provisions of Directive 2005/36/EC, as it relates to medical practitioners. Part VI deals with the registration of medical practitioners in one of four divisions – the General Division, the Specialist Division, the Trainee Specialist Division and the Visiting EEA Practitioners Division and the procedures to be followed by the Medical Council on applications for registration, including the timescales outlined under Directive 2005/36. The Medical Council, which is the designated competent authority under the Directive, must take into account training and experience from a third country where appropriate.

Pharmacists

In July 2006, the Court of Justice made a ruling in *C-221/05 Sam McCauley Chemists (Blackpool) Ltd, Mark Sadja v. Pharmaceutical Society of Ireland and others*. This case involved a preliminary ruling from the Supreme Court who sought an interpretation of Article 2 (1) and (2) of Directive 85/433/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in pharmacy. The Directive was transposed in Ireland by the European Communities (Recognition of Qualifications in Pharmacy) Regulations 1991.

The key issue was whether it was appropriate to use a statutory instrument to implement the Directive or whether the government was in fact exercising discretion which would necessitate new legislation to be brought before the Oireachtas. In its decision of 13 July 2006, the European Court of Justice determined that Ireland was not in breach of its obligations under the Directive because Article 2 must be interpreted as meaning that a Member State which complies merely with the minimal level of recognition of diplomas laid down by that Directive is not exercising any discretion conferred by that Directive. Therefore, the implementation of the Directive by statutory instrument was valid in view of the terms of Section 3 of the European Communities Act 1972.

The case reverted to the Supreme Court in order to determine whether the European Communities (Recognition of Qualifications in Pharmacy) Regulations 1991 were valid in the light of the Court's interpretation of Article 2.[36]

The Pharmacy Act 2007[37] published on 9 March 2007 takes account of Directive 2005/36/EC, designating the newly established Pharmaceutical Society of Ireland as the competent authority for the purposes of the Directive. Section 16 contains provisions on the qualifications required for practice and registration and takes account of Articles 23 and 44 of the Directive.

The Act provides for "an enhanced and modern system of regulation of the pharmacy profession in Ireland and removes the derogation whereby there was a restriction on pharmacists educated in other EU or EEA countries from owning, managing or supervising a pharmacy in Ireland that was less than three years old".[38] The legislation thus prospectively resolves issues raised in the *Sam Mc Cauley case* regarding the three year rule.

The restrictions on non-Irish qualified pharmacists owning, managing and operating a pharmacy will effectively be replaced with fitness to practise regulations. A prospective pharmacist's fitness to practise will be determined by a new 21-member Council, nine of whom will be pharmacists and the remainder of whom will be non-elected lay persons. The

35 Medical Practitioners Act 2007 (No. 25 of 2007) http://www.oireachtas.ie/viewdoc.asp?DocID=7984&CatID=87.

36 Case 294/02 Sam McCauley Chemists (Blackpool) Ltd & Anor v. Pharmaceutical Society of Ireland & Ors – this case was listed for mention before the Supreme Court on 2-6 October 2006.

37 Pharmacy Act 2007 (No. 20 of 2007) http://www.oireachtas.ie/documents/bills28/acts/2007/a2007.pdf.

38 Department of Health Press Release, Pharmacy Bill 2007 a complete overhaul of regulation of pharmacy for the first time in 130 years, 9 March 2007 http://www.dohc.ie/press/releases/2007/20070309a.html.

mandate of the Council will be to ensure that pharmacy outlets adhere to adequate standards and that their owners possess adequate linguistic skills.

4. Nationality conditions for captains of ships

There is no Irish nationality condition for access to the posts of captain and first officer of an Irish-flagged ship.

CHAPTER III. EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

1. Working conditions, social and tax advantages (direct, indirect discrimination)

Background

Equality Legislation

The statutory framework to combat discrimination in Ireland largely consists of three Equality Acts – the Employment Equality Act 1998,[39] the Equal Status Act 2000[40] and the Equality Act 2004.[41] In relation to employee protection, the Protection of Employees (Part-Time Work) Act is also of importance. In relation to persons covered by Directive 2004/38, the European Communities (Free Movement of Persons) (No. 2) Regulations 2006[42] contain provisions on entitlements implementing the equal treatment provisions in Article 24 of the Directive.

The Equality Act 2004 amends the Employment Equality Act 1998, the Pension Act 1990 and the Equal Status Act 2000 and gives effect to Directive 2000/43/EC and Directive 2000/78/EC (the Race and Employment Directives). In line with the Race and Employment Directives, the Equality Act 2004 amends the 1998 Act to permit positive measures to be taken to prevent or to compensate for disadvantages linked to grounds such as race (including nationality), supplementing the existing grounds of gender, disability, age and membership of the Travelling Community. The Social Welfare (Miscellaneous Provisions) Act 2004 has amended the Pensions Act 1990 to give effect to these Directives in so far as they relate to occupational pensions.

Conditions of Employment

Irish law endorses the principle of non-discrimination in relation to the treatment of all workers irrespective of origin.

Differential treatment exists in relation to entry for the purposes of employment, where a broad distinction may be drawn between privileged EU/EEA nationals, EU nationals where there are transitional measures in place, privileged third-country nationals (including Turkish workers) and a residual class of third-country nationals. Such differences have been maintained by the provisions of the Employment Permits Act 2006[43] briefly discussed in Chapter VII. (The question of equal access of nationals of EU Member States and family members to employment is addressed in Chapter II, above.)

Such differential treatment in relation to access is not in itself antithetical to the idea that, once employed, there should be equality in treatment as regards pay and other conditions of employment.

There has been concern 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 which acceded in 2004 (in particular, Poland and the Baltic States). Examples of these cases are considered in Chapters VII and VIII, below. Over 2006, 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 are bolstered by the political commitments in the Social Partnership Agreement *Towards 2016* [44] discussed below in Chapter VII.

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39 No. 21 of 1998 http://www.equality.ie/getFile.asp?FC_ID=6&docID=205.
40 No. 8 of 2000 http://www.equality.ie/getFile.asp?FC_ID=7&docID=207.
41 No. 24 of 2004 http://www.equality.ie/getFile.asp?FC_ID=175&docID=206.
42 See n. 2, above.
43 No. 16 of 2006 (commenced by Employment Permits Act 2006 (Commencement Order) 2006 (S.I. No. 682 of 2006)).
44 Towards 2016: Ten Year Framework Social Partnership Agreement 2006-2015 http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf.

Social Advantages

The application of the equality principle has also arisen in relation to the application of the "habitual residence" test introduced in 2004 for access to social welfare payments. This is discussed in Chapter X, below.

Text(s) in force

Employment Equality Acts 1998-2004
The Employment Equality Acts 1998-2004 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.

It should be noted that Section 36 of the 1998 Act effectively provides for 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.

Protection of Employees (Part-Time Work Act) 2001

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.

Directive 2004/38 and the European Communities (Free Movement of Persons) (No. 2) Regulations 2006

Regulation 18 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 contains provisions on entitlements implementing the equal treatment provisions in Article 24 of the Directive:

- Equal treatment with Irish citizens is assured in relation to rights of travel in or to or from the State, self-employment and the receipt and provision of services, access to education and training, the receipt of medical care and services and "other entitlements" (a "catch-all" category);
- Reflecting Article 24(2) of the Directive, entitlement to social welfare benefits is not available for three months after entry (or a longer period in the case of a job-seeker). However, this limitation does not apply to workers, self-employed persons, or persons who retain such a status and their family members;
- Regulation 18 also implements Article 24(2) of the Directive in relation to maintenance grants for students;
- Regulation 18(3) makes it clear that persons covered may be asked to provide the relevant residence document or evidence of application in order to exercise an entitlement, but that failure to do so may not of itself be used as a reason to refuse an entitlement to a person. This appears to comply with Article 25(1) of the Directive, but unfortunately

does not state in terms that "entitlement to rights may be attested by other means of proof"; and

- With regard to access to employment, Regulation 18 provides that access to the labour market is subject to the restrictions contained in the Employment Permits Acts 2003-2006. This is ostensibly to make the access of Romanian and Bulgarian nationals subject to the requirement of obtaining an employment permit (discussed in Chapter VIII below).

Draft Legislation, circulars, etc

Nothing to report.

Judicial Practice

Background
The Equality Tribunal is an impartial, independent, quasi-judicial body charged with hearing or mediating claims of alleged discrimination under the Employment Equality Acts 1998 and 2004, the Pensions Acts 1990 to 2004 and the Equal Status Acts 2000 and 2004.

Czerski v Ice Group (2006)
The complainant, a Polish national, successfully argued that she had been indirectly discriminated against on the grounds of race when she was not selected for a role as a Production Operative because she could not comply with the requirement to submit two references.

Under Section 6(1)(b) of the Employment Equality Act 1998, "the ground of race" covers discrimination on grounds of different race, colour, nationality or ethnic or national origins.

The Equality Tribunal concluded that requiring two career (interpreted to mean 'employment related') references was an indication of indirect discrimination on grounds of race contrary to Section 31 as the requirement could be complied with by a substantially smaller number of prospective employees who were non-Irish nationals as compared to prospective employees who were Irish nationals.

The decision suggests that the discrimination could have been avoided if the recruitment agency had permitted the complainant to provide an alternative to this requirement (e.g. a character reference or a reference from an employer in Poland). The respondent recruitment agency failed to produce evidence to show that the requirement was justified as reasonable in the circumstances. The claimant was awarded €7000 in punitive compensation.

Miscellaneous (administrative practices, etc)

Annual Report of the Equality Authority
The Annual Report of the Equality Authority 2005, published in May 2006, states that the ground of race remained the largest category of Equality Authority (32%) case files under the Employment Equality Acts.[45] Moreover, in April 2006, the Equality Tribunal announced that race claims had risen from 17% in 2004 to 21% in 2005 and by April 2006 accounted for 33% of all claims of discrimination at work.[46] It is not possible to state what proportion of such cases involved discrimination against EU nationals as statistics are compiled on the basis of the ground for the discrimination rather than the profile of the individual discriminated against.

Allegations of discrimination arose under a range of headings including unequal pay, excessive working hours, lack of access to statutory leave entitlements, harassment and dis-

45 The Equality Authority Annual Report 2005 published on 8 May 2006 http://193.178.1.9/getFile.asp?FC_ID=255&docID=536.

46 Press Release: Equality Tribunal announces online referral service, improved leaflets and Quarter 1 statistics, 20 April 2006 http://www.equalitytribunal.ie/index.asp?locID=80&docID=1209.

criminatory dismissal. The largest area where discrimination was alleged relates to working conditions followed by access to employment and dismissal.

Under the Equal Status Acts, race accounts for 13.7% of the case files. The impact of the Race Directive is beginning to become evident in the case files of the Equality Authority particularly for those claims in relation to accommodation under the Equal Status Acts 2000 to 2004.

The Annual Report states that, "there are continuing delays in the Equality Tribunal regarding the appointment of Equality Officers, the scheduling of hearings and delivery of recommendations. These delays mean that remedies are not effective, proportionate and dissuasive as required by EU Equality Directives. It is hoped that this issue should, in part, be responded to with the preparation as a matter of urgency of statutory procedures for carrying out investigations as allowed for under Section 79 (4) of the Employment Equality Acts".

Recent legal literature

Economic & Social Research Institute, *Migrants' Experience of Racism and Discrimination in Ireland: Survey Report,* Frances McGinnity, Emma Quinn, James Williams & Philip J O'Connell, published in November 2006.[47] This study reports the results of a survey conducted in Ireland in Summer 2005 as part of a wider EU project, to assess the prevalence and degree of discrimination experienced by recent migrants to Ireland. The results are based on questionnaires completed by 679 work permit holders and 430 asylum seekers. Harassment in public places is the most common form of discrimination, closely followed by insults or other forms of harassment at work. Discrimination in access to employment and public services is also reported. The study also highlights the differences in the nature and form of discrimination experienced by people from different regions.

Equality Authority, *Embedding Equality in Immigration Policy*, August 2006.[48] This submission on the discussion document of the Department of Justice, Equality and Law Reform on the Immigration and Residence Bill contains a useful analysis on the intersection of equality legislation with immigration and proposes an equality based approach to equality legislation.

2. Other obstacles to the free movement of workers

Nothing to report.

3. Specific issue: frontier workers

Nothing to report.

47 http://www.esri.ie/UserFiles/publications/20061106142132/BKMNINT193.pdf.
48 http://www.equality.ie/getFile.asp?FC_ID=296&docID=621.

CHAPTER IV. EMPLOYMENT IN THE PUBLIC SECTOR

1. Access to the public sector

1.1 Irish Nationality and Language Requirements

This section provides an overview of the current situation in relation to the nationality condition for access to public employment. In doing so, information is provided in relation to specific Irish nationality requirements as well as Irish language requirements, which could be tantamount to a nationality requirement.

In relation to language, The Official Languages Act 2003[49] aims to ensure the availability and a higher standard of services through Irish and provides a statutory framework for the delivery of public services through the Irish Language. Section 11 of the Act provides for the preparation by public bodies of a statutory scheme detailing the services they will provide (i) through the medium of Irish, (ii) through the medium of English, and (iii) through the medium of Irish and English, and the measures to be adopted to ensure that any service not provided by the body through the medium of the Irish language will be so provided within an agreed timeframe. Generally speaking, the obligations for public bodies under the Official Languages Act 2003 will necessitate greater recruitment of persons with Irish language skills.

In relation to the application of the non-discrimination principle, it should be noted that Section 35 of the Employment Equality Act 1998[50] effectively exempts from the application of the equality regime provisions (relating to residence, citizenship and proficiency in the Irish language) with respect to:

a. holding office under, or in the service of, the State (including the Garda Síochána and the Defence Forces) or otherwise as a civil servant, within the meaning of the Civil Service Regulation Act, 1956; or
b. officers or servants of a local authority, for the purposes of the Local Government Act, 1941, a harbour authority, a health board or a vocational educational committee.

The position is considered below with regard to the Civil Service, the Health Service, the Defence Forces, the Education Sector, the Marine Sector and An Garda Síochána (the Police).
Some observations will then be made on the question of recognition of diplomas for access to the public sector.

The Civil Service
Nationality. There is no specific legislative provision requiring the possession of Irish nationality for access to posts in the Civil Service.

Section 17 of the Civil Service Regulation Act 1956 provides that the Minister for Finance shall be responsible for the regulation and control of the Civil Service as well as the fixing of the terms and conditions of service of civil servants and the conditions governing their promotion. The Minister may, for this purpose, make such arrangements as he thinks fit and may cancel or vary such arrangements.

In relation to the holding of competitions, Section 16 of the Civil Service Commissioners Act 1956 provided that, subject to the consent of the Minister, the Commissioners might, in making regulations in respect of competitions, provide, amongst other matters, for "the confining of the competition to citizens of Ireland". It does not appear that any such regulations have been made. This Act has been repealed by the Public Service Management (Recruitment and Appointments) Act 2004, which confers responsibility for running competitions on the Public Appointments Service. Section 58 makes it plain that the Minister for Finance

49 Act No. 32 of 2003 http://www.oireachtas.ie/documents/bills28/acts/2003/a3203.pdf.
50 See n. 39, above.

is responsible for all matters relating to recruitment in the Civil Service, including "eligibility criteria".

Recruitment to *professional* posts (for example, engineers, accountants and lawyers) is fully open to nationals of the other EU Member States.

Recruitment to *administrative* posts is in principle open to nationals of the other EU and EEA Member States. However, there are certain posts in areas considered to be essential to the national interest (such as the diplomatic service and security posts) which are restricted to Irish nationals. There is no published list of such posts. However, when these jobs are advertised, it is specified that they are only open to Irish nationals. In relation to the Department of Foreign Affairs, all posts in the Irish Diplomatic Service (Third Secretary, Counsellor and Ambassador) which require the holding of a diplomatic passport are reserved for Irish citizens.[51] 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.

Language. Section 58 of the Public Service Management (Recruitment and Appointments) Act 2004 makes it clear that the Minister is responsible for all matters relating to recruitment in the Civil Service, including "the use or knowledge of the Irish language in the Civil Service or any part of it". Since all citizens have the right to conduct their business with Government through Irish or English, there have to be sufficient staff available in the Civil Service to provide a service to Irish speakers. In most open competitions, applicants invited to interview may, take an optional language test. Candidates who satisfy the Public Appointments Service that they are proficient in both Irish and English will be awarded extra marks which could result in a higher ranking for a competition.

