REPORT
on the Free Movement of Workers in Spain in 2006

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CHAPTER I. ENTRY, RESIDENCE AND DEPARTURE

1. Entry

Text in force

During 2006 the legal regime applicable to Community citizens and their families (who wish to enter, move, reside and work in Spain) is *Royal Decree 178/2003, of February 14,*[1] *on entry to and residence in Spain of the nationals from Member States of the EU and from other States which are parties to the Agreement on the European Economic Area* (hereinafter RD 178/2003). As regards the entry of nationals of the Member States, those of the EEA, Swiss citizens and their families, it should be pointed out that the references to the applicable regulations of RD 178/2003 made in previous reports[2] continued to be apply.

Entry bis (Since April 2, 2007).

Directive 2004/38 has been transposed through Royal Decree 240/2007, of February 16, on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other states parties to the agreement of the European Economic Area. Said Royal Decree is in force, since April 2, 2007. Therefore, in this 2006 Report, we can only make a general reference to this recent legislation without making any evaluations. A more detailed analysis of Spanish administrative practice and possible Case Law will be made in the 2007 Report.

Text in force (since April 2, 2007).

The new Royal Decree 240/2007, of February 16, on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other states parties to the agreement of the European Economic Area (RD 240/2007), in relation to the entry of EU citizens to Spain, establishes, in article 4, that this will be done with a passport or valid ID Card in force, which records the nationality of the holder. It is also stipulated that, if EU or EEA citizens do not have the travel documents required to enter Spain, when they reach the border, the responsible authorities will provide them with all the facilities to obtain these documents or to accredit that they are beneficiaries of the right to enter by other means.

Having a passport or an ID Card in force are also the conditions required in article 6 for the cases in which EU or EEA citizens remain in Spain (termed a stay) for a period less than three months regardless of the finality of this temporary stay.

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1 *Official State Gazette of February* 22, 2003, nr. 46, p. 7397.. On 2005, a new Decision of the Spanish Supreme Court of February 8, reaffirmed once again the nullity of some articles of RD 178/2003. Both in 2004 and 2005 the Spanish Supreme Court made references to the ECJ on the *MRAX* and *Akrich* cases.

2 It is important to remember here the Instruction of June, 2005, of the Spanish Department of Immigration of the Ministry of Employment and Social Services which specifically stated that: *"Pursuant to what is established by the European Community Court of Justice in its decision of April 14 2005, the content of article 11.3.C) of RD 178/2003, whereby the requisite in relation to the family members of Community citizens or of nationals from other States which are parties to the Agreement on the European Economic Area, when these are not in turn Community citizens or nationals of the aforementioned States, to attach(...), the residence visa in the passport, or the request for exemption from this, which must be presented together with the request for the residence card must be considered to be inapplicable".* Nevertheless, the Instruction of June 2005 continued: "*On the contrary, the relevant visa of stay will be required from the aforementioned family members for entry into Spain in the event that they are nationals of any of the States included in Annex I, of Regulation (EC) 539/2001, of the Council, of March 15, 2001, whereby the list of third countries whose nationals are submitted to the obligation to have a visa in order to cross the external borders are established.*"

2. Residence

Text in force (2006)

As regards the residence of nationals of the Member States, those of the EEA, Swiss citizens and their families, it should be pointed out that the references to the applicable regulations of RD 178/2003 made in previous reports[3] continue to apply. No modifications have been introduced during 2006.

Residence bis and Text in force (since 2nd April, 2007)

The new RD 240/2007 concerning the holder of the right to residence takes two situations into account. The first is residence for over three months of EU or EEA citizens (article 7). In this case, those concerned who have been in Spain for more than three months since 2 of April 2007 or previous to this and did not have a valid EU residence card can personally request their registration in the Central Register of Aliens at the Office of Aliens in the province where they intend to reside or where they resided without the EU Residence Card, using the official form (termed EX.16). To do so, they must present the passport or the valid ID Card in force. This registration enables them to automatically obtain a registration certificate which will contain the name, nationality and address of the person registered, his alien identity number (Alien Identity Number, NIE) and the date of registration.

The second case of residence is the so called permanent residence (article 10). This permanent residence can be held by the EU or EEA citizens who accredit having stayed in Spain legally and continually for more than five years. At the request of the person concerned, the Office of Aliens in the province where he resides will provide him with the certificate which recognises his right to reside permanently as soon as possible and once the duration of the residence has been verified.

3. Departure

Text in force (2006).

As was pointed out in previous reports, during 2006, the questions which affect articles 16[4] and 18[5] of Royal Decree 178/2003 relative to the measures applicable due to reasons of public order, security and public health.

Judicial Practice

In application of the expulsion stipulated in these provisions, mention can be made of the *Decision of the Contentious Administrative Court of November 28, 2006*. This case involved the request for the annulment of an expulsion order and prohibition of entry to the Schengen Area for 10 years by an alien arrested in Spain and convicted for an offence sanctioned

3 See especially Spanish Report on the Free Movement of Workers 2002-2003, p. 505 et seq.

4 We continue to hold, as we did in our 2004 Report, that since there has been no regulation change to "*the reference made in section 2 of article 16 of Royal Decree 178/2003 to the criteria of Organic Law 4/2000 gives rise to serious doubts concerning its compatibility, bearing in mind that the criteria included in the general regime for aliens offers little guarantee to aliens involved in expulsion proceedings, which might be urgent (24 hours) or ordinary, as well as the automatic nature of the administrative act of expulsion, and would imply discriminatory treatment of Community nationals as compared with Spanish nationals or even as compared with aliens in general*".

5 The Decision of February 9, 20055 annulled the section "*or refusal to provide cards*" in article 18.2 of RD 178/2003. Until this Decision, the Spanish authorities demanded that the persons involved in resolutions on expulsions and the refusals to provide cards of the Community regime had to abandon Spanish territory in a concrete period time, in application of article 18.2 of RD 178/2003. By virtue of the aforementioned decision of the Supreme Court, and as from the publication of the Decision, the resolutions whereby a Community regime card was refused will not refer any more to a period for the compulsory exit of the person concerned.

with detention for a period greater than one year. The problem arose because the Spanish authorities directly applied the non-Community alien regime of the Law on Aliens 4/2000. The Spanish judge annulled the expulsion order as he understood that it was not possible to apply the non-Community legal regime, and Royal Decree 178/2003 had to be applied. The application of Royal Decree 178/2003 was justified due to her condition as daughter of a Community citizen resident in France and only the expulsion measure based on article 16.1 c) of Royal Decree 178/2003 could be adopted, a circumstance which the Spanish administrative authorities have not invoked or reasoned sufficiently.

As concerns expulsion, reference must also be made to the Decision of the *High Court of Justice of the Canary Islands of May 21, 2005*, which is of interest, although it is not within the period covered by the report. This litigation involved the discussion on whether it is possible to include criminal violent family behaviour in order to adopt an expulsion decision regarding a Community family when invoking the notion of public order (which has Community importance or scope). Unfortunately, it was not possible to prove this criminal offence during the trial, nor was it possible to prove that the couple who made a contract with the alleged victim incurred abuse of process as the intention was to acquire the condition of Community family member. In any case, it should be pointed out that the judge in this case referred to Directive 2004/38 although he stated that the period for its transposition in Spain had not concluded.

Administrative practice

The most important innovation concerning expulsions is specified in Memorandum 2/2006 of the Director of Public Prosecutions[6] (dependent on the Ministry of Justice) of July 27, 2006 on several aspects of the regime on aliens in Spain. In this Memorandum, an analysis was made of a number of considerations concerning the real possibility of adopting decisions on the expulsion of EU citizens or citizens if other assimilated countries (citizens of the European Economic Area and Switzerland) instead of imprisonment which would be imposed in Spain. It should also be pointed out that this position of the Spanish Prosecutors takes the content of Directive 2004/38, not transposed in 2006 by the Spanish Government, into account as an interpretational factor.

Memorandum 2/2006 expressly states that, in accordance with the stipulations in Memorandum 3/2001 and with the new drafting of article 89 of the Criminal Code of 1995, the substitution of imprisonment by expulsion

> "can hardly be applied to a Community citizen, and it can also be seen that there is an additional difficulty for the (expulsion) measure to be effective, bearing in mind that there is a common area with no boarders created by the Schengen rules ... These conclusions are reinforced by the regulation contained in the recent Directive 2004/38".

The argumentation of the Memorandum continues with a reference to articles 33, 27 and 28 of this Directive and the Director of Public Prosecutions concludes that

> "the criteria that the Prosecutors must, in general and except in exceptional cases, give a negative report concerning the applications for expulsion for Community citizens or assimilated citizens who, under the stipulations in articles 57.7 of the Organic Law and 89 of the Penal Code, are transferred to them for reports by the competent judicial organisms is maintained. These exceptional cases must be treated otherwise due to reasons of public order, public security or public health as referred to in article 16 of Royal Decree RD 178/2003 and Directive 2004/38/EC, respecting the procedural peculiarities in article 17 of the aforementioned Royal Decree."

Departure bis Text in force (since 2nd April, 2007).

As regards the restrictive measures, the new RD 240/2007 establishes that, in general, entry to Spain can only be prevented, registration in the Central Register of Aliens refused or the

6 See http//www.fiscal.es/ (last visit February 28, 2007).

expulsion or return of EU or EEA citizens from Spanish territory ordered when there are reasons of public order, public security or public health. In the case of EU or EEA citizens with permanent residence, it is expressly established that an expulsion measure can only be adopted when there are serious reasons of public order or public security. Moreover, before the expulsion decision is adopted, the competent Spanish authority must evaluate the duration of the residence, the social and cultural integration of the person concerned in Spain, his age, state of health, family and economic situation and the importance of the links with his country of origin, as factors indicating settlement which must be taken specially into account.

In the cases of prohibitions to entry to Spain for EU or EEA citizens, it is stipulated that these persons can request the lifting of the prohibition within a period of two years, alleging the reasons they consider appropriate which accredit a material change in the circumstances which justified the prohibition to enter Spain. This request must be resolved within a period of three months.

Both the general restrictive measures based on public order, security and public health, as well as the measures based on serious reasons of public order and public security are subject to determined criteria when being adopted. Thus, they must be adopted in accordance with the principle of legality, they can be revoked ex officio if there is a change in the circumstances which gave rise to these or at the request of a party concerned, and they cannot conceal reasons of an economic nature. In addition, when the measures concern public order or security, they must comply with the criteria included in the Case Law of the ECCJ as regards the derogated Directive 64/221, that is to say, the restrictive measures adopted must be based exclusively on the personal conduct of the party concerned, and this conduct must constitute real, present threat which is sufficiently serious to affect a fundamental interest of society. The existence of previous criminal sentences cannot be a reason in themselves for adopting such measure. When the restrictive measures are adopted for reasons of public health, only those measures which are based on diseases which have epidemic potential catalogued by the WHO or infectious or parasitical diseases in accordance with Spanish Law will be accepted.

4. Information on the transposition of Directive 2004/38/EC.

In 2006, the Spanish Government did not comply with the period for transposition established by Directive 2004/38 which concluded on April 30, 2006. However, on May 25, 2005 there was an unofficial draft of a Spanish Royal Decree to adapt Directive 2004/38. This draft was approved in 2007 by *Royal Decree 240/2007*, of February 16,[7] on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other States parties to the Agreement on the European Economic Area. The content, scope and, possibly, its judicial application will be the subject of the study for the 2007 report.

Despite the fact that the Directive 2004/38 has not been transposed by the Spanish Government, there are references to this. The first was the one analysed above in *Memorandum 2/2006* which interpreted articles 27, 28 and 33 of the Directive when applying article 89 of the Spanish Penal Code OF 1995 and concluded with the non-expulsion of Community citizens, assimilated citizens and their family members substituting one of the prison sentences included in article 89 of the Penal Code of 1995.

In the judicial area, the first reference to Directive 2004/38 is in the *Decision of the High Court of Justice of the Canary Islands of December 21, 2005* (not mentioned in previous report 2005). The litigation arose due to the fact that the husband of a Spanish woman (who is equated with Community family members in Spain by article 2 of Royal Decree 178/2003) had his application for a Community resident family member card rejected as the holder of the right did not reside in Spain.

The Spanish judge, first stated that

7 *Official State Gazette* February 28, 2007.

> "the right to residence of family members depends on the fact that the European citizen exercises his right to free residence in a specific host State, or in the case of the family members of Spanish citizens, that the Spanish citizen effectively resides in Spain. If this is not the case, the right to reside in Spain cannot be claimed. This right arises from the time the family member moves to Spain to live in the same place as the Spanish citizen or another Community citizen with whom he has family links.".

Secondly, the judge mentioned Directive 2004/38 stating that, when this is implemented,

> "it will go much further as regards the recognition of the rights of the spouse who is not a national of Member State to reside in the State where the other spouse is resident, as it regulates the right of residence even in the cases of a rupture of the family link on condition that there are certain requirements"..

The third reference is much more precise and important with regard to the provisions of Directive 2004/38 and refers to the *Decision of the High Court of Justice of the Basque Country of March 10, 2006*. In this case, a Rumanian national, who had a stable relationship with a Spanish citizen and were duly registered as a common law couple in the Register of Common Law Couples in the Autonomous Community of the Basque Country was refused the exemption from a visa and the issue of a Community residence permit, applied for in 2003. The refusal of the Community family member card by the Spanish Administration was based on the fact that common law couples are not included as families in article 2 of Royal Decree 178/2003 and, therefore, neither article 8.3 nor article 11 of Royal Decree 178/2003 applied to them.

However, the judge understood that, on the date of termination of this case, Directive 2004/38 was in force and, despite the fact that the Spanish government had not complied with articles 40 and 38 of the Directive, the judge established that,

> " this point (the lack of transposition) is relevant as regards the effects of compliance with the decision and the following will have to be taken into account with respect to its execution by the administrative authority: in the first place, article 2.2. of the new Directive modifies the notion of family members who are beneficiaries of the Community Law regime, which now includes: b) the partner with whom the citizen of the EU has formed a registered union... It will also have to take into account that article 3.2. of the new Directive *already in force and directly applicable in its own terms* if its transposition to internal legislation does not take place within the period stated.... Consequently, the reason for the appeal deduced by the State Defence must be rejected and the administrative action declared null".

5. Treatment of jobseekers

The analysis of the regulation of nationals of the EU or assimilated citizens (nationals of the European economic Area and Switzerland) who travel to Spain in search of work is focused on two questions.

In the first place, article 3.2 of Royal Decree 178/2003 determines that it is a right for these nationals that they can "access any work as an employee or as self-employed, in the same conditions as Spanish citizens, without prejudice to the limitation established in article 39.4 of the TEC". The provision excludes the relatives in the ascending line of the Community citizen or assimilated citizens from this right, as well as the relatives in the ascending line of students and their spouses.

In the second place, the full exercise of this right and its compatibility with Community Law makes it necessary to specify how the treatment of jobseekers in Spain is realised in practice. This question was resolved through the *Resolution of July 11, 1996*[8] on the registration of foreigners in the offices of the National Employment Institute (INE) and in the agencies responsible for job placements, unemployment protection and the exchange of information.

8 Resolution of July 11, 1996 of the Department of Employment and Migration on the instructions on the registration of aliens in the offices of the National Institute of Employment and in the agencies responsible for job placements, unemployment protection and the exchange of information in the *Official State Gazette* of August 9, 1996.

The objective of this Resolution of 1996 by the Spanish Government was the previous legal regime intended to include the entry into force of the Agreement on the European Economic Area and the enlargement to include Austria, Finland and Sweden. Specifically, it establishes that, through this resolution, the free movement of workers of the EU and of the European Economic Area is guaranteed while it guarantees that this will not be applied to these nationals, in accordance with Regulation 1612/68, legal, regulation or administrative provisions, nor will the administrative practices which subordinate access to employment to registration conditions at the work placement offices apply. Moreover, they are guaranteed the same assistance and help by the employment offices and work placement agencies in Spain as Spanish citizens.

As an addition, the Resolution of 1996 establishes that the criteria for registration in the employment offices which, in our opinion, respect the principle of equality of treatment of Community national, assimilated nationals and their families with the restrictions stated above, are as follows:

a) Workers who do not reside in Spain and are nationals of the EU or the European Economic Area and are contracted on the payroll to work are not required to register previously.
b) As regards registration of workers who are nationals of these States who seek work in the offices of the National Institute of Employment, the same norms as those for the registration of Spanish nationals will apply, and it is not necessary to previously obtain a residence permit.
c) These same criteria will be applied to the nationals of third States who are spouses, children under twenty-one, or older than this age and under the charge of a national of the European Union or of the European Economic Area (including Spain) who reside in Spain.

In the case of unemployment benefit, this Resolution of 1996 established that:

> "A) The alien workers who are nationals of countries of the EU or of the European Economic Area who comply with the requirements set out the requirements established in Certificate III of the Revised Text of the General Law on Social Security, approved by Legislative Royal Decree 1/1994, of June 20, will have the right to unemployment benefit at contributory and assistance level as stipulated in following points of the Memorandum of the Department of the National Employment Institute:
> *Memorandum 22/1986 of June 22*, on the harmonisation of the legislation on unemployment protection in Spain with the stipulations in the EEC Regulation 1408/1971 (LCEur 1983\411/1) and 574/1972 (LCEur 1983\411/2) on Social Security for Migrant Workers.
> *Memorandum 2/199 of January 22*, whereby Memorandum 22/1986 was adapted t the free movement of workers.
> *Memorandum of June 15, 1993* on the inclusion of unemployment subsidy in the scope of application of Regulations EEC1408/1971 and 574/1972.
> *Memorandum 3/1994 of January 27*, whereby the Agreement on the European Economic Area of May 2, 1992 concerning employment and unemployment protection was applied.
> B) For the purposes of the application and reception of the unemployment benefits and subsidies, registration as a jobseeker by alien workers from countries of the EU and the European Economic Area will be made in accordance with the stipulations in Instruction I, point I.5 of this Memorandum."

The conclusion we can reach as regards the treatment of jobseekers who are nationals of the EU or of the European Economic Area is that there is an apparent absence of direct or indirect discrimination. The only question on this point concerns the inclusion or not of the nationals of Switzerland and their families which, although this is not expressly included, this regime must apply to them. The same occurs with A8 nationals to whom, from May 1, 2006, the end of the transitory period agreed to by Spain, the stipulations in Royal Decree 178/2003 and in the Resolution of July 1996 must be applied as explained in Chapter VIII.

Otherwise, in order to register non Community alien workers in the public employment services and the agencies for work placement at the Ministry of Employment, the *Ministerial*

Order of November 22, 2006[9] was issued, and is applicable to nationals of Rumania and Bulgaria whose treatment in Spain will be addressed in depth in Chapter VIII.

Article 1.2 of this Order determines that this will be applicable to non Community aliens. With some ambiguity, article 1.3 establishes that all the natural persons from Member States who are conditioned by transitory periods regarding the free movement of workers are also considered to be alien workers. The application of this article 1.3, which is compatible with Community Law, supposes that this Order will only be applicable to the nationals of Rumania and Bulgaria, excluding those of the EU8 as from May 1, 2006.

9 *Official State Gazette* of December 6, 2006.

CHAPTER II. ACCESS TO EMPLOYMENT

1. Equal treatment in access to employment

As regards the role of the employment agencies, we have already mentioned above that the Resolution of July 11, 1996 on the registration of Community and non Community aliens binds both the national Employment Institute and the private work placement agencies. Both entities must also guarantee the principle of equality for Community and assimilated job seekers. Therefore, as regards this point, we will only mention the judicial regime of the private work placement agencies.

These agencies were authorised to act as a complement to the public work placement system through *Royal Decree 735/1995 of May 5*[10] which regulates the non-profit making work placement agencies and the integrated employment services. This norm establishes the requirements and conditions which the work placement agencies which collaborate with the National Employment Institute operating in the job market and the authorisation procedures must comply with.

From the point of view of Community Law, the only reference to the obligations of these agencies is the *Single Additional Provision on the Offer of Community Employment*. Specifically, it is established that

> "The offer of employment from other countries of the European Union through its public employment services will be processed by the National Employment Institute.... particularly as regards a network created under the name EURES. These offers include those from the countries of the European Economic Area."

The conclusion is that the private work placement agencies have the same obligations as regards the Community workers, assimilated workers and their families as the National Employment Institute as the public authority by virtue of the Resolution of July 11, 1996.

2. Language requirement

In the employment conditions in the private sector, there is such freedom to contract that it has not been possible to establish a contracting model which excludes Community or assimilated workers due to language. In fact, the majority of private job offers request knowledge of English or another Community language. Unless this question is more precisely delimited in Spain, this question cannot be analysed.

3. Recognition of diplomas and initiatives to transpose Directive 2005/36/EC.

In relation to the possible initiatives aimed at incorporating Directive 2005/36/EC to Spanish legislation during 2006, no official transposition legislation has been found.

The most important innovations within the framework of the recognition of diplomas in 2006 were two. One is general and the other more specific as regards professional certificates issued by a Member State of the EU or of the European Economic Area.

The innovation of a general nature is the *Order of the Ministry of Education and Science of May 11, 2006*[11] whereby the general criteria for determining and complying with the complementary training requirements previous to the approval of foreign higher education certificates. The main objective of this Order is to implement Royal Decree 285/2004, of February 20, whereby the conditions for the approval and validation of foreign higher education certificates and studies are regulated, modified by Royal Decree 309/2005 of March 18.

10 *Official State Gazette* of May 8, 1995.
11 *Official State Gazette*, May 11, 2006.

This Order establish the possibility that a foreign certificate (not specific if it is issued by a Member State of the EU or of the European Economic Area or of a third State) can be approved is conditioned by the previous compliance of the person concerned with certain complementary training requirements when certain gaps are detected in the foreign training as compared with the training required to obtain the Spanish certificate whose approval is sought.

The second specific and sector innovation is the *Order of the Ministry of the Presidency of February 28, 2006*[12] which implements Royal Decree 1665/1991, of October 25, regulating the general system for the recognition of higher education certificates of the Member States of the EU and other States parties to the Agreement on the European Economic Area, which require a minimum training period of three years as regards the professions listed in the Ministry of Industry, Tourism and Commerce.

The purpose of this Order

> "is to implement Royal Decree 1665/1991, of October 25, whereby the general system for the recognition of higher education certificates of the Member States of the European Union and other States in the European Economic Area, which require a minimum training period of three years, as regards the professions of Physics, Chemistry, Industrial Engineering, Mining Engineering, Telecommunications Engineering, Naval Engineering, Technical Industrial Engineering, Technical Mining Engineering, Technical Telecommunications Engineering, Technical Naval Engineering and Tourist Company and Activities Technician and Royal Decree 1171/2003, of September 12, as regards the modifications to the former."

According to point seven of the Order of February 28, 2006, the application for the recognition of certificates issued by the Member States of the EU or the European Economic Area in relation to these professions means that this will be subjected to a procedure whose result or solution may give rise to three different situations:

a) Favourable to the recognition of the certificate for professional purposes.
b) The requirement to pass an aptitude test or a period of training.
c) Unfavourable to the recognition of the certificate with the due reasons.

If the recognition procedure concludes with a resolution proposing an aptitude test or a period of training which cannot exceed three years, this could give rise to the doubt about its compatibility with Community Law. The compatibility or incompatibility of this resolution with Community Law will depend on the training and the case by case consideration of the aptitude test or the conditions in which the person concerned must carry out the training and its content. As regards these questions, the Order only refers to them in very general terms, which leaves a wide margin for interpretation and application.

The doubts on the possible dissuasive use of this aptitude test for recognition purposes and the subsequent approval is justified if we analyse the *Decision of the Supreme Court of December 12, 2006*. In this Decision, the Supreme Court resolved an appeal against a Decision of the National Court concerning the recognition of sixteen applicants for the approval of the Certificate of Specialist Doctor in Allergology obtained in France as the corresponding certificate in Spain.