In some cases, the terms of the competition may require a certain proficiency in the Irish language. For example, in a recent competition for the post of Principal Officer, the department circular provides that, "It is recognised that the performance of duties in certain posts in the Department of Community, Rural and Gaeltacht Affairs, the Department of Education and Science and the Public Appointments Service requires a competency in Irish. Those Departments/Offices may, therefore, as an exceptional arrangement, satisfy themselves as to the competence of any candidate due to be assigned to them to undertake such duties through the medium of Irish. If further appraisal of a candidate's competence in that respect is sought, it will be addressed by the Public Appointments Service on the basis of a test held specifically for this purpose".[52]

Similarly Section 13 (2) (e) of the Official Languages Act 2003 provides for the Irish language to become the working language in offices situated in the Gaeltacht areas within a certain timeframe to be agreed between the relevant public body and the Minister.

The Health Service

*Nationality***.** There are no nationality requirements for access to employment in the Health Service.

Irish Language. There is no general requirement that applicants for jobs in the Health Services speak Irish. However, all citizens have the right to conduct their business through Irish and, in order to ensure that there are sufficient staff available to provide a service to Irish-speakers, applicants invited to a competitive interview may have an assessment made of their ability to communicate in English and in Irish.

The Defence Forces

Nationality. Irish citizenship, or specific approval of the Minister for Defence, is required for recruitment to the commissioned officer ranks in the Irish Defence Forces.[53] Competitions to recruit commissioned officers having particular qualifications are generally open to applicants of any nationality. For example, where the Irish Defence forces seek to recruit qualified

51 See "Ireland" in Cross-Border Mobility of Public Sector Workers.

52 Circular 11/2007 Department of Finance http://www.finance.gov.ie/documents/circulars/circ11.2007.pdf

53 Section 41 of the Defence Act 1954.

medical practitioners, candidates from overseas will be eligible so long as the candidate has the necessary qualifications specified in the competition guidelines and the candidate is registered with the applicable professional body in Ireland.[54]

In order to enter the Defence Forces below the level of commissioned officer, a candidate for a cadetship must be either a citizen of Ireland, a convention refugee, an EEA national or be lawfully present in Ireland and have five years lawful residence in the State.[55] The requirement to have five years of lawful residence will be fulfilled if it can be shown that the candidate has been continually resident for at least one year prior to the closing date for applications and that during the eight years immediately preceding that period, have had a total period of residence in the State amounting to four years.

The Minister must be satisfied as to character for all appointments.

Irish Language. There is no statutory requirement for those seeking access to commissioned officer or other ranks to have Irish language qualifications. All members of the Defence Forces are to be instructed in giving and receiving, in the Irish language, such commands and directions as are necessitated by the routine tasks of their ranks and appointments.

Education Sector

Nationality. There are no nationality requirements for recruitment.

Language. Teachers trained in Ireland will possess Irish language qualifications, as this is a compulsory part of the training curriculum. In relation to teachers trained in another EU Member State, a distinction is drawn between those seeking appointment as teacher in mainstream national schools and those seeking appointment in second level schools.

The position for mainstream national schools, second level schools and universities is outlined below.

Mainstream national schools[56]

Teachers trained in another EU Member State, whose qualifications have been assessed and accepted by the Department of Education and Science, but who do not possess an appropriate Irish language qualification will be granted a five-year period of *provisional recognition* to teach in national schools. During this period these teachers will be required to work towards meeting the Department's Irish language requirements and must, where necessary, attend training courses to prepare for the Irish language examination, *Scrúdú Cáilíochta sa Ghaeilge* ("SCG").

To satisfy the Irish language requirements, applicants must pass the SCG and provide certification that they have resided in the *Gaeltacht* (an Irish-speaking area) while attending an approved three-week course or its aggregated equivalent.

The Teaching Council[57] has advised that, in recent months, it has began offering candidates an alternative means to acquire the required language skills for full recognition because it believed the provisions of a variety of means may be required to comply with the State's obligations under EU law. Candidates are being offered a choice between undertaking the SCG aptitude test or an 'adaptation period' of between 3-5 years where the candidate gains the requisite skills through a combination of on the job training, observation and Gaeltacht placements.

The Teaching Council has not formalised the requirements under the 'adaptation period'. It has, however, stressed that the adaptation period requirements must lead to a similar outcome as the SCG and is not a soft option for recognition.

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54 A South African doctor was recently commissioned as Captain in the Irish army on this basis (see The Irish Times " Military History: from Soweto to the Army", 8 March 2007).

55 Cadetship Competitions: Information and Rules Cadetships in the Defence Forces 2007 for school leavers, graduates and service personnel. http://www.military.ie/Cadetship2007.pdf.

56 See Department of Education and Science, Circular letter 25/00.

57 In accordance with the provisions of the Teaching Council Act, the Registration Council was dissolved with effect from 28 March 2006, the date on which the Teaching Council was established. The Teaching Council has taken over the role of teacher registration and the recognition of qualifications for the purposes of post-primary teaching.

Although teachers with provisional recognition may be appointed as permanent, temporary or substitute teachers, the period of employment may not exceed the period granted for provisional recognition. The basis for the requirement is that teachers in national schools should be qualified to teach the range of primary school subject through Irish. Where a teacher with provisional recognition is employed, the school must show that appropriate arrangements have been made to teach the Irish curriculum to the teacher's class: the Department of Education and Science has made it clear that "under no circumstances should such a class be deprived of competent Irish language tuition".

In September 2004, all current and past candidates for the SCG were granted a two-year extension to the normal five-year period and new applicants may request such an extension where they have failed to pass all the SCG modules within the five-year period. This was a once-off extension and since September 2006 only a normal five-year period is applicable.

Full recognition is granted to those teachers who have already satisfied the language and all other requirements. This currently applies to teachers who have successfully completed certain courses with Irish-language content in St. Mary's College, Belfast. Failure to satisfy the language requirements within the five-year period will lead to the person losing their provisional recognition status. The school is notified accordingly by the Department of Education and Science and should seek to replace that teacher with a qualified person. In an interim where the person continues to be employed they will be paid an unqualified teacher's rate of pay. The person is however permitted at any time to sit the SCG and achieve full recognition.

The above rules apply to "mainstream" national schools. A scheme of "restricted recognition" – designed to ensure that the teacher qualified under another jurisdiction cannot teach in a mainstream class – applies to certain categories of special schools and classes.

Second Level Schools

The requirement that all second level teachers should have passed the oral component of the *Ceard Teastas Gaeilge* – with teachers coming from other Member States allowed a period of three years after appointment to achieve this – was removed for most second level teachers in June 1999.[58] Teachers of Irish and those employed in schools in the Gaeltacht and where Irish is the medium of instruction continue to be required to be fully proficient in Irish. This change was seen as facilitating the mobility of teachers between the Republic and Northern Ireland, to the benefit of teachers and pupils and to the education systems in both jurisdictions.

Universities

A former Irish language requirement for posts in the National University of Ireland, Galway (formerly, University College Galway) has now been removed. The University College Galway (Amendment) Act 2006[59] which came into force on 22 February 2006, inserted a new Section 3 into the University College Galway Act 1929. Section 3 removes the requirement to appoint candidates competent in the Irish language and replaces it with an obligation to ensure that strategic development plans of the University contain a provision for the delivery of education through the medium of Irish. The President and governing authority of the University are obliged to ensure that this aim is implemented.

The Marine Sector

There is no Irish nationality condition for access to the posts of captain and first officer of an Irish-flagged ship.

58 See Minister's Press Release of 24 June 1999, reprinted in Department of Education and Science "Registration Council: Application for Recognition of Qualifications for the Purposes of registration as a Secondary Teacher".

59 Act No. 1 of 2006.

Police (An Garda Síochánà)
There is no formal nationality or residence requirement for entry to An Garda Síochána, the Irish police service. However, the requirement to hold a qualification in both Irish and English at Leaving Certificate level, or equivalent, had effectively limited entry to Irish citizens.

The position changed radically as a result of the Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2005[60] made in September 2005. The language requirement has been replaced with a requirement to hold a qualification in two languages, at least one of which is to be Irish or English.

A new nationality and residence condition has also been introduced. Entry will now be open to:

i. nationals of an EU Member State, other EEA State or the Swiss Confederation; and
ii. nationals of any other state who are lawfully present in Ireland and have five years lawful residence there.

In order to ensure that An Garda Síochána can deliver on its very strong commitment to delivering a service in Irish, all Garda recruits will be required to achieve an appropriate standard in Irish before becoming full members of the force and recruits who do not have an Irish-language qualification will undergo basic training in that language.

According to the Minister for Justice, Equality and Law Reform, the new changes will "open up entry to An Garda Síochána to persons in Ireland from all parts of the community and from all ethnic backgrounds. This is a hugely significant step which will help ensure that future intakes of recruits to An Garda Síochána reflect the composition of Irish society, to the benefit of the Force and the people it serves".

The Garda Síochána Act 2005 is the legal basis for the appointment of *reserve* members by the Garda Commissioner. The Garda Síochána (Reserve Members) Regulations 2006[61] which came into force on 1 August 2006 provides for appointment of reserve members by the Garda Commissioner. A reserve member of the police force is not remunerated though he/she will be reimbursed for expenses incurred. The eligibility requirements set out in Section 4 of the Regulations provide for both nationals and non-nationals who are legal residents of Ireland to be recruited on the basis of fulfilling the same conditions.

One pre-condition for eligibility relates to standards attained in second-level assessments and provides that the Minister shall determine whether *in his opinion* the assessment can be deemed commensurate with the Irish Leaving Certificate.

1.2 Irish Language Requirements

This has been addressed in 1.1., above.

1.3 Obligation to Participate in a Competition which gives Access to Training and then to a Post in the Public Sector (Burbaud)

In the *Burbaud* case, the Court of Justice decided that a Member State – *in casu* France – cannot oblige a Member State national who is fully qualified in another Member State to participate in a competition which is intended to recruit people for a training course the successful completion of which is a precondition for access to the employment concerned.

There is, in general, no such system in Ireland, so the question of the application of *Burbaud* does not generally arise.

However, the system for recruiting auditors in the Office of the Comptroller and Auditor General could be mentioned. Persons who have passed, or are due to pass, the first-stage examinations of a recognised accountancy body are eligible to compete for the post of Trainee Auditor, which will involve "on-the-job" training and funding, together with leave for professional training and examinations. Once training is completed, the Trainee Auditor will be eligible for promotion to Auditor. It is understood that there are no publicly adver-

60 S.I No. 560 of 2005.
61 S.I. No. 413 of 2006

tised positions for Auditors, so that a trained auditor, whether from Ireland or another Member State, will not be able to occupy a post as Auditor in the Office where he/she has not served as Trainee Auditor there.

1.4 Recognition of Diplomas[62]

The Public Appointments Service (formerly the Office of the Civil Service and Local Appointments Commissioners) operates a non-published procedure for the recognition of diplomas. When a copy of the diploma itself is provided, contact will be made with appropriate professional bodies and colleges and a decision will be taken after taking all factors into account. It appears that some attempt is made to ensure uniformity of treatment. In case of rejection, there is the possibility of an ex gratia administrative appeal.

There does not appear to have been any recourse to the courts in relation to a refusal to grant recognition. The lack of transparency and predictability may cause concern.

2. Equality of Treatment

2.1 Recognition of professional experience for access to the public sector (e.g., as a condition for participation in a recruitment procedure or for granting additional points within this procedure

General
Previous professional experience *in the public sector* may be taken into account for the purposes of awarding incremental credit where such experience is specified as relevant to a given post. This will largely be the case for competitions for certain technical and professional posts. It appears that, in general, recognition is not given for *private sector* experience, though credit for same may be given.

Recruitment to An Garda Síochána (Police force)
Section 52 of the Garda Síochána Act 2005[63] provides for the appointment of members of the Police Service of Northern Ireland (PSNI) to ranks in the Garda Siochána not below the rank of superintendent. Candidates are to compete in a merit-based selection procedure with other applicants for appointment to the rank concerned. It is provided that, in determining the eligibility of a member of the PSNI to apply for appointment, appropriate recognition shall be given to the rank, experience and qualifications that would be required for appointment to an equivalent rank in the PSNI.

2.2 Recognition of professional experience for the purpose of determining the professional advantages

Incremental credit for previous public sector service is given at entry level and will apply to the salary point awarded on recruitment: it will have no bearing on the order of merit established under the selection process. The officer concerned must apply for credit and provide proof of relevant previous service.

The question of incremental credit for previous service has also been addressed in agreements between the Minister for Finance and trade unions. For example, in April 2006, the Minister of Finance agreed to provide for the granting of incremental credit for previous service for entry levels at Tax Officer and Higher Tax Officer grades represented by the Irish Municipal Public and Civil Trade Union (IMPACT).[64] This Agreement is effective from 1 October 2002. Staff with prior qualifying service promoted between 1 May 2000 and 30 September 2002 inclusive may have their notional starting pay on promotion recalculated to take account of credit: however, actual pay should only be revised with effect from 1 October

62 See, generally, "Ireland" in Cross-Border Mobility of Public Sector Workers.
63 No. 20 of 2005. (http://www.oireachtas.ie/documents/bills28/acts/2005/2005.pdf .
64 http://www.finance.gov.ie/viewdoc.asp?DocID=3882&CatID=28&StartDate=01+January+2006&m.

2002. This measure, which applies only to adjust pay and does not affect seniority, applies to all Tax Officers, employed in a "public service body" as defined in Section 1 of the Public Service Superannuation (Miscellaneous Provisions) Act 2004 (and a number of other specified public bodies) or "in an equivalent body in the EU Member States".[65] It is stated that experience in the Public Service in Ireland or in the EU Member States will have to be relevant to the work of the grade. The Government Department concerned will check with the previous employer in Ireland or another EU Member State whether previous service is relevant and the Department of Finance is to make the final decision on new cases. There are a number of other Agreements to the same effect relating to other posts in the Civil Service.

65 It is stated that employment in the public service in EFTA countries and the EU Commission will be considered as relevant in this regard.

CHAPTER V. MEMBERS OF THE FAMILY

1. Residence rights

Information on the transposition of Directive 2004/38

Directive 2004/38/EC was initially implemented by the European Communities (Free Movement of Persons) Regulations 2006, made in April 2006. The European Communities (Free Movement of Workers) (No. 2) Regulations 2006 (the 2006 Regulations) were brought into force to update the earlier Regulations in order to provide for the free movement rights of Bulgarian and Romanian citizens upon accession.

A number of specific points may be made here:

- Regulation 3(2) provides that only family members lawfully resident in another Member State come within the scope of the Regulations. This restriction is not contained in Article 3 of the Directive but the Minister for Justice, Equality and Law Reform has stated that it[66] was inserted to take account of the ECJ ruling in the *Akrich* case;
- The Regulations refer to family members defined in Article 2(2) of the Directive as "qualifying family members" and to those covered in Article 3(2) of the Directive as "permitted family members";
- Regulation 7(1), which implements Article 9 of the Directive (administrative formalities for family members who are not nationals of a Member State), provides that such a family member "who has been resident in the State for not less than 3 months shall apply to the Minister for a residence card". This provision satisfies the requirements of Article 9(2). However, it also gives the impression that a residence card cannot be applied for earlier: Article 9(1) of the Directive, in referring to a "planned period" of residence of more than three months, seems to imply that an application may be made earlier;
  - Under Regulation 7(2), the issue of the residence card is subject to the Minister being "satisfied that it is appropriate to do so". This suggests an element of subjective appraisal in the process which is not foreseen in the Directive; and
  - There is no provision that the possession of residence cards issued by other Member States exempts family members from the visa requirement (Regulations 4(3)(a) and 5(3) require the family member to be in possession of a valid Irish visa as a condition to being granted permission to enter the State.

Schedule 2 to Regulation 7(1)(b) sets out the particulars to be contained in an application for a residence card by a family member of an EU national who is not a national of a Member State.