The relevant and most important aspect of this case in the Supreme Court is that it shows the discretional nature or the wide margin of interpretation of the competent Spanish authorities which can be a clear obstacle to approval and recognition:

1) In order to make the comparison in accordance with article 12 bis of Royal Decree 1691/1989 (the National Commission for the Speciality of Allergology), the competent organism refused to recognise certain subjects studied in France and equivalent to Spanish subjects for no reason.
2) It recommended that the persons affected should do complementary training of between two years and four months and two years and eight months when the raining period in Spain is four years and in France between three and four years;

12 *Official State Gazette* of Mars 3, 2006.

3) When drawing up the practical-theoretical test which the applicants seeking the approval of foreign certificates of specialist doctor must pass was so difficult that an examiner considered that it was impossible to answer.

In the light of these considerations, the Supreme Court rejected the appeal lodged by the Spanish Association of Allergology and Immunology against the decision to approve and recognise the French certificates.

Another relevant judicial pronouncement concerning recognition and approval of certificates is the *Decision of the National Court of September 28, 2006*. The litigation involved the refusal of the Spanish Administration (which mentioned Directive 2005/36/EC) to approve the degree of Bachelor of Arts in Business Administration. The refusal of the Spanish Administration was based on the fact that the degree had been awarded by the University of Wales (United Kingdom) but the training had been received at a Spanish university centre in Spain and this British University had an agreement with the Spanish University centre, however, it was not an "authorised centre" in Spain in accordance with Spanish legislation on university centres.

After analysing the compatibility of the applicable Spanish legislation and mentioning the *ECJ of November 13, 2003 (NERI)*, the National Court determined that the case returns to the time of the initial submittal of the application for approval and that the proper reports on the case involving the English certificate and its equivalence with the Spanish one be drawn up.

Finally, the *Decision of the High Court of Justice of Madrid of March 23, 2006* mentions Directive 2005/36/EC when determining the activities which a company can carry out from a tax point of view.

4. Nationality Condition for Ship Captains

Text in force

The norms analysed in the 2005 report continue to apply to the professions of Captain and First Officer of ships of the Spanish Merchant Navy. However, in order to complete what is stated in the 2005 report, it is necessary to mention article 7 as modified by Royal Decree 652/2005 of June 7, which regulates the minimum level of training in maritime professions.[13]

Sections 1 and 2 of article 7 are drafted as follows and seem implicitly to favour Spanish nationals:

> "1. The professional certificates of captain, skipper, first officer and radio operator issued by other States on condition that they are parties to the STCW Agreement and the conditions laid down in this Royal Decree are complied with. The approval of certificates issued by a State other than the one which issued the professional certificate will not be accepted for recognition.
> The professional certificate whose recognition is requested must include the approval of the State which issued it, which accredits compliance with the provisions of the STCW Agreement, with the form established in section A-I/2 of the training code.
> 2. The recognition of a professional certificate will be required in order to directly access employment as a crew member on Spanish merchant ships, except for the posts which entail or may entail the exercise of government functions which are legally attributed to Spanish nationals, such as the post of captain, skipper or first officer on the bridge, which will be reserved for Spanish nationals , without prejudice to the stipulations in article 8.2. The recognition will be carried out by approval at the request of the person concerned or of the shipping company, in accordance with rule I/10 of the annex to the STCW Agreement and section A-I/10 of the training code and the corresponding Merchant Navy professional card will be issued."

13 *Official State Gazette*, June 16,2005, nr. 143. The objective of this Royal Decree is to incorporate Directive 2003/103/EC of the European Parliament and of the Council, of November 17, 2003, whereby it was necessary to modify Royal Decree 2062/1999, of December 30, which is the general legislative framework for the maritime professions in Spain.

These two sections entail that, according to section 1 of article 7, the Spanish authorities may not recognise certificates which have been validated by other Member States and will only recognise those certificates which have been directly issued by a Member State of the EU. A careful reading of section 2 of article 7 seems to indicate that the posts of Captain, Skipper and First Officer are reserved as government employment which means that they are to be held by Spanish nationals in the first instance, although it later introduces the possibility of opening these up to Community nationals on condition that they pass the exam on Spanish maritime legislation in accordance with article 8.2[14], as we pointed out in the 2005 report.

Draft Legislation

Finally, mention must be made of the *Draft Bill on Maritime Navigation of November 13, 2006*, as its article 212 establishes that

> "the Captain and the First Deck Officer of Spanish ships must be Spanish, except in the cases in which the regulations establish that these posts can be held by the nationals of other Member States of the EU. At least fifty per cent of the rest of the crew must be Spanish or from another Member State of the EU".

The drafting of this provision presents doubts as regards the real opening up of this profession to any national of the EU and assimilated citizens who are not referred to and, possibly, the validity or invalidity of education certificates obtained in other Member States to which it refers.

14 See Royal Decree 652/2005 which establishes that article 8 of Royal Decree 2062/1999 is to be drafted as follows: "*Article 8. Specific regulations on the recognition of professional certificates issued by Member States of the EU*
1. The Department of the Merchant Navy can directly recognise the professional certificates issued by a Member State of the European Union in accordance with the applicable national provisions.
2. The citizens of the European Union who do not have Spanish nationality and have a professional certificate with sufficient attributions issued by a Member State, once they have passed the test on knowledge of Spanish maritime legislation, can exercise command of vessels with gross loads less than 100 GT which transport cargo or less than 100 passengers, on condition that they operate exclusively between ports or points located in zones in which Spain exercises sovereignty, sovereign rights or jurisdiction".
Order FOM/2285/2004, of June 28, regulates the tests on recognition of Spanish Maritime Law and the procedure for the issue of certificates to those holding professional certificates under Agreement STWC78/95, *Official State Gazette*, July 10, 2004, No. 166. Specifically, article 2 states the following requisites for the submittal of the application for the test of knowledge of Spanish Maritime Law.
"1. The person interested in the recognition of a professional certificate which authorises the person to exercise the post of Captain or First Mate, or the shipping company in the person's name, must apply to the Department of the Merchant Navy to do a test on knowledge of Spanish maritime legislation, and must provide the documentation listed below: a) Application as per the model in annex I. b) Professional certificate issued by the Maritime Administration of another country with the international certificate in accordance with Agreement STCW 78/95. c) Receipt demonstrating that the fees for the corresponding exam have been paid.
2. Those who have the certificates issued by those countries with which the Department of the Merchant Navy has signed an Agreement under the stipulations of Rule 1/10 of Agreement STCW 78/95 can take this test, as well as those who have certificates issued by the EU".

CHAPTER III. EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

1.Working conditions, social and tax advantages

During 2006 Spanish legislation appears to comply fully with the principle of equality concerning access to or the enjoyment of Spanish employment policies developed by the Spanish Government.

Judicial practice

With regard to the work conditions, there have been two Spanish Decisions with differing scopes as concerns the effective time of the recognition of professional experience acquired in another Member State and its evaluation in the promotion process.

The first is the *Decision of the National Court of October 13, 2005* where a selection process and the provision of internal promotion post of Specialist Doctor in the area of Employment Medicine in Spain was held and the training done by the person concerned in Belgium in order to obtain the Certificate of Graduate in Work Medicine in 1991.

The National Court concluded that

> "the validity and the recognition of the certificate referred to cannot be retroactive to dates previous to the date the credential was obtained, especially when it is on record that the person concerned had to have complementary training in order to validate the certificate in Spain".

This Decision seems to indicate that the previous training in order to obtain the certificate in the State of origin will not generally be taken into account, but will come into effect a from the time of the recognition in Spain and having passed the complementary training periods which the recognition of certificates of other Member States of the EU is normally subject in Spain.

The second relevant Decision is that of the *High Court of Justice of Castile-La Mancha of June 14, 2006* within the framework of a staff selection process through a call for applications, in which the Health Care Services of Castile-La Mancha carried out a minimum evaluation of the years of experience acquired by three Community citizens in the Portuguese health care system. In this case, the Court found that the citizens affected were in the right as it understood

> "that the application of a merit points system cannot serve as an excuse as this is clearly contrary to the constituent legislation of the EU as it is an indirect form of discrimination which unjustifiably gives priority to Spanish professional experience despite the similarity of the systems and legislation in the countries which make up the Union and this is a barrier to the principle of free movement in the common European area".

Text in force (social advantages)

With regard to social advantages, mention should be made of the approval of *Royal Decree 1621/2005, of December 30*[15] whereby the Implementation Rules 40/2003, of November 18, 2003 on the protection of large families were approved. The protection measures contained in this Royal Decree 1621/2005 are applicable to the Community nationals and assimilated nationals, including their family members. This is established in article 2.1 on the recognition of the condition of large family. This law stipulates that

> "in the case of nationals of the Member States of the EU or the States which are parties to the Agreement on the European Economic Area, who do not reside on Spanish territory, the Autonomous Com-

15 *Official State Gazette* of January 18, 2006.

> munity where the applicant works as an employed or self-employed person will be competent for the recognition of large families".

Once the possible protection measures requested by a Community national and his family are recognised in accordance with Royal Decree 1621/2005, these measures may be the following: social benefits as regards Social Security allowances to contract carers for large families; benefits for public or general interest activities and services such as the granting of scholarships, aid and exemptions from fees and prices in the area of education; benefits as regards transport and benefits for leisure and cultural activities.

Finally, as concerns social advantages, we should stress the *Resolution of March 23, 2006*[16] of the Department of Emigration (Dependent on the Ministry of Employment) whereby aid is provided to facilitate the occupation, professional qualifications and work experience for workers in the environment of the countries of the European Economic Area and Switzerland due to the possible exclusion of Community citizens from such aids. The doubt regarding their compatibility with Community Law arises when this Resolution defines the beneficiaries in its fourth section, "*...the Spanish nationals resident in Spain or abroad and the nationals of a Member State of the European Economic Area or Switzerland who reside in Spain...*". The omission of an express mention of Community residents in Spain as beneficiaries of these programmes must be evaluated as a possible discrimination.

2.Other obstacles to the free movement of workers

Text in force

In line with the above, that is to say, within the framework of measures or social advantages, is Royal Decree 200/2006 of February 17,[17] which modifies Royal Decree 625/1985, of April 2, which implements Law 31/1984 of August 20 unemployment protection. According to the drafting of the new section 3 article 6, can be considered to be an obstacle to the movement of unemployed workers from Spain. This possible obstacle is based on the stipulations in article 6.3 which now establishes that,

> "The right to payment or subsidy for unemployment will be suspended in the cases in which there is a transfer of residence abroad and the beneficiary declares that this is in search of work or to carry out work, professional training, or international cooperation, for a continued period which is less than twelve months, without prejudice to the application of the stipulations on the exportation of payments in the Community Agreements or Norms. Otherwise, the transfer of residence abroad involving the failure to comply with any of the above requirements will mean the extinction of the right".

3. Frontier workers

Text in force

In Spain the treatment of frontier workers involves a certain contradiction as, *a priori*, they do not require a residence permit. The fact that this is not required for frontier workers is laid down in article 6.1, letter c) of Royal Decree 178/2003 as it considers

> "the following persons who have an ID Card or a national passport which is valid and in force can reside in Spain and do not require a residence permit issued by the Spanish authorities to do so: c) the nationals of the Member States of the European Union and from other States which are parties to the Agreement on the European Economic Area who work in Spain and maintain their residence in the territory of any of these States and return there every day or, at least, once a week."

16 *Official State Gazette* of April 14, 2006.
17 *Official State Gazette*, March 3, 2006.

Although in section 2 of article 6 it establishes that these nationals can apply for the residence permit and will be told that this is not required but if the person concerned submits an application, he will be given a residence permit or a residence certificate.

Precisely for this last case in which the frontier worker submits an application for a residence permit article 11.2 of Royal Decree 178/2003 establishes the requirements which must be complied with: "*if this involves a frontier worker, he must attach a residence certificate, documents on his work and accreditation that he returns every day or, at least, once a week to the State where he resides*". The fact that the residence permit is not required for frontier workers means that it is not necessary to comment on the requirements of article 11.2 of Royal Decree 178/2003.

CHAPTER IV. EMPLOYMENT IN THE PUBLIC SECTOR.

1. Access to public sector

1.1.Nationality condition for access to the public sector

Texts in force

The State legislation which stipulates the environments which cannot be accessed by non-nationals, not even by Community citizens.

The Draft Law of the Basic Statute of Government Employees (presented in 2005 and referred to in our report last year) has reached the final stage of its processing and is logically very advanced.

However, it should be mentioned that, as regards the troops and sailors in the Spanish Army and Navy, it is surprising that non-nationals and non-Community nationals can access this environment, and, with certain nuances, they do not appear to acquire the condition of government worker. On the other hand, the civil protection and emergencies sector is an environment in which such personnel have the condition of agents of the authority and this could be reconsidered.

With regard to the first sector mentioned, last year *Law 8/2006, of April 24*, on Troops and Sailors, was approved, and replaces the Law approved in 2002 which had been in force until then, which, as declared in the Stated Purpose, required a modification in order to achieve the full professionalism of the Armed Forces.

Leaving apart other aspects of the text which are not related to the case, we believe that it is necessary to stress the prerequisite concerning the candidates who wish to access professional military service as soldiers and sailors contained in article 3.1 of law 8/2006. Spanish nationality is required (which is coherent with the exclusion Community nationals as regards sectors which entail the exercise of authority, and which include the Armed Forces); alternatively, in order to access these posts, it is possible "*to be a national of the countries which are determined by regulations as those which have special historical, cultural and linguistic links*". As the Implementation Rules of the Law on Soldiers and Sailors of 2006 has not been promulgated, we understand that Royal Decree 1224/2002, of November 29, which regulates the access of aliens to professional military posts as soldiers and sailors, is still in force, and in its Annex I it lists the countries these may come from: Argentina, Bolivia, Costa Rica, Colombia, Cuba, Chile, Ecuador, El Salvador, Equatorial Guinea, Guatemala, Honduras, México, Nicaragua, Panama, Paraguay, Peru, the Dominican republic, Uruguay and Venezuela. As can be seen, the list does not include the States which compose the European Union, despite the fact that the legislator refers to States with which Spain maintains special historical, cultural and linguistic links. If the new model of military service includes the access of nationals from these countries, even though these may access specific units and determined functions, it is surprising that Community citizens are excluded.

Thus, in the preliminary recitals of the Draft Law of the Military Career[18] stress is laid on the different functions carried out by the officers and NCOs as compared to the soldiers and sailors. "*The service of officers and NCOs is of a permanent nature, while the regime of soldiers and sailors is regulated by Law 8/2006, of April 24, can acquire the condition of officers and NCOs when they access services of a permanent nature*". In Additional Provision 5 of the Implementation Rules of this future Law the character of agent of the authority is granted to "the members of the Armed Forces who serve in the Emergency military Unit or as Military Police in the exercise of their functions. The members of the Armed Forces who, in the exercise of their functions, provide support to the Security Forces of the State will also have this same character due to the provisions in Organic Law 5/2005, of November 17, on National Defence.

18 *Official Bulletin of the Parliament*, No. 114-1, Series A, December 1, 2006.

The other important area in which the Spanish nationality requirement is questionable is civil protection and emergency attention, specifically as regards firemen. In this case, the Autonomous Communities have competence. During 2006 Andalusia, the Balearic Islands and Navarre regulated some aspects of these functions.

In chronological order, article 43.2 of the *Law of the Balearic Islands 3/2006, of March 30*, on the Management of Emergencies in the Balearic Islands (*Official Gazette of the Balearic Islands* No. 50, of April 6, 2006) provides that

> "they are agents of the authority within the scope of application of this Law and in the exercise of their functions without prejudice to the stipulations in Law 2/1998, of March 13 on the General Regulation of Emergencies in the Balearic Islands:
> a) The heads of the organic head offices and the head technicians ascribed to the department competent as regards emergencies.
> b) The technical personnel and the emergency agents dependent on the institutional administration competent as regards the management of emergencies.
> c) The managers of the emergency management centres ascribed to SEIB-112.
> d) The heads of the advanced command posts and of the action groups for the advanced civil protection plans".

Given the condition of agent of the authority, it is understood that Spanish nationality is required in order to carry out these functions.

In the second place, article 4.1.a of the *Decree of the Government of Andalusia 160/2006, of August 29*, whereby the special selection procedures for accessing the civil service in the Prevention and Extinction of Fires and Rescue Services (Official Gazette of the Government of Andalusia No. 179, of September 14, 2006), requires that the candidates who wish to participate in the procedures regulated in the decree have Spanish nationality.

Finally, the *Regional Decree of Navarre 82/2006, of November 20*, determines the certificates required in order to access the posts of sergeant and officer of firemen in the prevention, extinction of fires and rescue services in the Public Administration of Navarre (*Official State Gazette of Navarre* No. 145, of December 4, 2006). This decree implements the Regional Law of 8/2005, of July 1, on Civil Protection and Attention in Emergencies in Navarre (Official Gazette of Navarre No. 81, of July 8, 2005) and its article 50 provides that "*in the exercise of its functions, the personnel of the prevention and extinction of fires and rescue public services will be considered to be agents of the authority in order to more efficiently guarantee the protection of persons and goods in danger*". Consequently, a nationality other than Spanish will not be valid. Perhaps the explanation provided by article 53 on posts and functions gives rise to the doubt that, if this indirect exclusion of Community citizens is not excessive, it seems to be logical that, in the positions of responsibility or management, Spanish nationality is required, the justification of this requirement does not appear to be so clear when this involves a fireman, who, in accordance with the law itself, "has functions involving operative intervention and execution under the command of higher commanders".

Judicial practice

As regards the requirement concerning Spanish nationality in order to carry out the functions of fireman, the *Decision of the High Court of Justice of the Canary Islands, Santa Cruz de Tenerife, of January 31, 2006* (RJ 2006/120317). This case law decision arises from the general rule included in article 1.3 of Law 17/1993, in accordance with which the posts in the sectors referred to in section 1 of article 1 of this law, which entail the exercise of public powers or responsibilities as regards the protection of State or Public Administration interests within the scope of their respective competences and as regards the determination of these posts are reserved for civil servants who are Spanish nationals.

However, this determination cannot remain at the free disposal of the respective Administration as the exclusion of the nationals of other Member States if the European Union to access certain posts is closely conditioned by the carrying out of functions which involve

the exercise of authority. This is the undetermined judicial concept which closes the list of sectors and posts in the Administration which cannot be accessed by these. Consequently, a case by case analysis must be made of whether the post in question implies or entails the exercise of authority or not in order to know whether it is right to exclude the nationals from other Member States. The Decision which we submit refers to one of the areas which we have cited in the section referred to legislation (the one referring to firemen) and confirms the perception we have specified above with regard perhaps to the exclusion of the nationals of other Member States as regards access to any post related to the emergency services.

In the case referred to, the Autonomous Community challenges the agreement of the Executive Committee of the consortium for the prevention and extinction of fires on the Island of Tenerife in 2003 where the bases which regulated the calls for the provision of 35 posts of fireman, among others, were approved. Specifically, an objection was raised to the fact that these bases permitted citizens of Member States of the European Union to access these posts, and, in the opinion of the Autonomous Administration, this contravenes article 1.3 of Law 17/1993 for accessing determined sectors of the civil service.

The High Court of Justice clarifies that, in its opinion,

> "this argument can also be rejected as the work of fireman may entail responsibility or power which is auxiliary and closely linked to the work involved in rescue in a specific event, but this will never interfere in the safeguarding of the interests of the Spanish Public Administration" (Third Judicial Grounds).

This pronouncement seems to move forward in consonance with the principle of the free movement of workers, in similar terms as in other sectors of the public service in which the entry of the nationals of Member States has been made more flexible (such as ship's captains) and in the stipulations of the legislation in force, as these functions are not included in the Annex of Royal Decree 543/2001, of May 18, of public employment in the State Administration and its public organisms for the nationals of other States to which the right of free movement of workers is applied.

The other judicial resolution pronounced during 2006 in relation to the access of Community citizens to Spanish civil service posts (*Decision of the High Court of Justice of Extremadura of September 29, 2006* (RJ 294054/2006) which is intended to challenge Decree 45/2004 of the Presidential Council of the Government of Extremadura by the Civil Service Trade Unions, whereby the list of posts of the Department of Agriculture and Environment is modified.

The Decision refers to article 5 of Decree 170/2002 which provides that the civil service posts expressly determined in the lists of posts is reserved for civil servants with Spanish nationality, including a list of functions which includes: the inspection, instruction expropriation, financial, taxation, Cash & Banks, auditing and taxation economic-accounting, etc. Those posts which involve the recognition of the condition of public authority are excluded. In this case, the Spanish/Nationality code appears (only for nationals), which determines that, in each case, the power belongs to the Administration. In the opinion of the Court, "no discrimination arises from this as any Spanish citizen can apply for the posts reserved for Spanish citizens but also those reserved for Community citizens therefore no harm should be done to Community members" (Fifth Judicial Grounds).

1.2. Language requirement

There were two decisions on the specific inclusion of a co-official language (Basque and Catalan), although in neither case was the person concerned a national of a Member State:

- Decision of the Supreme Court of March 6, 2006 (RJ 5731/2006)
- Decision of the National Court of October 4, 2006 (RJ 257173/2006)

1.3.Recruitment procedures

Texts in force (both analysed in chapter II)

- *Order PRE/572/2006, of February 28*, (Official State Gazette No. 53, of March 3, 2006) was dictated and implements Royal Decree 1665/1991, of October 25, 1991, regulating the general system for the recognition of Higher Education Certificates of the Member States of the European Union and other States which are parties to the Agreement on the European Economic Area, which require a minimum training lasting three years, as regards the professions listed by the Ministry of Industry, Tourism and Commerce, analysed in the Chapter II.
- Attention should also be drawn to *Order ECI/1591/2006, of May 11* (Official State Gazette No. 119, of May 19), whereby the general criteria for the determination and execution of the complementary training requirements previous to the confirmation of foreign higher education degrees are stipulated.

1.4. Recognition of diplomas.

Judicial practice

- *Decision of the Supreme Court, of May 8, 2006 (RJ 2161/2006)*

The appellant sustained that that the fact that the mechanism for obtaining the specialisation in Clinical Analysis through validation stipulated in Royal Decree 2708/1982, of October 15, was only applicable to the certificates of aliens involved discriminatory treatment against Spaniards (therefore, he requested similar treatment for the certificates obtained abroad) as regards the possibility of accessing the degree of Specialist Pharmacist in Clinical Analysis through the evaluation his knowledge once the corresponding aptitude test and his professional experience included in his curriculum vitae).

In appeals to both the National Court and the Supreme Court, these understand that there is no discrimination because these are different solutions for different situations. Thus, those who have studied in Spain, regardless of whether they are Spanish nationals or not, have the possibility of directly accessing the specialisation (article 5 of Royal Decree 2708/1982), but, if the studies are done abroad, there is no way of directly accessing the specialisation except through validation. Therefore,

> "it cannot be stated that those in the first group are discriminated against as the regime stipulated for the second group does not apply to them as it is a question of different solutions for different cases: while those who study in Spain can directly access the specialisation on condition that they comply with the requirements, those who have studied abroad are subject to the legislation of the country where they have studied and to the validation and the other requirements established by the regulations of the country they wish to practice in, in this case Spain, requirements which obviously do not apply to those who have been trained in our country" (Third Judicial Grounds).

- *Decision of the High Court of Justice of Castile - La Mancha, of October 2 (RJ 257248/2006)*

In this case, the question involves deciding the possible valuation as a merit of the academic record referred to as Master in Humanities Second Class (Division 1) of the University of Aberdeen included in the public call. That is to say, the candidate for the presented this document as a merit but the Administration making the call did not take this into account because, in its opinion, it does not have to do with the requirements of the call.