In relation to the Certificate of Residence, in May 2006 the Minister for Justice, Equality and Law Reform introduced a fee for the issue of Certificates of Registration or registration cards to non-EEA nationals. The Immigration Act 2004 (Registration Certificate Fee) Regulations 2006[67] provide for exemptions from payment of the fee. There are six categories of persons who are exempt from payment of the fee including family members/dependants of EU nationals who apply for a residence permit under the 2006 Regulations.

Practice of Member State when issuing visas to third-country family members

In November 2005, the Department of Justice, Equality and Law Reform issued lengthy guidelines on documentation required for applying for a visa.[68] These guidelines set out the minimum documentation required with all visa applications and specify additional requirements for particular categories of visas.

In relation to visa applications generally, it is provided, amongst other matters, that:

66 Dáil Debates 13 June 2006 p. 970.
67 S.I. No. 253 of 2006.
68 http://www.justice.ie/80256E01003A21A5/vWeb/flJUSQ678E4G-en/$File/VisaAppDocs.pdf.

- the fully completed form must be signed by the applicant, save where he/she is under 18 where the parent's may sign on the applicant's behalf;
- all documents submitted must be in English, or where in another language, a notarised translation must accompany the original document;
- at the time of the application, the passport must be valid for 6 months after the date on which it is proposed to leave Ireland. For long-term stays, it is advised that the passport be valid for at least 12 months;
- all visa applicants must be able to show evidence that they can support themselves during their stay in Ireland without recourse to public funds or resources. A detailed bank statement showing sufficient funds – and covering the immediate 6-month period prior to submitting the application should be submitted. Lump-sum lodgements made in the run-up to the application are not taken into account; and
- details should be included of any other family members presently in Ireland, or any other EU State.

In relation to the "Spouse of Irish/EU Visa", which covers spouses of Irish nationals and nationals of other EU Member States, the additional requirements are as follows:
- a fully completed and signed application form;
- a passport valid for at least 12 months;
- a clear copy of the other spouse's passport;
- a marriage certificate;
- for recent marriages, and marriages where the couple have not yet resided together, the applicant is asked to give a full account of the relationship history – when and where the couple met and evidence of this such a visas, entry/exit stamps on passport of Irish/EU national;
- evidence of Irish/EU national's employment in Ireland (P60 form, payslips);
- if other spouse is not in employment, details of how the applicant intends to support himself /herself; and
- accommodation details.

The guidelines also contain further information relating to visa decisions, rights of appeal and arrival in the State.

Application of Akrich Judgment

In the *Akrich* case (C-109/01), the European Court of Justice ruled, amongst other matters, that in order to be able to benefit from the rights provided for in Article 10 of Regulation (EEC) No. 1612/68 on freedom of workers within the Community, a national of a non-Member State married to a citizen of the Union must be lawfully resident in a Member State when he/she moves to another Member State to which the Union citizen is migrating or has migrated.

The 2006 Regulations take account of this decision by providing in Regulation 3 (2) that "these Regulations shall not apply to a family member unless the family member is lawfully resident in another Member State".

(It is clear that the January 2007 ruling of the European Court of Justice in the *Jia* Case (Case C-1/05) limiting the scope of the *Akrich* ruling means that Regulation 3(2) will need to be deleted/amended. This will be considered further in the 2007 Report.)

2. Access to work

Regulation 18 of the European Communities (Free Movement of Workers) (No. 2) Regulations 2006 sets out the entitlements of persons exercising their free movement rights including the right to work. Regulation 18(1)(b) provides that persons coming within the scope of the Regulations - which include qualifying and permitted family members - shall be entitled 'without prejudice to any restriction on that entitlement contained in the Employment Per-

mits Acts 2003–2006, to seek and enter employment in the State in the like manner and to the like extent in all respects as Irish citizens'.

EU nationals are removed from the scope of the Employment Permits Acts by Section 2(10)(c). This provides that the ban on a non-national entering employment except in accordance with an employment permit does not apply to a person "who is entitled to enter the State and to be in employment in the State pursuant to the Treaties governing the European Communities (within the meaning of the European Communities Acts 1972-2003)".

There is an exception to this general exemption for EU nationals, in so far as under transitional measures in place following the accession of Romania and Bulgaria, nationals of these Member States continue to come within the scope of the Employment Permits Acts 2003 – 2006 which regulate applications, grants and renewals of employment permits (See Chapter VIII).

For more information on the Irish employment permits regime see Chapter VIII.

Access to education (study grants)

See the discussion in relation to students in Chapter XI, below.

Other issues concerning equal treatment (social and tax advantages)

Habitual residence condition

Issues in relation to the habitual residence condition are discussed below in Chapter X.

CHAPTER VI. RELEVANCE, INFLUENCE, FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGMENTS

The Chen *Case (Case C-200/02) – Free Movement Rights*

In the *Chen* case, the European Court of Justice addressed the question of the free movement rights of a child born of Chinese parents in Northern Ireland (and hence entitled to *ius soli* Irish citizenship) and her Chinese-national mother and made it clear that Irish citizen children born in the North and their carer parents could, where self-sufficient, enjoy rights of free movement in the UK.

In May 2004, Advocate General Tizzano had delivered his Opinion in the *Chen* case, concluding that a child of non-national parents born in Northern Ireland and hence entitled to Irish citizenship and enjoying, through her parents, sufficient resources to ensure that she would not become a burden on the finances of the host State, was entitled as a matter of Community law to reside in Northern Ireland. The need to give that right useful effect, as well as the prohibition of discrimination on grounds of nationality in Article 12 of the EC Treaty, entitled the non-national mother to a long-term residence permit. It was, to say the least, potentially embarrassing to the Irish Government to retain a citizenship regime, with such Community law consequences in another Member State. Indeed, as the Advocate General pointed out: "[i]n order to avoid such situations, the criterion [used by the Irish legislation for granting nationality] could have been moderated by the addition of a condition of settled residence of the parent within the territory of Ireland".

Such concerns, which many thought exaggerated or misplaced, resulted in an amendment to the Constitution in 2004 removing the *constitutional* entitlement to citizenship of those born in the island of Ireland where neither parent is an Irish citizen or entitled to be so. In June 2004, a Bill to amend Article 9 of the Constitution was passed by the people in a referendum. The resulting Twenty-Seventh Amendment of the Constitution Act[69] was designed to remove the *constitutional* right to entitlement to Irish citizenship of persons born in the island of Ireland born after the date of enactment of the enactment of the Act who do not have, at the time of birth, at least one parent who is an Irish citizen or entitled to be an Irish citizen. Such persons are to be entitled to Irish citizenship only as provided by law.

The Irish Nationality and Citizenship Act 2004,[70] coming into effect on 1 January 2005, has introduced a residence requirement to be satisfied by certain non-national parents before children born in the island of Ireland can benefit from ius soli citizenship. This has effectively removed the opportunity for persons in the position of Ms Chen and her mother to avail of free movement rights under Community law.

The Trojani *Case (C-456/02) – Residence Rights of Union Citizens*

In its judgment in the *Trojani* case, the Court of Justice held that a Union citizen who was not able to avail of rights under the EC Treaty provisions on free movement, nonetheless had a right of residence under Article 18(1) of the EC Treaty "where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit", and was, as a result, entitled to rely on Article 12 of the EC Treaty.

Union citizens lawfully residing in the State do not require a residence permit, so it is unlikely that the *Trojani* rule would apply insofar as it is predicated on the possession of a residence permit. I am not aware of any cases where a Union citizen from another Member State has claimed rights under Article 12 on the basis of lawful residence in Ireland for a certain time. Such cases are unlikely to arise, since most rights are available on the basis of residence and the period in question is likely to exceed the period required by the habitual residence condition (see Chapter IX, below). The issue raised in *Trojani* does not appear to have been addressed in legislation or administrative practice and it was not considered in

69 http://www.oireachtas.ie/documents/bills28/acts/2004/a27th04.pdf.
70 No. 38 of 2004 (http://www.oireachtas.ie/documents/bills28/acts/2004/a3804.pdf).

the context of changes to the habitual residence regime designed to ensure compliance with EC rules.

The Ioannidis *Case (C-258/04) – Tideover Allowance*

The circumstances arising in the *Ioannidis* case do not appear to obtain in the Irish case. There is no published practice directly on this. It should be noted that officers deciding on a range of social welfare payments must, according to published guidelines, pay due regard to EU law, with this taking precedence over national law (see Chapter X, below). However, the Union citizens concerned are not made aware of their specific rights in this regard.

The Collins *Case (C-138/02) – Job-Seeker's Allowance*

In the *Collins* judgment the Court of Justice established that it could be regarded as legitimate for a Member State to grant a job-seeker's allowance only after it is possible to establish that a genuine link exists between the job-seeker and the host Member State's employment market. The existence of such a link could be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State.

A residence requirement is, in principle, appropriate to ensure such a link, provided it is proportionate. Specifically (a) its application by the national authorities must rest on clear criteria known in advance; and (b) provision must be made for the possibility of a means of redress of a judicial nature.

In any event, any residence requirement must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.

The Court specifically ruled as follows:

> "The right to equal treatment laid down in … Article 39(2) EC …, read in conjunction with … Articles 12 EC and 17 EC …, does not preclude national legislation which makes entitlement to a jobseeker's 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 person concerned and proportionate to the legitimate aim of the national provisions."

The *Collins* judgment has been used to justify the introduction of a habitual residence requirement for a variety of social assistance payments.

It is worth noting that the Irish habitual residence conditions (discussed in Chapter IX below) restricts access to a far wider range of payments than a jobseeker's allowance, and in December 2004, the European Commission issued a Letter of Formal Notice indicating that it was concerned about the compatibility of the habitual residence condition with Ireland's obligations under Regulations 1408/71 and 1612/68, as well as the potential indirectly discriminatory effect on grounds of nationality and the direct discrimination between applicants from within the Common Travel Area as opposed to other Member States. In April 2006 the Commission decided not to pursue infringement proceedings against Ireland having been satisfied that the decision-making process underpinning the habitual residence condition is now in compliance with European jurisprudence.[71]

Van Lent *(Case C-232/01) &* Commission v. Denmark *(Case C-464/02) – Obligations re Registration of Vehicles*

In Case C-232/01 *van Lent*, the Court of Justice ruled that Article 39 of the EC Treaty precluded national rules of a Member State which prohibited a worker who was domiciled in that Member State from using on its territory a vehicle registered in another neighbouring

71 Department of Social and Family Affairs, Internal Review of the Operation of the Habitual Residence Condition, July 2006. http://www.welfare.ie/publications/hrcreview06.pdf.

State, belonging to a leasing company established in that second Member State, and made available to the worker by his employer who is also established in the second Member State.

In *Commission v. Denmark*, the Court held that Denmark had failed to fulfil its obligations under Article 39 of the EC Treaty insofar as its legislation and administrative practice:

a) did not allow workers resident in Denmark and employed in another Member State in work which is not their principal employment to use for business or private purposes a company vehicle registered in that other Member State where the employer is established; and
b) allowed employees resident in Denmark and employed in another Member State to use for business purposes, or business and private purposes a company vehicle registered in that other Member State in which the employer has a registered office or principal establishment, the vehicle neither being intended to be essentially used in Denmark on a permanent basis nor being actually so used, only subject to the condition that the employment with that employer is their main employment and that a tax is paid for that purpose.

The position in Ireland as regards vehicle registration requirements for company vehicles registered in another Member State (ordinarily the UK) used by workers resident in Ireland is as follows:

1. All motor vehicles in the State are required to be registered and are subject to an excise duty – Vehicle Registration Tax (VRT);[72]
2. The legal basis for a *temporary* exemption from registration is provided in Section 135 of the Finance Act 1992. This states:
   "A vehicle which is temporarily brought into the State may be exempted by the Commissioners from the requirement to be registered, in such manner and subject to such conditions, restrictions and limitations as the Minister may prescribe by regulations … if the vehicle is:
   a) brought into the State by a person established outside the State for his private or business use;
   …"
3. 1993 Ministerial Regulations prescribe the criteria for eligibility for exemption from the requirement to be registered with the Revenue Commissioners where a vehicle is temporarily brought into the State.[73] It is stated, in Regulation 5(1), that:
   "The exemption under Section 135(a) of the Act shall be granted for a period not exceeding 12 months from the date upon which the vehicle concerned was brought into the State or such longer period as the Commissioners in their discretion may allow in any particular case, if the vehicle:
   a) is owned by or registered in the name of a person established outside the State,
   b) is not disposed of or hired out in the State or lent to a person established in the State, and
   c) whilst in the State, is not driven by a person established in the State save with the permission of the Commissioners."
4. According to a leaflet published by the Revenue Commissioners,[74] a State resident who is employed by an employer established in another Member State may, on application to the Revenue Commissioners, be approved to use a Category A vehicle (cars, minibuses and other smaller motor vehicles) or a motor cycle registered in another Member State (either owned or leased by the employer) for business/private use in the State. However, this vehicle must be used *primarily* in the other Member State. (Application forms for this temporary exemption are available from Vehicle Registration Offices).

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72 Section 131 and 132 of the Finance Act 1992 (No. 9 of 1992). (http://www.irishstatutebook.ie/ZZA9Y1992.html).

73 Temporary Exemption from Registration of Vehicles Regulations, 1993 (SI No. 60 of 1993). (http://www.irishstatutebook.ie/ZZSI60Y1993.html).

74 Vehicle Registration Tax: Foreign Registered Vehicles Temporary Exemptions – VRT 2 (as amended 28 June 2006) (http://www.revenue.ie/leaflets/vrt2.htm).

As far as concerns the application of the *van Lent* ruling, there is no outright prohibition on a State resident employed in another Member State from using a motor vehicle registered by the employer in that Member State.

It is clear from the *Denmark* judgment that the Member State of the employee's residence would be entitled to insist on registration and payment of tax where the vehicle is to be used permanently in that Member State. In this context, it seems to be in principle acceptable that the exemption in Ireland applies only where the vehicle is temporarily brought into the State.

However, the requirement that the vehicle be used "primarily" in the other Member State does seem to suggest that the exemption will not be applicable where the employee is not using the vehicle mainly in the other Member State, which could be the case if the employment in the other Member State is not the employee's *principal* employment (this clearly raises the question whether the Irish rules comply with the *Denmark* judgment. Further possible difficulties are that the system is predicated on the discretion of the Revenue Commissioners and that the relevant employees must obtain their approval.

National Quotas and Impact of Bosman, Kolpak *and* Simutenkov *rulings*

There is no rule of the Football Association of Ireland (FAI) which limits the extent to which non-national players may take part in official matches. The *Bosman*, *Kolpak* and *Simutenkov* rulings as they relate to national quotas thus appear to be followed in Ireland.

It should be noted that the FAI endorses an all embracing anti-discrimination policy. Rules 74(c) states that:

> "Equality of opportunity at the FAI means that in all our activities we shall not discriminate or in any way treat anyone less favourably, on grounds of gender, sexual orientation, race, nationality, ethnic origin, colour, religion or disability".

This is specifically to include "selection for representative teams".

I am not aware of any difficulties relating to the application of the *Bosman* line of jurisprudence to other areas of sporting activity. It should perhaps be noted that, in the area of Gaelic sports, the question does not arise since these activities are reserved to amateurs: however, even here, there is no rule formally limiting access by non-national players.

CHAPTER VII. LEGISLATION WITH REPERCUSSIONS FOR THE FREE MOVEMENT OF WORKERS

Scheme for an Immigration, Residence and Protection Bill 200675

In September 2006, the Government published a scheme for the forthcoming Immigration, Residence and Protection Bill which will review, amend, consolidate and enhance the current body of immigration legislation, which dates from the Aliens Act 1935, and manage the entry and residence of all categories of foreign national. The Scheme is a set of instructions to Parliamentary Counsel to draft the text of the Bill. It is set out in several parts including a Preamble, General Principles of Immigration Policy, Visas, Entry into the State, Residence Permits and Registration Requirements, Removal from the State and Protection.
The Immigration, Residence and Protection Bill based on the above scheme was presented in April 2007, but work on this was suspended as a result of the May General Election. The Bill/Act will be addressed in more detail in the 2007 Report.

Economic Migration

Government Policy

The approach of the Irish Government to economic migration was addressed by the Minister for Enterprise, Trade and Employment upon the launch of the new employment permit arrangements in January 2007. While economic immigration is not a substitute for up-skilling and training the resident population, migrant workers are an essential component in moving the economy to a position where it is both knowledge-based and innovation-driven.