The Court stated that the appellant was in the right as however much the conditions of the call attempted to include all the possible forms to accredit the average grade, given the number of possible studies which are offered to citizens of the European Union, it is very difficult for the evaluation system of one university to adapt to the denominations used in

the Order to classify the academic record. Thus, it specifies two aspects. One, that the certificate submitted by the person concerned had been confirmed by the Spanish Ministry of Education and, two, that the conditions include a specific merit point related to the average grade of the academic record based on which the certificate was granted, and these reasons led to an attempt being made to incorporate the grade obtained at the University of Aberdeen into the grading system included in the Order for convening process.

That is to say, the lack of perfect equivalence of a degree obtained at a European University and the content of a specific call cannot exclude the valuing of this degree as merit, but, as is done by the Court, an attempt is made to establish the equivalence. In this case, through a simple arithmetic operation, the Court established the equivalence and left it fixed for valuing as merit for the public call (Third Judicial Grounds).

- A group of Decisions pronounced in 2006 by several Spanish jurisdictional organisms focused on the terminological and conceptual distinction between approval, validation and recognition of a degree.

Thus, the *Decision of the Supreme Court of May 3, 2006 (RJ 2142/2006)* resolves an appeal to the Supreme Court against a Decision of the National Court which declared that the Ministry of Education was right to reject the application for approval of the Degree of Bachelor of Arts with Second Class Honours (Upper Division) in Classics obtained at the Royal Holloway and Bedford New College-University of London as equivalent to the Spanish Degree in Philology, Classical Philology Section. Again the Supreme Court states that the authorisation for the exercise of professional activity granted under Royal Decree 1665/91 does not entail the academic approval of the degree (Second Judicial Grounds).

This same decision with its case law content (in the strict sense as it is a decision of the Supreme Court) serves as a basis and is reproduced in the ***Supreme Court Decision of May 16, 2006*** (RJ 2436/2006), in this case, the appeal was lodged by the Official Association of Naval and Oceanic Engineers due to the Resolution of the Ministry of Education whereby the Degree of Bachelor of Science with distinction Yacht and Small Craft Design and Master of Science in Maritime Engineering Science with Distinction obtained by a Spanish national at the Southampton Institute of Higher Education-the Nottingham Trent University and the University of Southampton was approved as equivalent to the Degree of Naval Engineer. It also cites other case law decisions along the same lines[19].

Also cited is the *Decision of the Supreme Court of July 14, 2006* (RJ 2006/6011), based on the ministerial Order whereby the application for the recognition of the certificate of a Technical University in the German Federal Republic was equivalent to the degree of Architecture was rejected.

Following this same criteria, the *National Court* made two Decisions during 2006: the *Decision of July 20, 2006* (RJ 198114/2006), in which the claimant, a Greek national, had studied for three years at the London School of Economics, dependent of the University of London, and obtained the Degree of Bachelor of Science in Economics and then obtained a Doctorate at the Université Libre de Bruxelles. The approval as the equivalent of the Spanish Degree in Economic Science and business Administration was refused by the Spanish Ministry.

Once again, the National Court based this on the failure of the University Board of Coordination to comply with the procedural requirements established and to order the antedating of the action to that procedural time, and thoroughly explained the difference of regime between approval and recognition in the area of European Community Law and in the domestic legislation framework.

The *Decision of the National Court of October 17, 2006* (RJ 256909/2006) makes an extensive statement on this same differentiation concerning the appeal lodged against the resolution of the competent Ministry whereby the application for the approval of the degree in "Bachelor of Arts in Business Studies" obtained at the University of Glamorgan (United Kingdom) as equivalent to Spanish Degree in Management and Business Administration was rejected.

19 Thus, Decisions of the Supreme Court of October 20 (RJ 8271) and 27, 2005 (8151).

The *Decision of the National Court of November 8, 2006* (RJ 2006/277518) deals with an Order of the Ministry of Education whereby it is agreed to recognise the equivalence of the academic degree "Laurea en Storia" issued by the Universitá Ca Foscari-Venecia (Italy) with the Spanish Diploma only for the purposes of continuing the second cycle university studies at any Spanish University, and this does not include employment or professional effects.

The National Court specified that it is necessary to differentiate between the approval which grants the foreign certificate the same effects as the Spanish certificate or degree it is equated with, throughout the whole territory, in accordance with the legislation in force and this corresponds to the Ministry of Education, and validation, which has the effects which correspond to the passing of the partial studies granted in the Spanish educational system and this corresponds to the Spanish University where the person concerned wishes to continue his studies.

The incidence of the International Treaties as regards this matter was clarified by the Supreme Court in recent case law. According to this,

> "the mere allegation of an International Agreement or Treaty is not sufficient to access automatic approval, or, in this case, the automatic recognition of the academic certificate or degree, and the Administration is required to carry out as check on the equivalence of the foreign certificate with regard to the Spanish academic certificate or degree which it is intended to equate it with" (Third judicial Grounds).

At the present time, the novelty of this decision lies in the structure of university teaching which has changed substantially and is determined by Royal Decree 55/2005 and includes Undergraduate and Postgraduate Studies (the latter are comprised of the second cycle – Master – and third cycle – Doctoral Studies. The problem is that "the approval of the academic level corresponding to the new studies of Graduate and Master will not come into force until the date on which the process for the renovation of the catalogue of official university certificates is complete. This process should be completed by October 1, 2007, therefore, until that date; the reference will be the academic certificates of Diploma and Degree".

In the specific case, the Italian degree of the appellant was a three year degree and corresponded to the first cycle of the Degree in History, equivalent to the Diploma and not to the Degree.

- *Decisions of the Supreme Court of October 3, 2006 (RJ 7586, 7589 and 7596/2006)*

These are important decisions adopted by the Spanish High Court which involve a change of case law criteria as from the resolution of a preliminary ruling raised by the High Court[20] and resolved by the *ECJ Decision of January 19, 2006* (C-330/03). The first of these (with marginal number 7586) which is the first to include and practically transcribe the content of the Decision of the ECJ, and the other two reproduce what is contained in the former in order to apply it to the decisions with the same sense.

The decision which is the subject of the appeal to the Supreme Court was dictated by the National Court on April 1, 1998, and rejected the contentious-administrative appeal lodged by the Association of Civil Engineers against the administrative resolution which recognised the degree of "Laurea in Ingegneria Civile" obtained in Italy by a Spanish national in order to exercise the profession of Civil Engineer in Spain. The Supreme Court declared that the appeal to the Supreme Court had to be allowed.

In the opinion of the National Court, an analysis of the regulation provisions applicable in order to verify the scope of the differences between both degrees was not carried out as it should have been. From this analysis, it was concluded that there are substantial differences in the subjects covered by the Italian degree and those required in Spain in order to access the degree of Civil Engineering, and the attributions of these engineers in Spain entail sectors for which the degree of Hydraulic Engineering in Italy does not provide the previous "specific training" which is imposed obligatorily by Spanish legislation. Consequently, the ECJ admitted that

20 Proceedings of July 21, 2003.

> "the content of the training corresponding to the profession of Hydraulic Civil Engineer in Italy and the profession of Civil Engineer in Spain have fundamental differences to such an extent that the application of compensatory measures or adaptation, in practice, makes it compulsory for the person concerned to acquire new professional training".[21]

That is to say, the compensatory measures are only right when there are differences and there is no alternative but to refuse the complete recognition applied for.

As stated in the Decision of Supreme Court cited here,

> "at this point, once the appeal to the Supreme Court is allowed, with the resulting change in the decision of the Court of Justice. If the national transposition is interpreted (article 5 of Royal Decree 1665/1991) in the light of the Community legislation transposed (Directive 89/48/EC) in accordance with the interpretation made by the Court, it must be concluded that the Spanish Administration had to access the recognition requested by the engineer with the Italian degree only partially. The European Community Court of Justice recognises that the compensatory measures have to be proportional to the finality sought, and that they have a dissuasive effect contrary to the finality of the Directive. In addition, if the activity intended in the host State is objectively possibly to disassociate from the activities included in the corresponding profession in this State, this factor may be one of the decisive criteria for obtaining partial recognition not subject to compensatory measures".

As a direct consequence, (leaving aside the foreseeable necessary reform of Spanish legislation, which logically should be carried out, according to the Supreme Court, in order to adapt it to the new interpretation of the Directive 89/48/CE), the Supreme Court, in the specific case in question, understands that there are no objections

> "to considering the work of engineer only in the corresponding sector (hydraulic) "objectively possibly to disassociate" from the rest of those which comprise the more general profession of Civil Engineer regulated in Spain. This will make it possible to access the partial recognition without subjecting the applicant to the additional requirements stipulated in letter b) of article 4, section one, of Directive 89/48/EC, that is to say, those required by article 5.b) of Royal Decree 1665/1991, requirements which are undoubtedly classified, in this case, as disproportionately restrictive or hinder the freedom of movement and establishment of persons when the partial recognition is more suitable for guaranteeing this, as occurs in this case" (Seventh Judicial Grounds).

This important decision based on the Decision of the *ECJ of February 19, 2006* was included in two decisions on the same date made by the same organism, which concluded that: one, with the recognition of the right of the Italian citizen, who had obtained the degree of "Laurea in Ingegneria Civile Sezione Trasporti" issued by the University of Studies of Genoa (Italy), to exercise the profession of engineer only in the transport sector of Civil Engineering, without subjecting him to the additional requirements stipulated in letter b) of article 5 of Royal Decree 1665/1991[22]; and another, with the same partial recognition of the degree of "Laurea in Ingegneria" a Spanish citizen only in the corresponding sector ("Edile", construction"), without subjecting her to the additional requirements referred to above.[23]

- *Decision of the National Court of October 31, 2006 (RJ 267384/2006)*

The purpose of the appeal was the resolution of the Technical General Secretary of the Ministry of Education, Culture and Sport which rejects the confirmation of the degree, "Bachelor of Arts in International Business Administration" obtained by the appellant at the University of Lincoln (United Kingdom) as equivalent to the Spanish degree in Management and Business Administration.

The problem in this case lay in the fact that the Administration had not sent the record to the Board of Universities, a technical organism which must report on the confirmation procedures. However, based on a generic report of this Board, which empowers the instruction organism to reject all the applications for confirmation where it is verified that the for-

21 Section 36 of the Decision of the European Community Court of Justice of February 19, 2006.
22 Supreme Court Decision of October 3, 2006 (RJ 7596/2006).
23 Supreme Court Decision of October 3, 2006 (RJ 7589/2006).

eign degree has a syllabus with duration less than three years, it resolved to reject the confirmation requested.

Apart from the doubtful legality of the work of the Board, which did not individualise the reports, based on recent case law[24] the Court stated that it could not reach a certain, unequivocal conclusion regarding the inapplicability of the confirmation requested by the appellant because the technical valuing of the studies of the appellant and their equating with the Spanish degree is entrusted to the Academic Commission of the Board of Universities in Royal Decree 86/1987, "*and its intervention must be considered to be an essential step in the confirmation procedure*". Consequently, as the Court cannot resolve whether the application is right or not, it orders the return to the administrative proceedings so that the Commission might issue the report on the confirmation, and from this point, the corresponding administrative resolution will continue.

2.Equality of treatment.

2.1. Recognition of professional experience for the purpose of determining the professional advantages

- *Decision of the High Court of Justice of Asturias, of February 27, 2006 (RJ 277/2006)*, on the valuing of merit points to access public functions (doctor).

In this case, among other things, a section on the scale for calls was challenged as only the services rendered in the Social Security and not those rendered in other Public Administrations, such as the Health Care Services of the Autonomous Communities or private institutions with agreements with the Social Security, where identical functions are carried out, was challenged.

The High Court of Justice of Asturias considered this a breach of the right to access public functions in conditions of equality as

> "it is evident that there is clear discrimination and damage for General Practitioners when prevalence is given to the certificate of Spanish internships as compared with the experience and other merits, as there are no legal grounds for giving such prevalence to the Spanish system of internship as compared with Spanish graduates or those from other Community countries who access the title of Specialist Doctor in Family and Community Medicine by another route. Since Spanish internship is an essential condition to access the title at the present time, all the Spanish doctors who have the title but have not accessed this through the Spanish internship, as well as the doctors of the other Community countries (regardless of the system for access) are discriminated, as there is no reason to establish a system which solely and exclusively benefits the family doctors of the Spanish internship system (there are family doctors from other Community countries who have been able to access the title with more demanding prerequisites, however, they are discriminated against as regards those with Spanish internships)" (Eighth Judicial Grounds).[25]

- *The Decision of the High Court of Justice of the Autonomous Community of Madrid of March 9, 2006 (RJ 196355/2006)*

This decision determines the conformity or inconformity with law of the Resolution of the Board of University Coordination, whereby the application of the appellants to be included in the lists of professors who would form part of the commissions for national authorisation by drawing lots was rejected, among other reasons, due to the fact that the requirement involving one or two research periods constitutes a breach of the principle of equality, as this is not required as regards professors from other States of the European Union.

24 Decisions of the Supreme Court of March 26, May 25 and September 21, 2004.

25 In support of this, it cites the Decision of the Supreme Court of February 22, 2005 (RJ 2202/2005). The explanation contained in the previous Judicial Grounds concerning the evolution of the domestic and European legislative framework of this question is of much interest as support for the decision.

In this regard, the Court does not include this argument because the precept questioned (article 89 of the Organic Law on Universities) makes it possible to incorporate foreign professors into the authorisation Commissions

> "if the Universities establish this in their Statutes ... the aforementioned precept ... clears up any doubt that might arise concerning the privileged situation of these professors as regards the nationals who do not have the required positive period of evaluation"(Fifth Judicial Grounds).

The *Decision of the National Court of July 3, 2006 (RJ 202457/2006)* deals with the effects of credentials which stated that the confirmation of a Spanish Degree in Medicine obtained in Uruguay, and recorded that the confirmation thus obtained did not necessarily have effect as regards the validity of the degree in Community countries, in accordance with the stipulations in the Directives of the Council of the European Union. It was a question of clarifying at which point the professional experience of the appellant could be taken into account in order to access the Public Health Care System, which is the date of the confirmation of the foreign specialist degree.

A clear case of the question presented here and analysed in chapter II, is resolved in the *Decision of the High Court of Justice of Castile- La Mancha of June 4, 2006 (RJ 773/2006)*, concerning the valuing of the services rendered by the players as nurses in Public Health Care Institutions in the Republic of Portugal, as the claimants understood that these should be valued as if they were services rendered in the National Health Care System, equating the national systems of the member countries of the European Community to which Portugal belongs.

In the Second Judicial grounds, two important Decisions of the European Community Court of Justice are reproduced: *ECJ Decision of May 12, 2005*, case C-278/2003, *Commission/Italy* and *ECJ of February 23, 1994*, case *Scholz*, pre-judicial question, case C-419/1992.

From then on, the European Court understands that failing to value the services rendered would entail

> "the application of a merit points system which is clearly contrary to the legislation constituting the European Union as it is a form of indirect discrimination which unjustifiably rewards Spanish professional experience despite the similarity of systems and legislation in the countries which make up the union and places a barrier to free movement within the common European area" (Third Judicial Grounds).

Finally, although it is not a resolution of a Spanish jurisdictional organism, we stress the *Decision of the ECJ, (Second Courtroom) of February 23, 2006, case C-205/04*, whereby the Kingdom of Spain was condemned for failing to comply with its obligations under articles 39 EC and 7 of Regulation No. 1612/68 of the Council of October 1968, concerning the free movement of workers within the Community, as it had been verified that, despite repeated notifications, the Spanish Government had not carried out legislative modification (of Law 70/1978) in order to allow that the periods of service previously completed by Community citizens as civil servants in other Member States be taken into account as regards the Spanish civil service.

CHAPTER V. MEMBERS OF THE FAMILY

Text in force (2006)

During 2006 the legal regime applicable to Community citizens and their families (who wish to enter, move, reside and work in Spain) is *Royal Decree 178/2003, of February 14*,[26] on entry to and residence in Spain of the nationals from Member States of the EU and from other States which are parties to the Agreement on the European Economic Area (hereinafter RD 178/2003).

Judicial practice

As already emphasised, Spain failed to transpose Directive 2000/38 on time[27]. However, the first Spanish judicial reference to Directive 2004/38 is the *Decision of the High Court of Justice of the Canary Islands, December 21, 2005*: in this decision the Spanish judge stressed that the Directive recognise the right of residence of the third country national spouse of an EU citizen *"even in cases of a rupture of the family link"* following certain requirements.

On 2006, although Spain did not transpose the Directive 2000/38, there is an important judicial reference to the Directive related with family member's issue. The Decision of the High Court of Justice of the Basque Country of March 10, 2006 stated that "*article 3, 2 of the new Directive is already in force*" and thus "*directly applicable in its own terms if its transposition to internal legislation does not take place within the period stated*". The Decision was regarding a Rumanian national and a Spanish citizen registered in the Register of Common Law Couples of the Basque Country Autonomous Community. The Spanish Administration refused the community family member card to the Rumanian national (even though under Spanish legislation, third country nationals married to Spaniards have equal treatment than third country national married other EU citizen) and the refusal was on grounds that Spanish Royal Decree 178/2003 in force did not apply to Common Law couples.

Nevertheless, the Supreme Court understood that, notwithstanding the lack of transposition by Spain, the Directive –which applies to Common Law couples- was "*in force and directly applicable on its own terms*".[28]

Regarding Enlargement (the so-called EU8), it is necessary to mention *Instruction April 25, 2006* on "the withdrawal of restrictions on the free movement of salaried workers who are nationals of the States which acceded to the EU on May 1 2004 and their family members".[29] The Instruction explains that third country nationals who are family members of an EU salaried worker can apply, from May 1, 2006, for the Community resident family member card and that those family members who have applied previous to May 1, 2006 are entitled to obtain their Community resident family member card.

As we already know (see Spanish Report for the FMOW'05) the *European Union Court of Justice Decision of April 1, 2005* considered to be inapplicable the Spanish requirement (concerning Third Country National family members of EU citizens) to attach a residence visa to their passport or the request for exemption in order to apply for a Community Member family card. However, this visa is required by family members of Community residents who are nationals of the States listed in Annex I of Regulation 539/2001 of the Council, March 15, 2001. As we explain in Chapter VIII, this gives rise to an unequal treatment given

26 *Official State Gazette* of February 22, 2003, number 46, page 7397. In 2005, a new Decision of the Spanish Supreme Court of February 8, reaffirmed once again the nullity of some articles of RD 178/2003. Both in 2004 and 2005 the Spanish Supreme Court made references to the ECJ on the *MRAX* and *Akrich* cases.

27 The Spanish transposition text is Royal Decree 240/2007, February 16. *Official State Gazette*, February 28, 2007.

28 Decision of the High Court of Justice of the Basque Country, March 10, 2006.

29 See Chapter VIII of this Report.

to family members of Community citizen included and those not included in Regulation 539/2001.

Last, regarding the transitional measures for workers from Bulgaria and Rumania (January 2007), it is to be noted that the concession of family resident card to family members of workers from this countries will be regulated by Royal Decree on Community citizen and assimilated citizen. Nevertheless, whenever these family members want to access to the labour market, two situations need to be distinguished: family members of workers legally residents at the time of accession and family members of workers not resident in Spain at the time of accession. In the first case the legal regime is Royal Decree on Community citizens and assimilated citizens; in the second case, the legal regime applicable is the Spanish Organic Law on Aliens 4/2000 and its implementation rules (see for further explanation Chapter VIII)

Text in force (Since 2nd April, 2007)

The new RD 240/2007 adapts the provisions of Directive 2004/38 in Spain. This point addresses the innovations referring especially to the family nucleus of the EU or EEA citizens who do not have any of these nationalities, nor their rights and obligations.

Article 2 of RD 240/2007 defines family members of the EU or EEA citizen as follows:

> "a) The spouse, on condition that the declaration or agreement of nullity of the matrimonial bond, divorce or legal separation has not taken place.
> b) The partner he has a union analogous to the matrimonial union with, which is registered in a public register established for this purpose in a Member State of the European Union or in a State which is a party to the European Economic Area, which prevents the possibility of two simultaneous registrations in this State, on condition that this registration has not been cancelled, which must be sufficiently accredited. Matrimony and registration as a registered couple will be considered to be incompatible with each other.
> c) The direct descendents and those of the spouse or registered partner on condition that the declaration or agreement of nullity of the matrimonial bond, divorce or legal separation has not taken place or the registration as a couple has not been cancelled, those under twenty-one years old, those over this age who live under his charge or are incapacitated.
> d) The direct grandparents, and those of the spouse or registered partner who live under his charge, on condition that the declaration or agreement of nullity of the matrimonial bond, divorce or legal separation has not taken place or the registration as a couple has not been cancelled."

As can be appreciated, the Spanish legislator has chosen the widest definition of the family nucleus and equates married couples with common law partners legally registered in another Member State equating these to those recognised in Spain. The right to enter, leave, move within and reside freely on Spanish territory is recognised for all these persons as essential rights except for the restrictions cited above in Chapter I of this Report on condition that the formalities required are complied with. In addition to these rights, these family members, with the exception of the descendents over twenty-one years old and the descendents under his charge, can access any type of employed or self-employed work in equal conditions with Spaniards.

In order to have these rights, a number of requirements or formalities must be complied with by the family members of the EU or EEA citizen.

Thus, in order to enter Spanish territory, it is established that the family members of EU or EEA citizens or of Spanish citizens who do not have any of these nationalities and are also nationals of any of the countries included in Annex I of Regulation 539/2001, of 15 March, will also require a valid passport in force, the corresponding entry visa, which must be granted free of charge and as soon as possible. The obligation to have this entry visa is waived if it can be demonstrated that the person has the residence card of a family member of a citizen of the EU valid, in force and issued by a State which is a Party to the Schengen Agreement.

As regards stays of the family members described above for less than three months, these must accredit the same formalities as for their entry to Spain (article 6). In the cases of

residence for the family members of EU or EEA citizens or of Spanish citizens in Spain for more than three months, the obligation is laid down to request and obtain a residence card of a family member of a citizen of the EU. This request will be made to the Office of Aliens and a receipt of request will be granted until the effective handover of the residence card (article 8).

The documentation which must be submitted to this Office of Aliens is as follows:

> "a) The valid passport of the applicant in force. In the event that this document has expired, a copy must be submitted together with the application for renewal.
> b) Accrediting documentation of the family, matrimonial or registered union bond, when necessary, duly translated and with an apostille or legalised, which grants the right to the card.
> c) The certificate of the registration of the family member who is a citizen of a Member State of the European Union or of another State party to the Agreement on the European Economic Area who accompanies the applicant or whom the applicant is going to join.
> d) In the cases in which this is required by article 2 of the present Royal Decree, documentation accrediting that the applicant for the card lives under the charge of the citizen of a Member State of the European Union or of another State party to the Agreement on the European Economic Area, and is a family member.
> e) Three recent colour photos with a white background, ID card size."

Once all these requirements are complied with, the residence card of a family member of a Community citizen will be given to the applicant and this will be valid for five years.

As regards the case of permanent residence, this is also recognised for the family members of EU and EEA citizens who have resided legally in Spain for a continual period of five years (article 10). In order to accredit this permanent residence, the Spanish authorities will issue a permanent residence card to these family members within a period of three months from application. This card will be automatically renewable every ten years and the interruptions of residence in Spain which do not exceed two years will not affect the validity of the permanent residence card of the family members.

Finally, from the point of view of the restrictive measures adopted for reasons of public order, security and health against the family members of EU or EEA citizens, the considerations stated in Chapter I are also applicable to the them.

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

1.Relevance of recent Court of Justice judgements.

The Spanish National Court, September 28, 2006 has mentioned the *NERI case (ECJ November 13, 2003)* when deciding on a case in which the Spanish Administration refused to approve a Degree of Bachelor of Arts in Business Administration awarded by the University of Wales but in which the training had been received at a Spanish university centre not authorised in Spain under Spanish legislation on university centres (see Chapter II.4 on Recognition of diplomas and initiatives to transpose Directive 2005/36/EC).