The policy of the Government is that the potential for EEA nationals to fill jobs in sectors where skills shortages have been identified must be maximised and the new employment permits regime will be used for attracting those high level skills which are strategically vital to the development of the economy, and cannot be sourced from within the EEA. "The fact that our employment permits arrangements will be based on job offers in skill shortage areas, rather than on unwieldy quota or points systems, will mean that they will be both responsive and efficient in responding to strategic high skill shortages as they emerge."[76]

The Employment Permits Acts 2003 - 2006

On 1 February 2007, the Employment Permits Act 2006[77] came into force. This Act codifies into law previous administrative practices and visa schemes, which supported the work permit system. The terms 'employment permit' in the new Act covers what were formerly called work permits, working visas and visa authorisations.

The 2006 Act provides for a new employment permits system involving the establishment of a Green Card system for occupations where there are skills shortages, a re-established Intra-Company Transfer Scheme for temporary trans-national management transfers and a Work Permit Scheme.

The Act also contains a number of important new protections for migrant employees. Employment permits will be granted to the employee rather than to the employer, and the employee may now apply for a permit directly. The permit will contain a statement of rights and entitlements of the migrant worker, including the right to change employment by obtaining a permit for another employer. Employers will be prohibited from deducting ex-

75 Scheme for an Immigration, Residence and Protection Bill 2006 http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6TDJ3V-en/$File/Scheme.pdf

76 Address by Minister for Enterprise, Trade and Employment Mr. Micheál Martin, T.D. at the launch of the New Employment Permits Arrangements including the Green Card Scheme 24 January 2007: http:// www.entemp.ie/press/2007/20070124a.htm

77 Act No. 16 of 2006

penses associated with recruitment from pay and from retaining personal documents belonging to the employee. Breaches of the new legislation will attract significant fines and, in the case of individuals, prison sentences.

The Act also contains specific provisions to guarantee that non-EEA workers are informed of their employment rights.

The employment permit system will be administered by the Department of Enterprise, Trade and Employment.

With regard to the right to work of family members who come to Ireland on the basis of family reunification, since January 2007 the Spousal Work Permits Scheme introduced in February 2004 has been extended to enable the spouse and dependents (under the age of 18) of all categories of employment permit holders to obtain a work permit under its less onerous terms.

Provisions ensuring preference for EEA workers

The Employment Permits Act 2006 also contains a number of provisions designed to ensure that companies seek to recruit from within the EU before considering third-country applicants.

Section 10 of the 2006 Act provides that where an employer submits an application for an employment permit, the job vacancy must be advertised with the FÁS/EURES employment network and in local and national newspapers for three days to ensure that an Irish, EEA or Swiss national cannot be found to fill the vacancy. Evidence of this so-called labour market test must be submitted with the application to the Department of Enterprise, Trade and Employment.

Similarly, the application must confirm that at the time of the application, more than 50% of the employees of the company are Irish, EU/EEA or Swiss nationals. This provision both complies with the EU obligation to give preference to EU/EEA nationals, as well as ensuring that third country workers do not displace jobs that could be filled by Irish and other EEA workers and their families.

With regard to Romanian and Bulgarian nationals, though transitional measures require them to obtain an employment permit to work in Ireland, under Section 2(11) of the 2003-2006 Acts, the Minister of Enterprise, Trade and Employment is to give preference to applications for employment permits for Romanian and Bulgarian nationals over third-country nationals when determining which applications for employment permits should be granted.

Employment of non-EEA national students

From April 2000 until April 2005, non-EEA nationals with permission to study in the State were permitted to take up casual employment. This liberal policy was abused by some education providers who offered courses to such nationals as a cover for enabling access to the Irish labour market. Since April 2005, only full-time non-EEA students in courses lasting at least one year in duration and leading to a recognised qualification are permitted to undertake up to 20 hours casual work per week during term-time and up to 40 hours per week during holiday periods.[78]

The Department of Education and Science has established a Register of Programmes Recognised by the Minister for Education and Science for purposes of student access to employment.[79]

The Department of Justice, Equality and Law Reform has put in place a Scheme to allow recent graduates a limited period of leave to remain to enable them to seek

78 Department of Justice, Equality and Law Reform: Student Visa Requirements 24 January 2007 http://www.justice.ie/80256E01003A21A5/vWeb/flJUSQ6XTML6-en/$File/StudentVisa24thJan2007.pdf

79 http://www.education.ie/servlet/blobservlet/int_non_eea_information_note.doc

employment.[80] Similarly if students have been offered a job prior to completing their degree they may also apply for a permit.

The new Social Partnership arrangements, *Towards 2016*, contain a commitment that the employment of non-EEA students should be the subject of an employment permit application. The Department of Enterprise, Trade and Employment is curerently engaged in drawing up a scheme to meet this commitment.[81]

Application of Employee Protection Legislation

The Current Position

Irish law endorses the principle of non-discrimination in relation to the *treatment* of workers, whether they come from Ireland, the old 15 EU Member States, the 12 new Member States, the other EEA Member States or from third countries.

As explained above, the Employment Permits Acts 2003-2006 provides for differential treatment in relation to entry for the purposes of employment, where a broad distinction may be drawn between privileged EU/EEA nationals, privileged third-country nationals (including Turkish workers) and a residual class of third-country nationals. However while differential treatment exists in relation to access, once a person is employed in the State, there should be equality in treatment as regards pay and other conditions of employment. Reference should be made to Section 20 of the Protection of Employees (Part-Time Work) Act 2001 outlined in Chapter III, which makes it clear that the full range of employee protection legislation thus formally applies to foreign workers, posted or otherwise, and irrespective of origin.

Over the course of 2006, there have been many more examples of alleged exploitation and there is continuing concern that there is a "race to the bottom" in relation to employee protection rights and consequent job displacement. The majority of reported cases of alleged exploitation have occurred in the construction sector, where it has been alleged that migrant EEA/non-EEA workers have been paid only 30-50% of the industry pay rate.

It is apparent that, even in the absence of confirmed facts, there is an issue with the breach and circumvention of equality rules by certain employers. A positive spin-off from the media spotlight on such cases of exploitation is that other foreign national workers are becoming aware of their employment rights. Furthermore non-governmental organisations and trade unions have invested heavily in increasing awareness in an attempt to decrease their vulnerability to such treatment. Employment protection and job displacement were key issues throughout the course of negotiations for a new Social Partnership Agreement in 2006.

Family Reunification

The Department of Justice, Equality and Law Reform issued guidelines in January 2007 entitled "Family Reunification for Workers", which offer guidance on the visa application procedures for the spouse and dependant unmarried children of non-EEA nationals who have valid work permits/work visas and fulfil certain other conditions.[82] In applying for a visa for the purposes of family reunification, persons must be able to show that:

- They are the spouse of a "qualifying sponsor" whose marriage is subsisting on the date of the application; or
- They are the dependant unmarried child of the sponsor under 18 years; and
- The qualifying sponsor fulfils the minimum income requirement where relevant; and
- They have private medical insurance; and

80 Department of Enterprise, Trade and Employment , Employment Permits Arrangements: Note on Graduate Scheme January 2007 http://www.entemp.ie/publications/labour/2007/guidegraduate.pdf

81 Dail Oireachtas Debates, 31 January 2007, p. 163 & http://www.entemp.ie/press/2007/20070124a.htm

82 http://www.justice.ie/80256E01003A21A5/vWeb/flJUSQ6XTNHR-en/$File/FamilyReunif24thJan2007.pdf

- They must have a passport valid for at least 12 months from the date of receipt of the application.

The definition of 'qualifying sponsor' varies in accordance with each type and nature of employment permit.

Ireland has not signed up to Council Directive 2003/86/EC on the right to family reunification.

The National Economic and Social Council published a detailed report entitled *Migration Policy* in September 2006.[83] The report notes that in the experience of other EU countries, an inflow of third-country nationals for the purposes of work is followed later by substantial inflows of third-country nationals for the purposes of family reunification. The Council notes that currently there are 'significant anomalies, administrative delays and inconsistencies in how people are treated' and that in future years family reunification is likely to be the single largest channel through which non-EEA nationals will enter Ireland. The report also discusses the complexity of finding a balance between competing interests and contrasts the position of non-EEA nationals in Irish law with the rights of EU nationals to be reunited with their family members.

The Social Partnership Agreement 2006-2015

In the context of Social Partnership, it has been recognised that there is a need to strengthen employment protection measures, to improve inspection and enforcement systems, to focus on the position of vulnerable workers from abroad and thereby "to secure an appropriate balance between employment protection and labour market flexibility".

Towards 2016, the Ten-Year Framework Social Partnership Agreement 2006-2015,[84] addresses these concerns in some detail. In summary,

> "A major package of measures has been agreed by the parties …. Including the establishment of a new statutory Office dedicated to employment rights compliance; a trebling in the number of Labour Inspectors; greater coordination among organisations concerned with compliance; new requirements in respect of record-keeping; enhanced employment rights activity; the introduction of a new and more user friendly system of employment rights compliance; increased resourcing of the system; and higher penalties for non-compliance with employment law."[85]

IOM Study on Migration

In September 2006, the International Organisation for Migration published a report for the National Economic and Social Council of Ireland called *Managing Migration in Ireland: A Social and Economic Analysis*.[86] The report examines the social and economic effects of recent immigration to Ireland and recommends how migration can be managed more effectively to minimise the associated costs and enhance the benefits for the State as a whole.

Integration Policy

The Department of Justice, Equality and Law Reform is finalising a framework for the promotion and coordination of social and organisational measures across Government Departments to facilitate the acceptance of lawful immigrants into Irish economic, cultural and

83 National Economic and Social Council, *Migration Policy*, September 2006 http://www.entemp.ie/trade/marketaccess/singlemarket/06serv638a.pdf

84 Towards 2016: Ten-Year Social Partnership Agreement 2006-2015, June 2006. http://www. taoiseach.gov.ie/attached_files/Towards2016PartnershipAgreement.pdf.

85 Paragraph 12.3.

86 International Organisation for Migration (A report for the National Economic and Social Council), *Managing Migration in Ireland: A Social and Economic Analysis*, No. 116, September 2006. http://www.entemp.ie/trade/marketaccess/singlemarket/06serv638.pdf

social life. This strategy will be pursued in close conjunction with the National Action Plan against Racism (NAPR).

In 2006, the Minister for Justice, Equality and Law Reform established a Fund of €5 million to support integration work. The general principles of an application for funding must be that the proposed measures:

- Facilitate and support access by immigrants to mainstream provision and enhance their participation in society generally;
- Avoid duplication with existing projects and services; and
- Reflect the basic principles of integration as set out by the Council of the European Union.[87]

A total of €2 million has been allocated to local partnerships working on locally-based initiatives and a further €1 million to national and regional NGOs working in the relevant area. A further € 0.9 million is being used to accelerate the implementation of the NAPR.

Recent Legal Literature

Compton, A. & O'Kelly, E., 'Overview of Employment Permits Position', (2006) 3 (3) *Irish Employment Law Journal*, 92: Overview of employment permits law and administrative practices in force at August 2006. This article explores the impact the Employment Permits Act 2006 is likely to have on the old employment permits regime.

Handoll, J., 'Horns of a Dilemma? Ireland, the EU and the Treatment of Migrant Workers', (2006) 100(4) *Gazette of the Law Society of Ireland* 60. Discusses the application of the equality principle to the conditions of work of migrant workers and outlines attempts to halt "the race to the bottom".

Handoll, J., 'Ireland', in: Rainer Bauböck, Eva Ersbøll, Kees Groenendijk & Harald Waldrauch (eds.), *Acquisition and Loss of Nationality. Policies and Trends in 15 European States*, vol. 1: Comparative Analyses, vol. 2: Country Analyses, Amsterdam University Press, IMISCOE series, 2006. A recent comprehensive overview of Irish nationality law taking into account the 2004 Act.

Quinn, E. & O'Connell, P.J., *Conditions of Entry and Residence of Third Country Highly-Skilled Workers in Ireland*, Economic & Social Research Institute Report, February 2007.[88] This Report outlines the basis for the skills based economic migration policy and explains the employment permit system that gives expression to this policy. It also sets out the rights and obligations of third country highly skilled nationals including family reunification and the right of family members to work. The Report evaluates the effectiveness of the procedures for the admission of third country highly skilled nationals and offers an analysis of the effectiveness of the labour migration policy and the necessity for adequate protection against exploitation.

Quinn, E. & Hughes, G., *Illegally Resident Third-Country Nationals in Ireland: State Approaches towards their Solution*, ESRI/EMN study financed by the European Commission DG Justice, Freedom and Security and Department of Justice, Equality and Law Reform, Ireland.

Immigrant Council of Ireland, *Family Matters: Experiences of Family Reunification in Ireland*, Dublin, 2006. A critical analysis of Irish Government policy and procedure on family reunification, documenting the experiences of those who have sought reunification and making recommendations for change.

87 http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6U9G9J-en/$File/GuidelinesPartner.pdf.
88 http://www.esri.ie/UserFiles/publications/20070226102534/BKMNEXT089.pdf

CHAPTER VIII. EU ENLARGEMENT

EU-8: No Transitional Measures

General

In 2003, Ireland decided to allow the nationals of all eight of the acceding Member States subject to the transitional regime[89] access to the labour market from the date of their accession in May 2004. The Employment Permits Act 2003,[90] which was designed to tighten-up the rules on access to employment for non-nationals, provides that the requirements for employment permits will not apply to nationals of the acceding Member States after enlargement.

The Employment Permits Act 2003 contains a mechanism in Section 3 (3) to enable the Minister for Enterprise, Trade and Employment to reintroduce, by way of Statutory Order, the requirement of an employment permit for nationals of these Member States, should the labour market experience a disturbance. This action can only be taken over the duration of the transitional period set out in the Accession Treaty, which expires at the very latest in 2011.

The large number of migrants from the eight Member States and widespread reports of low wages, exploitation and job displacement, led to calls in 2005/2006 for the work permit system to be reintroduced. An Irish Times/TNS MRBI poll in January 2006[91] showed a significant majority of those polled in favour of introducing work permits for nationals of the new Member States. This has been firmly resisted by the Irish Government who have repeatedly praised the contribution such persons have made to the social and economic fabric of Ireland.[92] Similarly the European Commission, in its report on impact of the transitional arrangements, pointed to the liberalised Irish regime as a model to be followed by the Member States that have hitherto imposed restrictions.[93]

Concerns about job displacement/exploitation

The concerns of trade unions and others regarding job displacement and exploitation on the back of mass immigration from the new Member States have been addressed in the context of the Social Partnership Agreement 2006-2015, *Towards 2016*. Government initiatives to tackle such exploitation and guarantee employment rights compliance - which apply to workers from old and new Member States as well as to third-country nationals - are more generally described in Chapter VII.

The majority of cases of reported exploitation of nationals of the eight Member States concerned have occurred in the construction and agricultural sectors. Reported examples include:

- The Cork Building Group (CBG) has evidence that overseas workers working on building projects in County Cork are paid an average of €5-8 an hour for up to 75-hour weeks where the industry pay rate is set at €16.87 by the Construction Industry Federation. CBG claims that this has led to the displacement of 300 skilled workers who have lost their jobs to cheaper migrant labour;
- Polish workers at the ESB power plant in Moneypoint were receiving less than the minimum wage and at €5.20 an hour, less than a third of the industry pay rate, from their employer a Polish owned subcontractor on the site;
- Similarly in the mushroom sector, there are reports of workers being paid at rates of €2.50 an hour (less than a third of the minimum rate of pay); workers becoming ill after

89 That is, the acceding Member States save for Malta and Cyprus.
90 Act No. 7 of 2003.
91 The Irish Times, 78% want permit system for EU migrants, 23 January 2006.
92 Dail Statement.
93 http://ec.europa.eu/employment_social/news/2006/feb/report_en.pdf .

being exposed to chemicals sprayed on mushrooms; workers labouring in excess of 16-hour days with no overtime provisions; and workers expected to be on call around the clock, seven days a week.[94] In one such case, seventeen mushroom pickers from Latvia and Lithuania won an unfair dismissal action following dismissal for both membership of a trade union and for attempts to assert their employment rights. The Employment Appeals Tribunal awarded compensation of €26,000 to each worker and further monetary awards for breaches of minimum notice, annual leave and pay for public holidays legislation.[95]

Studies on Immigration for EU-10

The International Organisation for Migration report on *Managing Migration in Ireland,* contains a case study on *The Implications of Recent Migration to Ireland for Poland.*[96] To assess such implications the study explores the reasons for migration to Ireland as a destination country. The reasons include:

- The absence of transitional measures restricting access to the Irish labour market;
- A perception that Ireland did not have a stereotype of Poles and would be receptive to them;
- The demand for labour in the Irish economy and a perception that the UK market is relatively saturated by immigrants;
- Good job prospects and career opportunities for Polish professionals;
- A sense of cultural similarity between the two countries; and
- The low cost of travelling between Ireland and Poland.