Regarding recognition of diplomas, there are important decisions adopted by the Spanish National Court which involve a change of case law criteria as from the resolution of a prejudicial question resolved by the *ECJ in the Decision of January 19, 2006* (C-330/03). One of those cases refers to an appeal lodges by the Association of Civil Engineers against the administrative resolution which recognised the Italian Degree of "Laurea in Ingenieria Civile" obtained by a Spanish national in Italy. At the end the Spanish Court (based on the Decision of the ECJ, January 19, 2006) recognised that the Spanish Administration had to access the recognition requested by the engineer with the Italian Degree only partially.

The *ECJ Decision February 23, 2006* (Case-205/04) condemned the Kingdom of Spain for failing to comply with its obligations under articles 39 EC and 7 of Regulation 1612/68, October 1968, on free movement of workers inside the EU because Spain had not carried out legislative modifications in order to allow that the periods of service previously completed by Community citizens as civil servants in other member States be taken into account as regards the Spanish civil service.

Finally, There are no special mentions in Spanish Case Law or in administrative practice to the cases which the European Commission has an interest in (*Trojani*, *Collins*, *Van Lent*), except for the *Iaonnidis* case. Specifically, the *Decision of the Court of Justice of Cantabria 5 October 2006*[30] (see Chapter X) refers to the Ioannidis Case in order to reject the request for the repayment of the accommodation and meal expenses of a Spanish citizen who was authorised by the Health Care Services of Cantabria to travel to Paris in order to receive medical treatment for cancer. After referring to the Decision of the ECJ of 25 February 2003 on the Ioannidis Case, the Decision of the ECJ of 12 July 2001 on the Vanbraekel and Others Case and the Decisions of 5 March 1998 on the Molennaar Case and the Decision of 16 May 2006 on the Watts Case, the Spanish Court rejected the application for these complementary expenses although it recognised the repayment of the main expenses of the Spanish citizen and his wife during their medical care stay in Paris, as the ECJ stated in its Decision of June 15, 2006 on the Acereda Herrera Case.

2. Application of free movement legislation in the sports sectors

In the sports environment, during 2006, some interesting aspects can be pointed out taking into account the fact that the national sports federations are those which establish their own Statutes and the regulations for the organisation of the respective sports activities. This activity of the national federations is subject to the control and approval of the Superior Sports Board, an organism which is dependent on the Ministry of Culture.

With regard to football, the Royal Spanish Football Federation approved *Memorandum No. 9 for the 2005/2006 season* whereby article 194 bis of the Statutes and General Regulations of the federation were modified. This modification supposes the express recognition of the elimination of quotas or restrictions concerning the players with the nationality of one of the Member States of the EU or of the EEA. **Article 194 bis** specifically establishes that, "*In the domestic area, foreign Community football players can be registered in Spanish football with no kind of restrictions, in the current divisions o categories, and in any new ones*

30 AS 2006/2620, http//www.westlaw.es/

which might be established." Memorandum No. 9 was clarified by another Memorandum. With the approval of the Management Committee of the Superior Sports Board, *Memorandum No. 12* of the Royal Spanish Football Federation confirmed that article 194 bis means that there are no restrictions of any kind for Community sports persons.

Unlike football, article 20.1.2 of the provisional version of the *General and Competition Regulations of 13 July 2006 of the Royal Basketball Federation* is drafted in such a way that it might give rise to confusion or interpretations which, in practice, entails the maintenance of quotas of Community or assimilated players in Spanish basketball teams. This drafting would require consulting the Spanish Superior Sports Board in order to determine its real scope.

In this regard, it is necessary to reproduce its content in order to see the ambiguity of the drafting. Specifically, article 20.1.2. establishes that

> "In order to subscribe to the application for a licence, a player must comply with the following prerequisites: a) Have Spanish nationality or the nationality of any of the Member States of the European Union or of the European Economic Area. Immigrants legally resident in Spain can also subscribe to a licence while they remain in this situation. *However, in the case of professional or semi-professional competitions, which are understood to be those for which an employment contract signed by the Club and the player are required, restrictions may be introduced for reasons of nationality, as regards the regulation of the employment market and the protection of the Spanish national sports teams*".

What is marked in italics is what may present doubts as it is not stated whether this limitation is only for non-Community citizens or whether it also includes Community and EEA citizens.

CHAPTER VII. GENERAL PROVISIONS WITH REPERCUSSIONS ON THE FREE MOVEMENT OF WORKERS

The more relevant Spanish legal provisions during 2006 with repercussions regarding the free movement of workers were as follows:

- Memorandum 2/2006 of the Director of Public Prosecutions on several aspects of the regime on aliens in Spain.
- Ministerial Order of November 22, 2006 on the registration of non Community alien workers in the employment public services and in the work placement agencies.
- The Order of the Ministry of Education and Science of May 11 whereby the general criteria for determining and complying with the complementary training requirements previous to the approval of foreign higher education certificates are established.
- Order of the Ministry of the Presidency of February 28, 2006 which implements Royal Decree 1665/1991, of October 25, regulating the general system for the recognition of higher education certificates of the Member States of the EU and other States parties to the Agreement on the European Economic Area, which require a minimum training period of three year for the professions listed in the Ministry of Industry, Tourism and Commerce.
- Royal Decree 1621/2005 of December 30 whereby the Implementation Rules of Law 40/2003 of November 18, 2003 on the protection of large families was approved.
- Resolution of March 23, 2006 on the Department of Emigration (Depending on the Ministry of Employment) whereby assistance is offered to facilitate the occupation, the professional classification and the employment experience of workers in the environment of the countries of the European Economic Area and Switzerland.
- Royal Decree 200/2006 of February 17 which modifies Royal Decree 625/1985 of April 2, which implements Law 31/1984 of August 2 on unemployment protection.
- Ministry of Employment approved the Instruction of April 25, 2006 on the withdrawal of restrictions on the free movement of salaried workers who are nationals of the States which acceded to the EU on May 1 2004 and their family members.
- Ministry of Employment approved the Instruction of December 27, 2006 on the regime for the entry, permanence and employment in Spain of employed persons from the States which joined the EU on January 1, 2007, as well as their family members.

CHAPTER VIII: EU ENLARGEMENT

1. Information on transitional arrangements regarding the EU8

In 2006 the Ministry of Employment issued the *Instruction of April 25, 2006* on the withdrawal of restrictions on the free movement of salaried workers who are nationals of the States which acceded to the EU on May 1 2004 and their family members. This Instruction establishes the scope of application, the rights recognised and the treatment of these nationals depending on their situations in or outside Spain at the time their transitory period and that of their family members ends.

The central idea of this Instruction is that, as from May 1, 2006, Royal Decree 178/2003 of February 14 applies fully to all these citizens and their families. The fact that the Spanish Law on Aliens 4/2000 does not apply to them means that they can access any job, as employed persons or as self-employed persons, in the same conditions as Spanish nationals and will not require a Community residence permit. This can be seen in a number of personal situations of the nationals of the EU8 which require individualised analysis.

The *Instruction of April 25, 2006* distinguishes four situations in which these nationals of the EU8 might find themselves.

The *first* would be those workers who are EU8 nationals who have a work permit for an employed person. For these workers, the Instruction establishes that, from May 1 2006, the Organic Law on Aliens 4/2000 of January 11 will not apply to them. In practice, this implies that, as from May 1, the work permits for employed persons and the alien ID Cards will become invalid as Royal Decree 178/2003 will be applied to these. Specifically, Community residence permits will only be given to those who request one although the competent Spanish Administration will have to inform them that this is not compulsory.

The *second* situation included in the Instruction is that of salaried workers of the EU8 who, previous or subsequent to May 1, submit their initial applications for the renewal or modification of the work permit for an employed person, which is stable or temporary, or an application for exception from the work permit and the students who are nationals of the EU8 who submit an application for a work permit:

- For those who have submitted the initial application for the renewal or modification of the work permit for an employed person, the application for exception from the permit or a permit for a student to work *before May 1, 2006*, the Spanish authorities will notify them in a reasoned document that the applications have been filed as they have been passed to the legal regime of Community citizens as from May 1, 2006.
- Those who submit the applications *after May 1, 2006* will be notified in a reasoned document that their applications have been admitted for processing as these are not legally required as the regime of Community citizens of Royal Decree 178/2003 is applicable to them.

The *third* situation stipulated in the Instruction refers to the workers of the EU8 who are within the framework of an administrative or judicial procedure on May 1, 2006 due to having submitted an administrative or judicial appeal against the decisions adopted by the competent Spanish organisms against these due to their administrative situation in Spain contrary to the Law on Aliens 4/2000:

- Those who *have submitted an appeal* in administrative or judicial proceedings will be notified in writing that their appeal remains without effects as the regime on Community citizens stipulated in Royal Decree 178/2003 is applied to them.
- In the case of *procedures in progress*, on May 1, 2006 the competent Court or Tribunal will be notified of the resolution of the appeal so that it can adopt the proper judicial decision regarding the filing of the actions due to a lack of purpose in the appeal.

The *fourth* and final situation refers to the non-Community family members of EU workers who have a relationship with the salaried workers of the EU included in article 2 of Royal

Decree 178/2003. Thee family members will be notified in writing and with reasons that, as from May 1, 2006, article 8.2 of Royal Decree 178/2003 applies to them, therefore, they can apply for the Community resident family member card. The family members who have applied previous to May 1, 2006 or who might have appealed administratively or judicially in Spain, will have the same solution as the one described in the previous section applied to them, that is to say, their application for a non-Community family member card will be filed or not admitted for processing.

However, the Instruction on visas states that expressly for the family members that

> "the content of article 11.3.C) of Royal Decree 178/2003, whereby the requirement concerning family members of Community citizens, when these are not nationals of the EU or assimilated nationals (from the European Economic Area and Switzerland), to attach the residence visa in the passport or the request for exemption to the application for a Community family member residence card must be considered to be inapplicable in accordance with what is stipulated by the European Community Court of Justice in its Decision of April 1, 2005".

However, this visa or application is required by the family members of Community residents who are nationals of any of the States included in Annex I, of Regulation 539/2001 of the Council, of March 15, 2001, which lists the third countries whose nationals are subject to the obligation to have a visa in order to cross the external borders of the Member States.

This legal regime for family members of Community residents gives rise to two doubts concerning its scope.

The first doubt concerns the concept of family in article 2 of Royal Decree 178/2003 referred to by the Instruction. We understand that the concept of family in article 2 of Royal Decree 178/2003 is not applicable as from April 30, 2006, the date of the transposition of Directive 2004/38/EC which the Spanish Government has not adapted to Spanish legislation. Therefore, as from this date, the family must be understood as explained in article 2 of Directive 2004/38/EC.

The second question is a reflection on the unequal treatment given to the family members of Community citizens who are not included in Regulation 539/2001 and those who are, due to the fact that their mobility, residence and employment are conditioned by the need for a visa, a circumstance already mentioned in the 2005 Report as unequal conditions concerning family relationships founded on the nationality of the family member or members.

2. Transitional measures for workers form Bulgaria and Romania

In relation to the measures of the Secretary of State for Immigration and Emigration of the Ministry of Employment approved the *Instruction of December 27, 2006* on the regime for the entry, permanence and employment in Spain of employed persons from the States which joined the EU on January 1, 2007, as well as their family members.

The stated purpose of this Instruction stipulates that, on December 22, 2006, the Council of Ministers of the Spanish Government approved the Agreement whereby it was established that, for Bulgarian and Rumanian nationals, a transitory period of two years was required as from January 1, 2007, and if the evolution of the Spanish job market permits, this may be reduced. It also establishes the general criteria for the future that, once this transitory period finalises, the legal regime for Community citizens, assimilated citizens and their families will be applied to them. This Instruction includes the situations in which these Bulgarian and Rumanian workers and their families depending on whether already in Spain before the adhesion or not.

The first question to stress is the *entry regime* stipulated for these nationals as from January 1, 2007 which has the following conditions:

- The valid travel document for Bulgarian and Rumanian nationals to enter Spanish territory will be a passport or, possibly, the ID Card in force, which must record their nationalities.