A report from the Swedish Institute for European Policy Study, published in May 2006, details experiences in Ireland in relation to freedom of movement for workers from Central and Eastern Europe.[97] This report examines the likely effects on the economy of the decision of the Irish and Swedish governments to deregulate migration from these countries following accession. It discusses the pre-enlargement debates in EU-15 Member States; the manner in which fears of welfare tourism were addressed in Ireland and Sweden; and the net economic effects of large-scale migration including alleged job displacement in Ireland.

Social Assistance

It should be noted that the Social Welfare (Miscellaneous Provisions) Act 2004, which entered into force on 1 May 2004, introduced a "habitual residence" test for obtaining certain social assistance payments: this appears partly to have reflected concerns that Ireland should not attract "welfare-scroungers" from the new Member States. This is addressed in more detail in Chapter IX.

It is clear, however, that some migrants from the Accession States have faced difficulties as a result of this and other factors. A report on the use of homelessness services by nationals of the Accession States concludes that, in September 2005, there were between 60 and 120 people from the 10 Accession Member States daily seeking support from homeless services. The report finds that reasons for destitution and homelessness could often be traced back to a low level of preparedness when the individuals concerned immigrated; poor language skills

94 Harvesting Justice: Mushroom Workers Call for Change November 2006 http://www.mrci.ie/publications/documents/HARVESTINGJUSTICE.pdf.

95 06/2006 (E.A.T.) Eamonn Murray t/a Kilnaleck Mushrooms -v- Zita Baltrusoviene & Other.

96 International Organisation for Migration (A report for the National Economic and Social Council), *Managing Migration in Ireland: A Social and Economic Analysis*, No. 116, September 2006. p. 231. http://www. entemp.ie/trade/marketaccess/singlemarket/06serv638.pdf.

97 Nicola Doyle, Gerard Hughes and Eskil Wadensjö *Freedom of Movement for Workers from Central and Eastern Europe: Experiences in Ireland and Sweden* SIEPS 2006: 5. http://www.sieps.se/publ/rapporter/2006/2006_5_en.html.

despite high level of education; and the false promises of employment agencies based in Poland and Ireland.[98]

The Houses of the Oireachtas Joint Committee on European Affairs published the Report on EU Migrant Workers in Ireland: An initial assessment of the position of European Union migrant workers in Ireland post 2004[99] in April 2006. The study concludes that the administrative arrangements in place to co-ordinate migration related issues are inadequate and makes a number of recommendations. The recommendations include:

- establishing of a network of 'drop-in centres' for migrants;
- placing restrictions on the activities of unscrupulous employment agencies; and
- improving links between Irish agencies and Governments of sending countries to publicise the appropriate routes for finding jobs in Ireland.

Arrangements for the Accession of Romania and Bulgaria on 1 January 2007

Directive 2004/38/EC and the European Communities (Free Movement of Persons) (No. 2) Regulations 2006

In preparation for the accession of Romania and Bulgaria, the European Communities (Free Movement of Persons) (No. 2) Regulations 2006, were signed on 18 December 2006 and came into force on 1 January 2007. Under these Regulations, Romanian and Bulgarian nationals have the same rights of access to Ireland as a citizen of an existing EU Member State *with the exception of access to the labour market*.

Following lengthy debate in the earlier months of 2006, in October the government decided to put transitional measures in place for Romanian and Bulgarian nationals following accession (subject to exceptions discussed below).[100] The Minister for Enterprise, Trade and Employment justified the decision on the basis of the unprecedented level of migration since the last round of accession which had created pressures in education, housing, traffic and health services and that breathing time was needed to take effective steps toward integration.[101] The view of unions such as the Irish Business and Employers Confederation (IBEC) and the Irish Congress of Trade Unions as well as the position of other Member States were taken into account.[102]

In the lead up to the May 2004 round of accession, IBEC was fully supportive of the Government decision to permit full access to the labour market from the date of accession. However in the run up to the accession of Romania and Bulgaria it moved from this position and proposed the introduction of transitional measures. However, it recommended a more liberal work permit scheme for these nationals (compared to that in force for third country nationals) where Bulgarian and Romanian citizens would be granted work permits on foot of a job offer, without having to undergo a labour market test.

The Government decision to adopt transitional measures also reflected the reality of sharing a common travel area with Britain, which had shortly before announced similar transitional measures. Similarly, it is also certain that the need to ensure better regulation and protection against displacement and exploitation was a factor in the light of the upcoming General Election in May 2007. The Economic and Social Research Institute has said that the ongoing requirement for 50,000 new workers each year in order to fuel growth could be met by migrants from the current Member States.

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98 "Away from Home and Homeless: Quantification and profile of EU10 nationals using homeless services and recommendations to address their needs", Emmet Bergin & Tanya Lalor, TSA Consultancy, for the Homeless Agency, January 2006 http://www.homelessagency.ie/downloads/publications/101.pdf.

99 http://www.oireachtas.ie/documents/committees29thdail/europeanaffairsreports/Migration.pdf.

100 Department of Enterprise, Trade and Employment Press Release, "Government decides to continue the existing work permits regime for Romania and Bulgaria from 1st January 2007", 24 October 2006.

101 The Irish Times, "Martin says worker ban on new EU states is justified", 25 October 2006.

102 Department of Enterprise, Trade and Employment Press Release, "Government decides to continue the existing work permits regime for Romania and Bulgaria from 1 January 2007" - 24 October 2006.

Transitional Measures

For the initial two years following accession (subject to review before the end of that time) Bulgarian and Romanian citizens will continue to require employment permits as they did prior to accession. Such employment permits are granted under the Employment Permits Acts 2003-2006 (discussed above at Chapter VII).

However, the requirement for an employment permit will not apply in the case of :

a) Persons already exempt by virtue of their existing residence status (in particular those with a Stamp 4 on their passports); and
b) Persons who have been working legally (i.e., with a work permit or work authorisation) for a 12 month period.

Furthermore, though all other Romanian and Bulgarian nationals will be required to obtain an employment permit to work in Ireland, under Section 2(11) of the 2003-2006 Acts, the Minister of Enterprise, Trade and Employment shall give preference to applications for employment permits for Romanian and Bulgarian nationals when determining which applications for employment permits should be granted.

It is unclear how long Ireland will retain these transitional measures for Romanian and Bulgarian nationals. The Minister for Enterprise Trade and Employment has said that the transitional measures will be reviewed in 2008.[103] All Member States can apply complete restrictions for two years and for a further three years once notice is given to the Commission. Restrictions for a further two years can only be imposed if serious disruption to the labour market would otherwise occur.

The introduction of restrictions to accessing the labour force has led to concern that Romanian and Bulgarian nationals who exercise the right of residence in Ireland will be vulnerable to exploitation because they will be forced to work in the black economy. The Government believe that the commitment to treble the number of Labour Inspectors from 31 to 90 over the course of 2007 will minimise the potential for such exploitation (discussed above in Chapter VII).

Self-employment

Regulation 18 of the European Communities (Free Movement of Persons) (No. 2) Regulations entitles Romanian and Bulgarian nationals "to carry on a business, trade or profession…" on the same basis as all EU nationals.

Since the accession of Romania and Bulgaria on 1 January 2007, there have been mixed press reports about Romanian and Bulgarian workers being classified as self-employed persons, as a vehicle for entry into the labour market while avoiding the need for an employment permit. On the one hand, newspapers have pointed to the fact that in January and February 2007, 5,291 PPS numbers have been issued to Romanians while only 18 work permits have been issued. This leads to suggestions that such Bulgarian nationals have been wrongly classified as self-employed to circumvent the requirement to obtain an employment permit.[104] On the other hand, the Romanian Ambassador has said that many Romanians who have been living in Ireland are now merely taking steps to legalise their presence in the State by registering for a PPS number.[105] It is also important to note that an application for a PPS number does not necessarily mean a person is working in the country. The demographic results from Census 2006 reveal that in 2006 there were 7,696 Romanian nationals living in the State.

In the absence of concrete evidence it is too early to surmise whether such reports of "bogus" self-employment are accurate. It is necessary to examine each individual case to establish whether an asserted self-employed status is in fact a "cover" for a contract of employment and all this takes time. The Government has said that it will introduce legislation

103 The Irish Times, Migrant workers, 25 October 2006.
104 The Irish Times, Move to target bogus self-employment, 6 March 2007.
105 The Irish Times, Romanian ambassador disputes influx of illegal workers to State, 14 March 2007.

to enable the Labour Inspectorate to work together with the Department of Social and Family Affairs and the Revenue Commissioners in joint investigative units to target such bogus self-employment.

Visas

From 1 January 2007 Bulgarian and Romanian citizens do not require visas to enter Ireland. Bulgarian and Romanian citizens, like those of other EU Member States (except the UK in accordance with the Common Travel Arrangements), will simply have to produce their passport or national identity card at the border.

Persons Currently Subject to Deportation Orders

The Department of Justice, Equality and Law Reform has confirmed that deportation orders previously issued remain in force. However, it has said that a person the subject of such an order may apply in writing to the Minister for Justice, Equality and Law Reform for the order to be revoked. In consideration of such applications the circumstances in which the order was made will be taken into account. There is a distinction in this regard between those deported for non-compliance with the immigration rules and those who have committed a criminal offence.

Asylum

In January 2007, the Department of Justice, Equality and Law Reform issued an information note[106] advising that in the light of the *EU Treaty Protocol on Asylum for Nationals of Member States of the European Union*, the Office of the Refugee Applications Commissioner (which is the first instance decision making body in the Irish Asylum System) will not accept asylum applications from nationals of EU Member States.

Stop Press: The Roma and the 2007 "Deportations"

In the early summer of 2007, a number of Romanian nationals who are members of the Roma community, set up an encampment near Dublin's M50 motorway. The conditions were substandard and children were taken into care of the social services. It seems clear that most of the individuals concerned did not have means to support themselves and were not entitled to social assistance. In July 2007, 86 nationals were served with deportation orders. Most appear to have acquiesced in the decision to deport, but some have decided to challenge the orders.

The precise basis for the deportation decisions is unclear, though the Minister is believed to have issued removal orders under Regulation 20 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006.[107] Regulation 6(1) allows a right to residence for up to three months on condition that he/she does not become an unreasonable burden on the social welfare system of the State, whilst Regulation 6(2) provides that a Union citizen not in employment/self-employment or a student may reside for a longer period only if he/she has sufficient resources and sickness insurance for himself/herself, his/her spouse and accompanying dependents. Further details will be provided in the 2007 Report.

106 http://www.justice.ie/80256E010039C5AF/vWeb/pcJUSQ6Y9HL7-en.
107 See, generally, Chapter I, above.

CHAPTER IX. STATISTICS

General

The reporter does not claim any particular expertise in statistics and, although some general (and one hopes helpful) data and explanation is provided below, the following indications should be treated with some caution. Reference should be made to the increasingly detailed statistical data published by the Central Statistics Office (CSO).[108]

For current purposes, the most important recent publications of the CSO include:

- Census 2006, Principal Demographic Results (http://www.cso.ie/census/Census2006_Principal_Demographic_Results.htm);
- Census 2006, Volume 4 – Usual Residence, Migration, Birthplaces and Nationalities (http://www.cso.ie/census/census2006results/volume_4/vol_4_2006_complete.pdf) ;
- Census 2006, Principal Socio-Economic Results (http://www.cso.ie/census/Census2006_Principal_Socio_economic_Results.htm);
- Quarterly National Household Survey (http://www.cso.ie/qnhs/main_result_qnhs.htm);and
- Measuring Ireland's Progress, 2006 (http://www.cso.ie/releasespublications/measuringirelandsprogress2006.htm).

Immigration

Over the past ten years, there has been a large increase in inward migration and a reduction in outward migration, leading to a more than three-fold increase in net migration from 19,200 in 1997 to nearly 70,000 in 2006.[109]

In terms of breakdown of immigrants on the basis of their origin, the available ten-year data has in relation to the EU distinguished between immigration from the UK, the former EU 15 (excluding the UK and Ireland), and, since 2004, immigration from the 10 new Member States. There is, as yet, no reliable data from Bulgaria and Romania. According to such data, contained in the CSO Report *Measuring Ireland's Progress*, around 37,400 persons moved to Ireland from the 10 new Member States in 2006 and 10,700 from the older 13 Member States (the UK is not included).[110]

The 2006 Census also provides data on persons who were usually resident in the State on Census Night (23 April 2006) but were usually resident outside the State one year before: this provides an indication of migration levels.[111] There are around 93,200 immigrants as a whole on this basis. It is significant that, save for relatively high levels of immigration from England and Wales (8,900), the higher number of immigrants come from the new 10 Member States (Poland (33,218), Lithuania (7,346), Latvia (4,040), Slovakia (3,605).

108 See www.cso.ie.
109 CSO, Measuring Ireland's Progress, 2006, p. 56.
110 CSO, Measuring Ireland's Progress, 2006, p. 56.
111 CSO, Census 2006, Volume 4 – Usual Residence, Migration, Birthplaces and Nationalities, Table 11.

Table IX-1
Persons present in the State on Census Night (23 April 2006), whose usual residence one year previously was outside the State, classified by former country of residence and born outside Ireland (adapted from Source CSO, Census 2006, Vol. 4, Table 11)

Nationality	Total	Male	Female
Austria	167	69	98
Belgium	281	139	142
Cyprus	92	49	43
Czech Republic	1,859	1,151	708
Denmark	165	83	82
Estonia	652	310	342
Finland	286	123	163
France	2,759	1,405	1,354
Germany	2,414	1,178	1,238
Greece	105	66	39
Hungary	1,333	802	531
Italy	1,643	912	731
Latvia	4,012	2,137	1,875
Lithuania	7,282	4,062	3,220
Luxembourg	33	19	14
Malta	42	25	17
Netherlands	676	374	302
Poland	32,997	20,672	12,325
Portugal	389	237	152
Slovakia	3,565	2,310	1,255
Slovenia	67	46	21
Spain	2,301	1,096	1,205
Sweden	616	311	305
UK	14,070	7,414	6,656
TOTAL	98,391	55,082	43,309

Nationality

In relation to the nationality of migrants,[112] of the 419,733 foreign nationals usually resident in the State, 66% (275,775) are from the (in 2006) 25 Member States. Of this number, almost 41% are British, 15.5% are nationals from the other old EU Member States and 43.7% are from the 10 Member States that joined in 2004. Nearly 23% are Polish. At the time of the Census, there were 7,696 Romanians living in the State (not included in the table).

112 CSO, Census 2006, Volume 4 – Usual Residence, Migration, Birthplaces and Nationalities, Table 41A.

Table IX-2
Usually resident persons, present in the State on Census Night (23 April 2006), classified by nationality (adapted from Source CSO, Census 2006, Vol. 4, Tables 41A-C)

Nationality	Male	Female	Total
Ireland	1,836,897	1,869,786	3,706,683
Austria	237	346	583
Belgium	474	436	910
Cyprus	39	21	60
Czech Republic	3,131	2,028	5,159
Denmark	365	364	729
Estonia	1,110	1,162	2,272
Finland	283	643	926
France	4,493	4,553	9.046
Germany	4,676	5,613	10,289
Greece	261	151	412
Hungary	2,118	1,322	3,440
Italy	3,564	2,626	6,190
Latvia	7,710	6,149	13,319
Lithuania	13,764	10,864	24,628
Luxembourg	13	13	26
Malta	76	63	139
Netherlands	2,146	1,844	3,990
Poland	40,288	22,988	63,276
Portugal	1,149	649	1,798
Slovakia	5,255	2,856	8,111
Slovenia	82	48	130
Spain	2,448	3,604	6.052
Sweden	651	1,091	1,742
UK	56,210	56,388	112,548
TOTAL EU ex IRELAND	150,003	125,772	275,775
TOTAL EU	1,986,900	1,995,558	3,982,458
TOTAL RESIDENT POPULATION	2,085,192	2,086,821	4,172,013

In the past, some importance was placed on the number of Personal Public Service Numbers (PPSN) issued to the Accession Member State nationals. It is not possible to work in the conventional economy without a PPSN. From May 2004 to end-April 2006, some 205,000 PPSN were issued. From May 2006 to September 2006, a further 84,000 numbers were issued, of which 56,000 were issued to Polish nationals. There is a significant discrepancy between these figures and the CSO figures, which appear to reflect the fact that there are a large number of short-stay and seasonal workers, and a number of people with PPSN who do not take up employment.[113]

Place of Birth: Long-Term Residence

The principal demographic results of the 2006 Census also provide statistics in relation to the country of birth of migrants – which are used as an indicator of long-term residence.[114] 14.8% (601,732) of all residents in the State were born in another country. The vast majority

113 See FÁS *The Irish Labour Market Review* 2006, pp. 18-19. (http://www.fas.ie/NR/rdonlyres/F63B6DCE-61FA-49B5-A4CC-E34522B16944/0/LABOUR_MARKET_REVIEW_2006.pdf.)

114 CSO, Census 2006, Volume 4 – Usual Residence, Migration, Birthplaces and Nationalities, Table 29A.

are from England & Wales (200,488) 5% of the total resident population), with persons born in Poland coming a distant second (62,495, 1.5%).

Table IX-3
Usually resident persons, present in the State on Census Night (23 April 2006), classified by birthplace (adapted from Source CSO, Census 2006, Vol. 4, Tables 29A-C)

Birthplace	Male	Female	Total
Ireland	1,721,605	1,744,418	3,466,023
Austria	243	369	612
Belgium	655	599	1,254
Cyprus	137	103	240
Czech Republic	3,177	2,053	5,230
Denmark	391	402	793
Estonia	1,159	1,192	2,351
Finland	273	640	913
France	4,516	4,629	9,145
Germany	5,262	6,282	11,544
Greece	290	176	466
Hungary	2,004	1,281	3,285
Italy	3,285	2,420	5,705
Latvia	7,478	6,376	13,854
Lithuania	13,834	10,777	24,611
Luxembourg	63	46	109
Malta	145	134	279
Netherlands	2,262	1,949	4,211
Poland	39,732	22,763	62,495
Portugal	951	545	1,496
Slovakia	5,253	2,876	8,129
Slovenia	77	56	133
Spain	2,513	3,609	6,122
Sweden	669	1,113	1,782
UK	131,266	134,881	266,147
TOTAL EU ex IRELAND	225,635	205,271	430,906
TOTAL EU	1,947,240	1,949,689	3,896,929
TOTAL RESIDENT POPULATION	2,034,089	2,036,666	4,067,755

The Labour Force

In 2005, the Central Statistics Office started to publish estimates of the labour force classified by nationality, ILO status and NACE Economic Sector. These figures are published as part of the Quarterly National Household Survey ("QNHS") and are regarded as "tentative" as the very large migration flows in recent years present a significant measurement challenge in a general purpose household survey such as the QNHS. It was, however, felt that the estimates presented provide a broadly accurate picture of the current situation and current trends (though subject to review in the final results of the 2006 Census).

The QNHS is published on a rolling quarterly basis and is available on the website of the Central Statistics Office.[115] Table A1 of QNHS Q4 2006 provides estimates of the number of persons aged 15 years and over classified by nationality and ILO economic status as follows:

115 http://www.cso.ie/releasespublications/documents/labour_market/current/qnhs.pdf.

Table IX-4
Estimated number of persons aged 15 years and over classified by nationality and ILO Economic Status,Q4 2006 (source, CSO, QNHS Q4 2006)

Nationality	ILO Economic Status				Total '000
	In employment	Unemployed	In labour force	Not economically active	
Irish nationals	1,850.6	74.4	1,925	1,195.7	3,120.7
Non-Irish nationals	215.5	14.3	229.8	71.4	301.1
UK	38	2.8	40.8	25.5	66.3
EU 15 (exc. Irl. and UK)	24.6	1.4	26	6	32
10 Accession States	88.6	5	93.6	9.5	103.1
Others	64.3	5.1	69.3	30.4	99.7
Total persons	2,066.1	88.7	2,154.8	1,267.1	3,421.8

In Q4 2006, 215,500 non-Irish nationals thus represented more than 10% of the total 2,066,100 people in employment, compared with 8.6% in Q4 2005. UK nationals represented 1.8%, the other 14 "old" Member States represented 1.1%, the 10 "new" Member States represented 4.3% and "others" represented 3.1%.

As compared with Q4 2005, there was a 30% increase in the number of nationals coming from the Accession countries and, even more significantly in the light of the more skills-focused employment permits regime, a 26% increase in 'other' non-nationals.

Repartition by sex/branch/skills-qualifications/region

Sex

In relation to *immigration*, *nationality* and *place of birth,* the 2006 Census provides a breakdown between male and female (see Tables IX-1-3, above).

Branch

Table A1 of QNHS Q4 2006 provides estimates of the number of persons aged 15 years and over classified by nationality and ILO economic status as follows:

*Estimated number of persons aged 15 years and over in employment (ILO) classified by nationality and ILO Economic Sectot,**Q4 2006** (source, CSO, QNHS Q4 2006)*												
Nationality	NACE Economic Sector											Total '000
	A-B Agricul-ture,Forestry, Fishing	C-E Other produc-tion industries	F Construction	G Wholesale & Retail Trade	H Hotels & Restaurants	I Transport, Storage, Communi-cation	J Financial & other business services	L Public ad-ministration & defence	M Education	N Health	O-Q Other	
Irish	110	256.7	243.9	260.7	83.8	107.2	251.2	103.9	132,7	190.5	108.9	1,850
Non-Irish	4.9	35.2	37.7	27.6	32.8	9.9	26.7	1.2	6.9	19.7	12.7	215.5
UK	0.8	5.2	5.6	5.1	2	2.3	6.6	0.7	2.6	4.5	2.7	38
EU-15 (exc. Irl. & UK)	0.3	3	1.1	2.7	3.7	1.5	6.4	-	1.5	1.8	2.4	24.6
EU-10	3.2	19.2	23.6	12.2	14.8	3.8	6.3	-	0.4	1.3	3.7	88.6
Other	0.5	7.9	7.4	7.6	12.3	2.2	7.4	0.3	2.4	12.2	4	64.3
Total	**115.8**	**292.1**	**281.6**	**288.3**	**116.6**	**117.2**	**278**	**105.1**	**139.6**	**2**	**121.6**	**2066.1**

The bulk of the Accession Member States nationals have taken up positions in construction, manufacturing, retail and hotel sectors. The bulk of 'other' immigrants have taken up positions in the health, financial and business services, construction and other production sectors.

The concentration of workers from the 10 Accession States in the construction, manufacturing, retail and hotel sectors echoes the findings of widespread underutilisation of the skills of accession workers[116] and suggests that they are engaged in lower-paid and lower-skilled work than their qualifications and experience would merit. The ever-increasing numbers of such migrants are significant in the context of the current debate on "job displacement" and arguments that immigration of "low-cost" employees from the new Member States in particular is encouraging a "race to the bottom".

It appears from the sectoral data that non-nationals have taken a disproportionate share of "new" jobs in the manufacturing, "hotel and restaurant" and construction sectors. While there is some evidence of displacement in the hotel and restaurant sector in particular, with 7,400 Irish workers leaving the sector and 8,500 foreign national workers joining, in the job market as a whole unemployment has remained low at just above 4%. The year-on-year changes in numbers of persons employed support this view: though 44,300 non-Irish nationals joined the labour force, 41,100 Irish nationals took up jobs in the same period.

The substantial increase in both Irish and foreign national workers as a whole makes it likely that those workers potentially displaced have found other work and that non-nationals have been able to take up new jobs in the economy without prejudicing the position of Irish nationals. There may, of course, be significant variations at local level and these figures do not measure any effect the employment of migrants may have on overall wage levels.[117]

Regions

The 2006 Census has produced detailed data in relation to persons usually resident in each Province, County, Town and Rural Area classified by country of birth and nationality (and broken down between male and female).[118] It is not proposed to analyse this data in any detail here. However, it should be noted that the capital, Dublin, has the highest percentage of non-national residents (13%), with Galway City and County coming second (10.7%). In one town, Gort, in Co. Galway, 40% of the population of 2,646, are non-nationals (mainly Brazilian), whilst in Ballyhaunis in Co. Mayo, 36% of its population are non-nationals, with 327 EU nationals (mainly Eastern European) and 163 nationals of Asian States.

Trends

General

The Central Statistics Office has produced statistics on estimated migration classified by sex and country of destination/origin, and by sex and nationality, for 2000-2005.[119] There has been fairly consistent migration during this period in relation to persons coming from the 15 old EU Member States, though it appears to have declined in the 12 months to April 2005. There was relatively high migration for those coming from the 10 new EU Member States in 2005: it is not possible to assess any trends over the period since immigration from the 10 new Member States was – for the previous 5 years counted as "rest of world".

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116 The Labour Market Characteristics and Labour Market Impacts of Immigrants in Ireland" *Alan Barrett, Adele Bergin and David Duffy – Labour Market Review* Volume 37 Spring 2006 No.1.

117 See, generally, two important reports in February 2006 from AIB Global Treasury Economic Research, based on QNHS data, which examine the scale and sectoral distribution of non-national employment in Ireland http://www.aibeconomicresearch.com/downloadPDF.asp?620; http://www.aibeconomicresearch.com/downloadPDF.asp?624.

118 CSO, Census 2006, Volume 4 – Usual Residence, Migration, Birthplaces and Nationalities, various Tables in Parts II and III.

119 http://www.cso.ie/releasespublications/documents/population/current/popmig.pdf.

However, the Census 2006 statistics results viewed together with the statistics gathered in the context of the Quarterly National Household Survey (discussed above) support the conclusion that many of migrants to Ireland from the countries that acceded to the EU in 2004, and Poland in particular, have arrived since Accession: the statistics classifying residents by their usual residence twelve months before the Census in 2006 show that 52,645 of the immigrants now usually resident in Ireland were living in those countries in April 2005. The data from Census 2002, for example, showing that there were only 2,200 Polish-born residents in Ireland at that time, supports this conclusion.

In making projections for population and labour force between 2006 and 2036,[120] the CSO stated in December 2004 that:

> "In its consideration of likely future migration patterns, the [Expert] Group recognized that the high economic and labour force growth experienced for Ireland in the past decade has radically changed the outlook in relation to migration. In short the country has moved from a long-standing pattern of emigration to a new pattern of relatively strong immigration and it is very unlikely that this will be reversed to any sustained degree over the projection period."

Impact of Demographic Trends on GDP Growth

In October 2006, NCB Stockbrokers produced a report, entitled *European Population Outlook 2020,* assessing the impact that demographic factors may have on GDP growth in each of the 25 Member States. The Report concluded that Ireland would have the largest population of young people by 2010. The Report, using official UN and EU statistics, predicts that 3 in 10 Irish people in 2010 will be aged under 15. The Report states that Ireland will have an average 2% increase in population per annum up to 2010, the highest of any EU Member State and a growth rate over 50% above other countries with a rising population. The report also estimates that Ireland will have the third highest rate of net migration up to 2010 after Luxembourg and Cyprus.

An earlier Report, *NCB 2020 Vision, The Irish Demographic Dividend*,[121] published in March 2006, analysed the importance of demographic influences for the growth outlook in Ireland. Points worth noting in the context of the free movement of workers include:

- Inward migration is now a significant feature of Irish demography;
- Immigrants will play an increasingly important role in the growth of the labour force and in the demand for housing in the years ahead. The rise of the immigrant population will account for as much as 50% of the growth in the total population between now and 2020;
- Immigrants accounted for 7% of the population in 2002 and could form 19% of the population, approximately 1 million people, by 2020;
- Immigrants comprised 9% of the total workforce in 2002 and their representation among the occupations was high in computer software (18%), other professional workers (16%), social workers (15%), health (13%) and scientific and technical (13%) and 8% in construction;[122]
- 3% of the total migrant population are working in the farming, fishing and forestry sectors, 11% in personal services and childcare, 10% in food, drink and tobacco production and 7% in other manufacturing roles. The study does not indicate what proportion of these workers are EU nationals;
- They have low representation among government workers, the police and the army;

120 CSO Population and Labour Force Projections 2006-2036. (December 2004) http://www.cso.ie/releasespublications/documents/population/2004/Publication%20Pop%20&%20Labour%20force%20for%20web.pdf

121 NCB 2020 Vision, The Irish Demographic Dividend, March 2006 http://www.ncb.ie/downloads/pdf/NCB2020Vision.pdf.

122 This percentage does not take account of self-employed migrant workers; workers in the black economy and posted workers engaged in the construction sector and accordingly should be treated with caution.

- NCB estimates that immigrants were 12% of the workforce in 2005; and
- The trend of high levels of immigration is expected to continue because of the free access to the labour market granted to nationals of the ten Accession States in 2004 and the relatively better income and employment prospects in Ireland than in countries of emigration.

CHAPTER X. SOCIAL SECURITY

Social Insurance

General

The Social Insurance system provides cover for a wide range of social welfare payments to workers and their dependants. Pay Related Social Insurance (PRSI) contributions, which are collected mainly through the income tax system, provide the main source of funding for the system.

For most employees, PRSI contributions are collected by the Revenue Commissioners through the Pay As You Earn (PAYE) tax system. Special arrangements apply to workers who are not in the PAYE system e.g. workers posted abroad temporarily and employees whose employer is not registered for PAYE and who lives outside the State.

In general, self-employed people pay their PRSI contributions to the Revenue Commissioners when paying their income tax. However, people who have been advised by the Inspector of Taxes that they need not make a return of income are liable to pay a flat rate contribution of €157.00 per annum.

PRSI is divided into different classes. The class of PRSI paid determines the social insurance benefits for which an individual may qualify.

Most persons classified as employees qualify for Class A benefits:

- Unemployment Benefit
- Disability Benefit
- Health and Safety Benefit
- Maternity Benefit
- Adoptive Benefit
- Invalidity Pension
- Widow's or Widower's (Contributory) Pension
- Orphan's (Contributory) Allowance
- Retirement Pension
- Old Age (Contributory) Pension
- Bereavement Grant
- Occupational Injuries Benefit
- Carer's Benefit

Persons classified as self-employed qualify for Class S benefits, namely:

- Widow's or Widower's (Contributory) Pension
- Orphan's (Contributory) Allowance
- Old Age (Contributory) Pension
- Maternity Benefit
- Adoptive Benefit
- Bereavement Grant

With regard to EEA workers' entitlement to social insurance benefits, where applicants do not have sufficient Irish PRSI contributions, regard must be had to whether they have an entitlement to benefit based on the aggregated contribution record, under the provisions of Regulation 1408/71. Therefore where EEA workers do not qualify for benefits on the basis of their Irish social insurance record, and have worked or made social insurance contributions in another country covered by EC regulations, they person may use their social insurance record in that country to assist them to meet the eligibility requirements, so long as they have paid at least one PRSI contribution since their return to Ireland.
Furthermore where there is a prima facie evidence of such an entitlement but there is a delay in finalising a benefit claim, the EEA worker provisions should be applied and the applicant advised on a possible entitlement to Supplementary Welfare Allowance.

Social Assistance

Social Assistance Payments: Introduction of a "Habitual Residence" Condition

General

Social assistance payments are means tested and may be paid to people who do not qualify for social insurance benefits.

Until May 2004, EU citizens who were in Ireland and had little or no income were eligible for Unemployment Assistance or Supplementary Welfare Allowance if they satisfied the means test and, in the case of Unemployment Assistance, were genuinely looking for work.

The Social Welfare (Miscellaneous Provisions) Act 2004,[123] which entered into force on 1 May 2004, introduced a "habitual residence" condition for obtaining certain social assistance payments under the Social Welfare (Consolidation) Act 1993[124] (as amended). The relevant legislation was consolidated in the Social Welfare Consolidation Act 2005.[125] The purpose of the habitual residence condition is to restrict access to social assistance and child benefit payments for people from other countries who have little or no connection to Ireland. In effect this means that anyone who fails to meet the condition is not eligible for a social assistance payment. The habitual residence condition is in addition to the normal conditions of entitlement for each type of payment.

The relevant social assistance payments are:[126]

- Jobseeker's Allowance;
- State Pension (Non-Contributory);
- Blind Persons Pension;
- Widow's/Widower's Payment
- Guardians Payment
- Non-Contributory Pension;
- One Parent Family Allowance;
- Carer's Allowance;
- Disability Allowance;
- Supplementary Welfare Allowance, save for once-off exceptional and urgent needs payments;
- Child Benefits (with certain exceptions).

Certain other payments – pre-retirement allowance, deserted wife's allowance and prisoner's wife's allowance – have not been made subject to the habitual residence condition.

No concrete test of habitual residence has been laid down in the legislation. However, Section 246 of the 2005 Act provides that, "It shall be presumed until the contrary is shown, that a person is not habitually resident in the State at the date of making his/her application concerned unless he has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date".

According to guidelines issued by the Department of Social and Family Affairs,[127] the condition applies to applicants regardless of nationality. (It is clear, however, that the regime naturally advantages those who have been resident in other parts of the Common Travel Area (CTA), in particular the UK.)

In December 2004, the European Commission issued a Letter of Formal Notice indicating that it was concerned about the compatibility of the habitual residence condition with

123 No. 9 of 2004.
124 No. 27 of 1993.
125 No. 26 of 2005 (http://www.oireachtas.ie/documents/bills28/acts/2005/a2605.pdf).
126 S.I. No. 246 of 2006: Social Welfare and Law Reform and Pensions Act 2006 (Section 4(4), (4 (5), 31 and 33) Commencement Order Regulations 2006 provides for the renaming of the Orphans Payments to Guardians Payments; S.I. No. 334 of 2006 Social Welfare and Law Reform and Pensions Act 2006 (Sections 4, 9, 10, 20-25) (Commencement Order) 2006 commenced Section 4 of the Act which amends the names given to the various benefits so that the name is descriptive of the benefit itself. These changes took effect from July to October 2006.
127 www.welfare.ie/publications/hrc.html.

Ireland's obligations under Regulations 1408/71 and 1612/68, the potential indirectly discriminatory effect on grounds of nationality and the direct discrimination between applicants from within the CTA as opposed to other Member States. In April 2006, the Commission decided not to pursue infringement proceedings having been satisfied that the condition complies fully with ECJ case law. This was based on an explanation from the Department of Social and Family Affairs that in cases where applicants had not lived within the CTA for more than two years, the two year negative presumption contained in Section 246 was not a determining factor in the decision making process, but rather that decisions were based on all five factors as set down by the ECJ.[128]

The Department of Social and Family Affairs accepts that a short holiday of, say, two to three weeks in each year will be accepted as not breaching the requirement of continuous residence in the CTA. Where the negative presumption does not apply, there is no corresponding presumption that a person living in Ireland or elsewhere in the CTA is habitually resident.

The term "habitually resident" is "intended to convey some degree of permanence and is intended to refer to a regular physical presence enduring for some time, usually (but not always) beginning at a date in the past and intended to continue for a period of time into the foreseeable future". It implies a close association between the applicant and the country from which payment is claimed and relies heavily on the fact" and that the "most important factors for habitual residence are the length, continuity and general nature of actual residence rather than intention".

The decision on whether a person is habitually resident in the State is one for determination by a statutorily appointed Deciding Officer or in the case of Supplementary Welfare Allowance, an officer of the Health Board who is duly authorised to determine entitlement. The decision will be made on the basis of applying five factors set down by the ECJ in deciding whether a person is habitually resident.[129]

These factors, which are not exhaustive, are[130]:

- the applicant's main centre of interest;
- length and continuity of residence in a particular country;
- length and purpose of absence from a country;
- nature and pattern of employment in a country;
- the future intention of the applicant concerned as it appears from all the circumstances.

The officers will have to regard to these five factors and to any additional information elicited by way of further enquiries. No single factor will be conclusive and the evidential weight to be attributed to each factor will depend on the circumstances of each case.

The Department has indicated that the following will/are likely to satisfy the habitual residency condition:

- Any applicant, regardless of nationality, who has spent most or all of his/her life in Ireland (*should* satisfy the condition);
- An applicant who has been present in Ireland for two years or more, works there and has a settled intention to remain in Ireland and makes is his/her permanent home (*will* satisfy the condition);
- Persons who have lived in other parts of the Common Travel Area for two years or more and then moved to Ireland with the intention of settling there (*quite likely* to satisfy the condition);
- Most applicants who have been in Ireland for more than two years prior to application (*likely* to satisfy the condition *in absence of contrary indications*).

128 Department of Social and Family Affairs, Internal Review of the Operation of the Habitual Residence Condition, July 2006. http://www.welfare.ie/publications/hrcreview06.pdf

129 See Case C-138/02 Collins v Secretary of State for Work and Pensions (Judgment of 23 March 2004).

130 For additional guidance on the rationale underlying each factor see: http://www.welfare.ie/foi/habres.html#G

Between May 2004 and April 2006, more than 34,000 cases were identified as requiring a detailed consideration of the habitual residence condition and 8000 cases were disallowed on the basis that the claimant was not habitually resident in the State. The main schemes affected are Unemployment Assistance and Child Benefit, which account for over 85% of the total number decided[131]. These figures do not take account of applications or decisions for Supplementary Welfare Allowance for which no detailed statistics are available.

In March 2007, the Irish Independent reported that the Department of Social and Family Affairs found that just 2.5% of the 322,000 workers from the new Member States who have received a PPS number since accession are claiming a social welfare benefit and just 1% claiming unemployment assistance/benefit. [132]

The position of persons entitled to payments under EU law

A published guideline on the Habitual Residence Condition[133] makes it clear that persons entitled to payments under EU law do not have to satisfy the habitual residence condition. It is stated that a "Deciding Officer should have due regard to EU law when deciding such cases" and that "in general EU law takes precedence over National Law".

Child Benefit, One Parent Family Payment and Orphan's (Non-Contributory) Pension are considered "family benefits" under Regulations 1408/71 and 574/72: An employed or self-employed person subject to Irish PRSI claiming one of these payments does not have to show habitual residence.

It is also made clear that a national of an EEA Member State who is employed or self-employed in Ireland and subject to the Irish PRSI system is entitled to payments classified as Family Benefits under EU law, even if his or her children are habitually resident in another EEA Member State. Such entitlement will continue even where the person concerned becomes unemployed and receives Irish Unemployment Benefit. The amount of Family Benefits payable will depend on whether there is entitlement in the other EEA Member State to Family Benefits.

In light of the ruling by the European Court of Justice that social benefits guaranteeing the minimum means of subsistence, such as the Irish Supplementary Welfare Allowance, fall within the meaning of "social advantage" in Article 7 (2) of Regulation 1612/68, it is recognised that workers from other EEA Member States must be treated in the same way as national (Irish) workers in determining entitlement to Supplementary Welfare Allowance and entitlement should be determined on the basis of a person's employment status and not on the basis of residence. Thus regard must be had to the equality provisions of Regulation 1612/68 when dealing with Supplementary Welfare Allowance claims.

It is stated that this requirement does not apply to other social welfare payments such as Unemployment Assistance or Old Age Pension, since there are covered by Regulation 1408/71 which takes precedence over Regulation 1612/68.

Some guidance is given on the meaning of "worker" in EU law and the need to establish that the claimant is in effective and genuine employment, and is not in work "on such a small scale as to be marginal and ancillary".

The guidelines also make it clear that certain former workers have rights under Regulations 1612/68 and 1251/70. This covers:

- a person retiring after pension age (65) where he/she has continuously resided in the State for more than three years (or whose spouse is, or was before marriage, an Irish national) or was employed in Ireland for at least 12 months before retirement;
- a person who has ceased employment in Ireland as a result of permanent incapacity for work, where he/she has continuously resided in the State for more than two years (or

131 Department of Social and Family Affairs, Internal Review of the Operation of the Habitual Residence Condition, July 2006. http://www.welfare.ie/publications/hrcreview06.pdf p. 7.

132 The Irish Independent, Immigrant workers not exploiting State, data shows, 6 March 2007.

133 In the Observatory for 2005, this guideline was only available through the freedom of information section of the Department of Social and Family Affairs website. The guidelines is now a separate publication and information on the habitual residence condition is more accessible. http://www.welfare.ie/foi/habres.html.

whose spouse is, or was before marriage, an Irish national) and is entitled to disablement benefit because the incapacity was due to an occupational accident or disease;
- a person who has been temporarily laid off work and who is seeking reinstatement or re-employment with the same employer;
- a person who has voluntary given up work to take up vocational training linked to the previous job;
- a person who has become involuntarily unemployed and must take up vocational training because of the state of the labour market.

The guideline states that people who move in search of employment benefit from equal treatment under Regulation 1612/68 only as regards access to employment. First-time job seekers do not qualify for equal treatment with regard to social and tax advantages within the meaning of Article 7(2) of that Regulation.

The Habitual Residence Condition & the Social Welfare Appeals Office

Decisions of the Deciding Officer can be appealed to the independent Social Welfare Appeals Officer (or, in the case of Supplementary Welfare Allowance to a Health Service Executive (HSE) Appeals Officer) and if necessary subsequently, to the independent Social Welfare Appeals Office.

According to the Social Welfare Appeals Office Annual Report 2006,[134] there are continued concerns of Appeal Officers in relation to inconsistency in the application of the habitual residence condition. This concern had also been noted in the 2004 and 2005 Annual Reports.[135] It also appeared that guidelines available to HSE Appeals Officers might not be fully up to date to reflect the latest thinking and EU case-law and it was indicated that the Department of Social and Family Affairs would be circulating updated guidelines shortly.

For the period 1 May 2004 to the end of March 2006, over 37.5% of decisions from 800 appeals against decisions of Deciding Officers relating to the habitual residence condition were overturned by the Social Welfare Appeals Office. Furthermore in an additional 400 cases, a decision was revised following a review of that decision by the Deciding Officer prior to the Appeal[136].

The 2005 Annual Report discusses several cases involving appeals against decisions on the habitual residence condition. In the context of persons coming within the scope of free movement of persons provisions, a particularly noteworthy appeal is described which involved a Czech national categorised as a refugee in Ireland prior to accession and who was seeking child benefit from June 2004. The Appeals Officer noted that the appellant was not a refugee with effect from 1 May 2004 and that EU legislation confers rights on workers to 'family benefits'. A EU family resident in Ireland qualifies for Child Benefit if one of the parents is in insurable employment or self-employment in the State and the habitual residence condition has no application in such a case. Accordingly as the woman's partner commenced employment in October 2004, the appellant was entitled to the payment provided the conditions for entitlement were satisfied. However the habitual residence condition did apply to the period June – October 2004 as neither parent had then been in insurable employment.

Another case involved a Slovakian appellant whose application for unemployment assistance was not allowed because he had not been resident in the State for the previous two years, did not have a stable pattern of employment and had not secured employment prior to his arrival and therefore did not satisfy the habitual residence condition. The Appeals Officer allowed the appeal holding that, though he was not resident in the State for two years at the date of his claim for unemployment assistance, in light of the evidence in the case, he and his wife were "embedded" in Ireland and were therefore habitually resident. The evidence in-

134 http://www.socialwelfareappeals.ie/pubs/annreps/annrep06.pdf
135 http://www.socialwelfareappeals.ie/pubs/annreps/annrep04.pdf, http://www.socialwelfareappeals.ie/pubs/annreps/annrep05.pdf
136 Department of Social and Family Affairs, Internal Review of the Operation of the Habitual Residence Condition, July 2006. http://www.welfare.ie/publications/hrcreview06.pdf

cluded a one year lease on current accommodation, bank accounts, children enrolled in local schools and involvement in a local parent/teacher association, lack of family ties in the country of origin and the stated intention that the family's move to Ireland was intended to be permanent.

The 2006 Annual Report describes the case of a Polish vet who had come to Ireland and whose employment in a veterinary hospital was terminated after only two months. She was initially refused supplementary welfare allowance on the basis that she had not worked for three months and that the work was therefore not effective and genuine. She did not therefore did not qualify as a worker, and did not satisfy the habitual residence condition. On appeal, it was held that she was a worker and should benefit from the allowance as a social advantage within the meaning of Article 7(2) of Regulation 1612/68. It was held that the work performed was effective and genuine, with the applicant working full-time and for long hours for two months and not expecting that her job would come to and so soon. She had since found another full-time job. She was therefore not required to satisfy the habitual residence condition.

An Internal Review of the Operation of the Habitual Residence Condition[137]

In June 2005, the Minister for Social and Family Affairs announced that a review was to be undertaken of the operation of the Habitual Residence Condition. The findings of this internal review were published in July 2006.

The report discusses a number of policy issues, which have emerged since the habitual residence condition was introduced. The Social Welfare Appeals Office Annual Report 2004 expressed concern that the condition might be in breach of the UN Convention on the Rights of the Child, to which Ireland is signatory. The review outlines advice the Department has received from the Attorney General's Office, which has concluded that the condition is compatible with Ireland's obligations under this Convention on the basis that under national law the right to child benefit is vested in the parent of the child. In its view, the habitual residence condition does not contravene the Convention in that the Convention only requires the child 'to benefit' from social security. "The child's right to benefit from social security is not defined and the State is free to decide in the case where the qualified person is habitually resident to provide for that right through child benefit, and in other cases through direct provision".[138]

In terms of compliance with the European Code of Social Security, the review notes that the ILO Committee of Experts had expressed concern that some decisions in applying the habitual residence condition may be in breach of Article 43 of the Code.[139] The review recommends that further consideration be given to the requirements of Articles 41 and 43 of the Code in relation to Child Benefit entitlements of families who are in employment or self-employment and to incorporate the necessary clarifications in the guidelines for the habitual residence condition.

Currently persons who are in Ireland on foot of a Stamp 3 Residence Permit are not permitted to access social benefits since such persons are supposed to be self-sufficient and are prohibited from taking up employment. Typically this is a stamp given to tourists, spouses of employment permit holders, persons receiving medical treatment and retired persons. The review has advised that this should be addressed in the context of the Immigration, Residence and Protection Bill and the relevant Government Departments should consider further the basis on which non-economically active migrants can be excluded from entitlements to public services.

In terms of administration, it is recommended that guidelines for decision-making be expanded to deal with the application of the habitual residence condition to certain groups,

137 Department of Social and Family Affairs, Internal Review of the Operation of the Habitual Residence Condition, July 2006. http://www.welfare.ie/publications/hrcreview06.pdf

138 *Ibid.*, p. 25

139 There is no ILO publication available on its website to indicate the precise nature of the concerns expressed.

such as asylum seekers, refugees, work permit holders and spouses of workers so, for example, Deciding Officers are aware of conditions associated with the applicant's right of residence. Forms and information leaflets related to the Habitual residence condition should also be made available in other languages. Links between the HSE and the Department of Social and Family Affairs should be strengthened to ensure consistency in decision-making.

Child Benefit & the Early Childcare Supplement Controversy

As indicated above, under the terms of Regulation 1408/71, a national of an EEA Member State who is employed or self-employed in Ireland and subject to the Irish PRSI system is entitled to payments classified as Family Benefits, even if his or her children are habitually resident in another EEA Member State.

Child benefits including the Early Childcare Supplement (a quarterly payment payable in respect of children aged six or under who are eligible for child benefits which came into effect in April 2006) are not subject to a means test and are universally available. Normally, these payments are subject to the habitual residence condition, but in the case of EU workers, the provisions of Regulation 1408/71 take precedence and workers are automatically entitled upon entry into the labour market.

The availability of such payments to new migrants led to political controversy in 2006 with political parties disputing the cost of making such payments where the children concerned were not resident in Ireland. The controversy was largely sparked by the introduction of the Early Childcare Supplement in April of that year. This payment is intended to help families with their childcare costs in Ireland and it was reported that the government had not anticipated that it would also fall within the definition of 'family benefits', making it available in respect of children resident outside the State, and consequently it had underestimated the annual cost of the initiative to the Exchequer.[140]

The consequence of the controversy was that many migrants became aware of their entitlement to such child benefits. Beforehand, there was little awareness of the availability of such payments as information from the Department of Health and Children and the Department of Social and Family Affairs did not clearly state that the habitual residence condition would not apply to applications in respect of family benefits.

The heightened awareness of the scope of the entitlement has led to an unanticipated high level of applications for child benefits and significant delays in processing applications. While the exact numbers of migrants from the Accession states in receipt of such payments are unconfirmed, it is reported that applications for the payments had increased from 30 per week in 2005 to an average of 300 per week following the press coverage of the controversy and the Department of Social and Family Affairs estimated that claims in respect of 25,000 non-resident children would be received in 2006.[141] There is no information available to indicate what proportion of such children are not resident in Ireland.[142]

Supplementary pension schemes

Current position

Section 26 of the Pensions (Amendment) Act 2002 implemented Council Directive 98/49/EC (the "Mobility Directive") by requiring that benefit as defined in that Section be provided on a non-discriminatory basis as between members who leave service because they have gone to a another Member State and members who leave for another reason. This Section came into operation on 1 June 2002, by virtue of the Pensions (Amendment) Act 2002

140 The Irish Times, FG denies criticism of childcare plan is racist, 31 January 2006; The Irish Times, Migrants right to payment raised a month after budget, 5 December 2006

141 The Irish Times, Migrant child payments may increase by €90 million, 16 October 2006

142 The Internal Review of the Operation of the Habitual Residence Condition carried out by the Department of Social and Family Affairs indicates that between May 2004 and April 2006, there was 1312 successful application for child benefit from nationals of the accession countries.

(Part 1 and Sections 6, 9 to 12, 15 to 28, 30 to 36, 40, 44, 50 to 55 and 59 (Commencement) Order 2002 (SI No. 276 of 2002).

The Occupational Pension Schemes (Disclosure of Information) (Amendment) Regulations 2003 (SI No. 4 of 2003) give effect to Article 7 of Directive 98/49, requiring that those responsible for the management of pension schemes to provide information to members who move to other Member States to the same extent as is given to members who remain.

Occupational pension schemes

Under Article 20 of Directive 2003/41 on the activities and supervision of occupational pensions (the IORPs Directive), employers based in Ireland must be allowed to make contributions to pension institutions based in other European States and Irish-registered occupational pension schemes must be allowed to accept contributions from employers located in other States.

Section 37 of the Social Welfare and Pensions Act 2005[143] inserts a new Part XII into the Pensions Act 1990, dealing with the conditions for prior authorisation to operate as a cross-border scheme and the conditions for approval to accept contributions when authorised to operate as a cross-border scheme.

The Occupational Pension Schemes (Cross-Border) Regulations 2005[144] provided for:

- the member protection provisions of the Pensions Act 1990 to be applied to Irish-based members of overseas schemes. These include preservation requirements and the jurisdiction of the Pensions Ombudsman;
- the information required when an application for authorisation to operate cross-border is submitted to the Pensions Board;
- additional conditions of authorisation;
- the information to be submitted to the Pensions Board once a scheme proposed to accept contributions from a foreign-based employer.

Complementary taxation changes were introduced in the Finance Act 2005. At the time of implementing the IORPs Directive, it was unclear whether it would cover existing UK/Ireland schemes, which were registered in Ireland with members in the UK.[145] These schemes were approved by the Revenue Commissioners prior to 1994 under a reciprocal agreement with the UK: although such schemes could not be established after that date, schemes in existence before then have continued to operate and to accept new members. Following discussions with the European Commission, it has been accepted that the cross-border provisions of the Directive, and in particular the requirement for prior authorisation and to satisfy certain ongoing conditions, apply to these schemes.

A notice relating to UK/Ireland schemes issued by the Pensions Board on 18 November 2005,[146] clarified the position and advised that, in the interests of natural justice, some transitional arrangements would be introduced to accommodate these schemes. Operators of schemes were invited to contact the Pensions Board with a view to applying for authorisation if they elected to continue to operate on a cross-border basis.

On 24 March 2006 the Occupational Pension Schemes (Cross-Border) Regulations 2006[147] came into force and both revoked and replaced the 2005 Regulations discussed above. The 2005 Regulations were made under section 3 of the European Communities Act 1972 due to uncertainty with regard to using the powers under the Pensions Act. To remedy such uncertainty, Section 5 of the Pensions Act 1990 was amended by Section 44 of the So-

143 Act No. 4 of 2005.
144 S. I. No. 592 of 2005.
145 See Pensions Board communication on "Position of UK/Ireland schemes under the EU IORPs Directive", 31 August 2005.
146 Pensions Board "Notice to UK/Ireland Schemes", 18 November 2005.
147 S.I. No. 292 of 2006

cial Welfare Law Reform and Pensions Act 2006 to expressly state that regulations made under the Pensions Act may be used to implement law.[148]

The 2006 Regulations are made under the Pensions Act powers. The main changes from the provisions of the 2005 Regulations as outlined above are:

- The condition of authorisation, that a scheme must satisfy the funding standard, was originally provided by way of primary legislation. This condition of authorisation is now being incorporated into secondary legislation to allow for flexibility in relation to the funding standard requirements for certain schemes which require authorisation to operate cross border.
- In the case of schemes which were already operating cross border on 22 September 2005, the condition of authorisation in relation to the funding standard shall not apply until the earlier of (i) the date on which the schemes satisfies the funding standard, (ii) the effective date of the next actuarial funding certificate after the date on which the application to operate cross border was made, or (iii) such later date as may be granted by the Pensions Board under section 49(3) of the Act.

In addition, Section 121 of the Pensions Act was amended to provide that where an employer provides access to overseas pensions schemes as defined in the Taxes Consolidation Act 1997, he is not obliged to give access to a PRSA (Personal Retirement Savings Accounts).[149]

Recent Commentary

Alan Barrett & Yvonne McCarthy, *Immigrants in a Booming Economy: Analysing Their Earnings and Welfare Dependence* Institute for the Study of Labour, November 2006. This paper examines the earnings of immigrants relative to host workers and also the extent to which immigrants draw on social welfare services in comparison to Irish nationals.

148 Social Welfare Law Reform and Pensions Act 2006 (Part 3)(Commencement Order) 2006 S.I. 291 of 2006

149 *Ibid.*

Migrant Rights Centre Ireland, *Social Protection Denied: The Impact of the Habitual Residence Condition on Migrant Workers*, November 2005. This report analyses the impact that the Habitual Residence Condition has had on migrant workers in Ireland. It makes recommendations for amending the HRC and improving access to social protection for migrant workers and their families.[150]

Cousins, Mel, "The Habitual Residence Condition in Irish Social Welfare Law", *The Irish Journal of European Law*, Volume 13, Number 1 and 2 2006. This article explores the role of the habitual residence condition in Irish social welfare law. It discusses how habitual residence is defined including references to ECJ jurisprudence on the matter. It also discusses the impact EU free movement rights have on the availability of social welfare payments and sets out a useful overview of the circumstances in which the habitual residence condition will or will not apply to persons availing of EU free movement rights.

150 An executive summary of the report is available at: http://www.mrci.ie/publications/documents/SocialProtectionDenied_ExectutiveSummary.pdf

CHAPTER XI. ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS

Establishment and the Provision of Services

Directive 2004/38/EC and the European Communities (Free Movement of Workers) (No. 2) Regulations confer rights on EU nationals and their family dependents who wish to avail of the freedom of establishment, receive or provide services and study in another Member State.

Directive 2006/123/EC on Services in the Internal Market: Irish position

A recent report commissioned by Forfás, entitled *Services Innovation in Ireland – Options for Innovation Policy*,[151] states that employment in the services sector in Ireland grew by 58.1% between 1995 and 2004. This can be contrasted with manufacturing employment growth of 5.6%. The growing importance of the service sector to the Irish economy is apparent from the fact that Ireland is the 14th largest per capita exporter of services in the world and its share of the global services trade reached 2.2% in 2004, in contrast with a 0.32% global share of the world economy.[152] These statistics provides a context for Ireland's pro-Directive position in the negotiations toward the recently adopted Services Directive.
In the negotiations leading to the adoption of the Services Directive, the Irish Government was consistently supportive of the need for such a Directive. At each step of the negotiations the Government stressed the role of ongoing consultation with the social partners in formulating its position on new drafts.[153]

Irish MEP's aligned with the ALDE (Progressive Democrats) and UEN (Fianna Fail) European political parties were involved in the rewording of the country of origin principle (see below) and other amendments which eventually lead to the Directive being adopted in December 2006.

Following the European Parliament's amendments to the text in February 2006, the Government broadly welcomed the European Parliament's proposal as a good basis for making progress though it has acknowledged that it would have preferred a more ambitious proposal -, for example, the inclusion of temporary employment agencies in the scope of the Directive. In particular, the Minister for Enterprise, Trade and Employment praised the European Parliament's input into the text of the Directive and put emphasis on the importance of striking a balance between achieving a Directive that would facilitate the evolution of a genuine market for services but also allay concerns regarding social dumping, the protection of public services and safeguarding workers' rights and consumer interests.[154]

Forfás had estimated that the original Commission proposal would have benefited Ireland to the tune of about €400 million annually. The indications are that the Directive as enacted will be worth about half that to Ireland and as such the government has expressed some disappointment in relation to the watering down of the thrust of the original proposal in particular in relation to the scaling down of the Directive's scope in Article 2.

Since the Directive was adopted, the Department of Enterprise, Trade and Employment and its counterparts in other Member States have participated in meetings in Brussels focused on developing a common strategy for implementing the Directive free of the political considerations that led to such entrenched positions in the negotiations. The Government

151 A report commissioned by Forfás from CM International, Services Innovation in Ireland – Options for Innovation policy, September 2006. www.forfas.ie
152 *Ibid.*
153 Department of Enterprise Trade and Employment website: http://www.entemp.ie/trade/marketaccess/singlemarket/servicesdirective.htm and Address by Minister of State at the Department of an Taoiseach at a Seminar on the Draft Directive on Services in the Internal Market, Liberty Hall 13 January 2006.
154 Department of Enterprise Trade and Employment Press Release 16 February 2006.

has indicated that the Directive will be implemented in accordance with the timeline set out in the Directive.[155]

Focus on the Country of Origin Principle

In the initial Commission proposal for a Directive, Ireland was in favour of the introduction of the 'country of origin' principle, where the service provider is regulated by the country in which it is established rather than the country to which it is providing a service, though like all Member States it wanted certain safeguards in relation to its application built in to address domestic concerns. In particular, the Government as well as the opposition parties were concerned about an erosion of labour standards in a more competitive environment.[156]

Ireland felt that making the country of origin principle subject to the fundamental employment law of the host state would be an adequate way to uphold the country of origin principle while addressing the widespread fear amongst trade unions that the without such a derogation, the introduction of the Directive would spark a "race to the bottom" in employment conditions.

In Dáil Debates,[157] the government highlighted that, even without the Directive, workers posted in Ireland from other EU Member States have the protection of all Irish employment legislation in the same way as employees who have an Irish contract of employment.[158]

Attention was also drawn to the Industrial Relations Act 1946, which provides for collective agreements negotiated between trade unions and employers in individual sectors, called Registered Employment Agreements, to be registered with the Labour Court. Once registered, these agreements are binding not only on the signatory parties but also upon all employers not party to the agreement. Therefore, employees posted to Ireland are entitled to the minimum pay and other terms and conditions of employment specified in the Registered agreement. There are approximately sixty agreements registered at the present time, many of which relate to the services sector.

Students

General

Regulation 18 of the European Communities (Free Movement of Workers) (No. 2) Regulations entitles students to access to education and training in the State in the like manner and the like extent as Irish citizens. In 2005, there were 9,000 international students from the EU registered in higher education institutes.[159]

EU Status

Third-level institutions will assess fees due on the basis of EU or non-EU status.

EU fees, which are usually at a substantially lower level than non-EU fees, are payable by those who meet certain conditions. The precise wording of these conditions varies as between third-level institutions. For the largest third-level institution in the State, University College Dublin, EU rates will apply:

- For students who are aged under 23 on 1 September of the year of entry into the institution concerned, where the student has been ordinarily resident in a EU Member State for three of the five years prior to entry **and** his/her parent(s) have been ordinarily resident (that is, principally resident for the purposes of taxation) in a EU Member State for three of the five years prior to the student's entry.

155 Dáil Éireann Parliamentary Questions 17 May 2006
156 Dáil Éireann Parliamentary Debates 23 November 2005 –Comments made by An Taoiseach Bertie Ahern
157 Dáil Éireann Parliamentary Debates 25 and 26 January 2006
158 See Chapter 3, above.
159 NESC, Migration Policy, September 2006.

- For students who are aged 23 or more on 1 September of the year of entry (and hence treated as mature students, where the student has been ordinarily resident (that is, principally resident for the purposes of taxation) in a EU Member State for three of the five years prior to the student's entry.

Undergraduate students born in Ireland who do not meet the normal residency requirements but who received all their primary and secondary education in Ireland and have no previous third-level attendance will also pay EU fees, as will graduate students born in Ireland who have also received all of their third-level education in Ireland.

Dublin City University defines the conditions for the status rather differently, stating that a candidate will qualify where they meet *one* of the following three criteria:

1. they are a national of an EU member state and will be ordinarily resident in an EU member state for three of the five years prior to the commencement of the programme.
2. they are a national of an EU member state and have received all their post-primary education within an EU member state.

3.1 where *over the age of 23*, they have been in full-time employment in an EU member state for three of the five years prior to the commencement of the first year of the course.

3.2 where *under the age of 23*, they have been ordinarily resident in an EU member state for three of the five years prior to the commencement of the programme and their parents have been in full-time employment in an EU member state for three of the five years prior to the commencement of the programme.

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 graduates who hold EU nationality or have official refugee status and who have been ordinarily resident in a EU Member State for at least three of the five years preceding their entry to the course.

Under the Higher Education Grants Scheme, which is administered by local authorities, means-tested grants are provided to eligible students who are pursuing approved full-time courses. In order to be eligible for a grant under this scheme for the 2006/2007 academic year, a student must:

- be at least 17 years old on 1 January 2007;
- have been ordinarily resident in the administrative area of the Local Authority from 1 October 2005 (and, save where the student is classed as "independent mature", their parents or guardians must fulfil the residency condition);
- have fulfilled the Leaving Certificate examination condition; and
- conform to the specified income limits.

In addition, the student must:

- hold EU nationality; or
- have official refugee status; or
- been granted humanitarian leave to remain; or
- have permission to remain by virtue of marriage to a resident Irish national (or be a child of such a person, not having EU nationality); or
- have permission to remain in the State by virtue of marriage to a national of another EU Member State who is residing in the State and who is/has been employed or self-employed (or be the child of such a person, not having EU nationality); or
- be a national of a member country of the EEA or Switzerland.

Foreign students' quotas

There appear to be no quota, or *numerus clausus*, arrangements applying to limit the number of students coming from outside Ireland.

Diplomas of private institutions and recognition by universities

Recent Legal Literature

Nothing to report

CHAPTER XII. MISCELLANEOUS

Nothing to report.

APPENDIX: LIST OF PRINCIPAL INTERNET SITES

Government

www.irlgov.ie	(Irish Government's "entry" web-page)
www.taoiseach.gov.ie	(Taoiseach (Prime Minister): high level policy)
www.justice.ie	(Department of Justice, Equality and Law Reform: immigration and nationality policy)
www.entemp.ie	(Department of Enterprise, Trade and Employment: work permits and other matters relating to third-country national workers)
www.welfare.ie	(Department of Social and Family Affairs: access to social welfare benefits and application of habitual residence test). See, also, www.socialwelfareappeals.ie (the independent appeals office for entitlement to social welfare payments)

Legislation

www.oireachtas.ie	(Parliament web-site: contains all enacted primary legislation and proposals)
www.irishstatutebook.ie	(contains primary and secondary legislation, currently up to 2003)

Employment

www.labourcourt.ie	(Labour Court)
www.lrc.ie	(Labour Relations Commission)
www.publicjobs.ie	(Public Appointments Service)

Statistics

www.cso.ie	(Central Statistics Office)

NGOs

www.immigrantcouncil.ie	(Immigrant Council of Ireland)