- A transit or stay visa will be required by the family members of Bulgarian and Rumanian nationals who are not nationals of a Member State of the EU, of the European Economic Area or of Switzerland, unless they are exempt from this obligation due to their nationalities.
- It will not be required to have an entry and exit stamp on the passports of Bulgarian and Rumanian nationals. This will be required of their family members when they do not have a residence permit in Spain.
- The Bulgarian and Rumanian nationals and their family members can only be subjected to a meticulous check at the exterior border crossing in accordance with the stipulations in the Schengen Border Code, when there are indications that the person in question might represent a threat to public order, public security or public health.
- These nationals and their family members can use the passages signposted for citizens of the EU.

The Instruction then establishes the legal regime applicable to the nationals and to their families depending on the following criteria:

1. As regards the Bulgarian and Rumanian workers not resident in Spain at the time of the accession and the Bulgarian and Rumanian workers resident in Spain or who acquire residency during the transitory period and endeavour to work as employed persons in Spain with a duration equal or greater than one year, the *Organic Law on Alien 4/2000 and Royal Decree 2393/2004, of December 30* will apply to them:
   - As concerns the *Bulgarian and Rumanian workers not resident in Spain at the time of the accession*, they will be issued with a residence and work visa which will be free and will be applied for and withdrawn personally by the person concerned in the country of origin or the country where the worker had his last address. Within a period of one month from entry to Spain, the Bulgarian or Rumanian worker must personally apply for the alien identity card. This card will be valid for one year and, in any case, when the transitory period finalises.
   - With regard to *Bulgarian and Rumanian workers resident in Spain at the time of the accession*, within a period of one month from notification of the work permit, they must personally apply for the alien identity card which will also have a validity period of one year and, possibly, the validity will expire if the transitory period finalises.
2. As regards the *nationals of the States referred to who resided in Spain previous to the date of accession* and have been granted a work permit as an employed person with a duration equal or greater than one year, the legal regime contained in the Royal Decree which regulates the entry, free movement and residence in Spain of citizens of the Member States of the EU and the other States which are parties to the Agreement on the European Economic Area will apply.
3. As from January 1, 2007, the workers who are nationals of Bulgaria and Rumania will not require a visa when they are contracted for temporary work which lasts for no longer than 180 days. The *Organic Law on Aliens 4/2000 and Royal Decree 2393/2004* will apply to these and they will be subject to the 2007 quota of non-Community foreign workers in Spain.
4. As concerns the students who are Bulgarian or Rumanian citizens and are authorised to work as employed persons and workers doing professional training, the *Organic Law on Aliens 4/2000* and its Implementation Rules 2393/2004 will apply. The worker doing professional training will be issued with a residence and work visa free of charge in the country of origin or in the country he last resided in and once one month has elapsed from his entry into Spain, he must personally apply for the alien identity card.
5. With regard to the workers exempt from obtaining a work permit and who do not reside in Spain as from the adhesion, the *Organic Law on Aliens 4/2000* and the Implementation Rules 2393/2004 will apply to them. The Royal Decree on Community citizens and assimilated citizens will apply to the workers who are exempt from work permits and at the time of the adhesion, already resided in Spain.

6. For the f*amily members* of those workers who accredit the family relationship, the regime for the application and concession of the family residence card will be regulated by the Royal Decree on Community citizens and assimilated citizen. However, for these family members to access the employment market, two situations are taken into account:
   - The first concerns the family members of those workers who are legally resident in Spain at the time of accession and on condition that the worker has an employed person work permit with a duration equal or greater than one year before January 1, 2007, the legal regime stipulated in the Royal Decree on Community citizens and assimilated citizens will apply..
   - As regards the family members who are not residing in Spain at the time of the accession and the worker accredits one year of legal residence and work as an employed person in Spain before or after the accession, the legal regime applicable will be the one stipulated in the Organic Law on Aliens 4/2000 and Implementation Rules 2393/2004.
7. Finally, as regards sanctions, the Instruction establishes that the sanctioning regime stipulated in the *Royal Decree on Community citizens and assimilated citizens* will apply.

CHAPTER IX. STATISTICS

1. The national statistical sources of the Ministry of Interior do not allow the distinction between workers of the European Economic Area (E.E.A.) and their families. The reason is mainly legal: these residents obtain a Community residence permit in order to work and reside. The Community residence permit does not specify whether this is only to reside or whether they are allowed to work as it does with nationals from third countries.

2. As we can see, we have had access to data from the Extended European Union only since 2004. Because of this, in this paper we use data for 2004 related to the Extended European Union.

3. However, statistics from Social Security provide us with figures for nationals of the E.E.A. who are working and paying Social Security contributions.

E.E.A. Countries and Third Countries

Country of Origin	2001	2002	2003	2004	2005	2006
E.E.A.	325,511	355,857	398,150	489,337	559,001	649,792
Third Countries	783,549	968,144	1,248,861	1,487,954	2,179,931	2,372,016
Total	1,109,060	1,324,001	1,647,011	1,977,291	2,738,932	3,021,808

Source: Statistical Yearbook on Aliens. Ministry of the Interior.

* Data from 2000, 2001, 2002, and 2003 correspond to the European Union comprised of 15 members and do not include Norway, Iceland and Liechtenstein)

** Data from 2004, 2005 and 2006 corresponding to the E.E.A.

In a period of six years, from 2001 to 2006, immigration from Member States of the European Economic Area has grown 100%, while immigration from third countries has increased 200%, just twice as much. In the last year, from 2005 to 2006, according to table No. 1, the growth of nationals of E.E.A. was around 16%, while the growth of *regular* residents of third countries was 9%[31].

In 2001, nationals from the E.E.A. represented 29% of the foreign population. While in 2006 the E.E.A. decreased to 21,5%. Eleven years ago EEA nationals had represented 47.5%. Despite the growth over these years, the increase of nationals from third countries has inverted the relationship between both groups of countries, thus at the present time the group of third countries represents the majority.

Gender

Years	European Economic Area		Third Countries	
	Men	Women	Men	Women
2001	51.62	48.38	59.82	40.18
2002	51.97	48.03	57.4	42.6
2003	50.9	49.04	57.85	42.15
2004*	52.55	47.45	56.92	43.08

31 It must be taken into account that the statistical source used in this document is the Yearbook on Aliens, which only registers the legal residents, but not all *de facto* residents. To have an idea of the real figure of foreign residents in Spain, the Municipal Register must be consulted. According to this source, at 1st January 2006, there were 918,886 EEA registered citizens; non-EEA nationals amounted to 3,225,280.

2005*	52.98	47.02	55.5	45,50
2006*	53.46	46.54	54.37	45.63

Source: Statistical Yearbooks on Aliens from those years.
*Data from the E.E.A.

Referring to gender distribution of E.E.A. nationals, men are over-represented with a 53.46% of total; between 2001 and 2006 men have experienced a relatively significant increase of nearly two percentage points. Comparing these figures with the ones from third countries, the difference of gender in these countries underwent around a 15 point gap in favour of men until 2004, with a substantial decrease of 5 percentage points up to 2006 when it reached 8.7.

Age

		0 to 15 years	16 to 64 years	More than 64 years	Unknown	Total
2001	EEA	20,262	252,794	52,455		325,511
	Third Countries	95,124	668,263	20,162		783,549
2002	EEA	22,802	275,535	57,518	2	355,857
	Third Countries	125,958	818,112	23,881	193	968,144
2003	EEA	25,857	307,965	64,323	5	398,150
	Third Countries	175,527	1,045,218	27,914	202	1,248,861
2004	EEA	28,853	383,995	76,489		489,337
	Third Countries	237,476	1,220,175	30,117	186	1,487,954
2005	EEA	34,576	438,219	86,204	2	559,001
	Third Countries	277,839	1,867,099	34,812	181	2,179,931
2006	EEA	39,183	510,408	100,194	7	649,792
	Third Countries	339,800	1,992,724	39,300	192	2,372,016

Source: Statistical Yearbooks on Aliens for those years. Ministry of the Interior.

In 2002, 77.2% of the residents of the E.E.A. were in the 16 to 64 age range. In other words, based only on their age, they would be able to perform any productive activity. Four years later, in 2006, that figure continues to be stable at 78,5%. The population under 16 also continues to stand at 6%. Comparing these figures with the ones from third countries, we can see that the latter had a higher percentage of people old enough to work (85%) in 2002, decreasing three points (82%) in 2004, but returning to 84 in 2006. On the other hand the population under 16 from third countries was double the same age range from the E.E.A. (13%) in 2002; four years later that difference increases slightly to stand at 14,4%. Regarding the population older than 64, we can observe a very unusual fact: while in 2002 they represented 16.3%, the absolute numbers increased 68% in 2006 (100,194). Although the global percentage decreased to 15.4%, this figure seems enormous when compared with over-64 non-EEA nationals. This fact seems to confirm the attraction which Spain has for the retired population from the countries of northern Europe. As concerns third countries, the difference decreased even more visibly from 2.3% in 2002 to a very low 1.5% in 2006.

In 2001, the founding countries of the European Union comprised 54% of the immigration from the E.E.A. However, in 2006 this figure decreased 12 percentage points to 42%. In the last 6 years (2001-2006) an analysis of the increase in immigration from countries of the E.E.A. shows four groups of countries classified according to their growth rates. The first group of countries has a low or very low increase of below 10%. The countries in this group are: Germany, Austria, Belgium, Denmark, Finland, France and Sweden.. The second group

is between 10 and 15%, and is constituted by Greece, Ireland and the Netherlands. The third group has a growth ranging from medium to high, 15 to 20%. The countries belonging to this group are Portugal, Italy and, and the United Kingdom.

Residents from the E.E.A. by country of origin 2001-2005

	2001*	2002*	2003*	2004**	2005**	2006**
Germany	62,506	65,823	67,963	69,719	71,513	77,390
Austria	3,711	3,931	4,172	4,290	4,420	4,775
Belgium	13,541	14,631	15,736	15,798	16,050	17,216
Denmark	5,818	6,167	6,568	6,910	7,122	7,606
Slovakia	----	----	----	1,988	2,947	4,062
Slovenia	----	----	----	----	----	380
Estonia	----	----	----	210	381	505
Finland	5,186	5,672	5,906	6,041	5,882	6,363
France	44,798	46,986	49,196	49,918	52,255	56,170
Greece	1,033	1,183	1,367	1,613	1,851	2,115
Hungary	----	----	----	1,255	1,934	2,950
Ireland	3,779	4,208	4,882	5,831	6,572	7,467
Italy	35,647	45,236	59,745	72,032	84,853	98,481
Latvia	----	----	----	499	900	1,276
Lithuania	----	----	----	6,338	11,296	13,810
Luxemburg	235	246	---	---	----	----
Netherlands	17,488	18,722	20,551	21,397	23,040	25,958
Poland	----	----	----	23,617	34,600	48,031
Portugal	42,634	43,309	45,614	50,955	59,787	72,505
United Kingdom	80,183	90,091	105,479	128,283	149,071	175,870
Czech Republic	----	----	----	2,166	3,068	4,040
Sweden	8,952	9,652	10,415	10,751	11,176	12,121
Island	231	264	----	292	347	406
Lichtenstein	23	20	----	----	----	----
Norway	5,587	6,717	8,049	8,865	9,256	9,806
Other EU	----	---	556	569	680	489
Total	325,511	355,857	398,150	489,337	559,001	649,792

Source: Statistical Yearbook on Aliens. Ministry of the Interior.

* Data from 2000, 2001, 2002, and 2003 correspond to the European Union comprised of 15 members and not include Norway, Iceland and Liechtenstein

** Data from 2004, 2005 and 2006 corresponding to the E.E.A.

Distribution by Autonomous Communities

Autonomous Communities	2001	2002	2003	2004*	2005*	2006*
Andalusia	60,662	68,509	78,360	94,934	106,598	125,554
Balearic Islands	33,456	33,780	36,340	41,047	43,798	48,395
Canary Islands	43,228	45,745	51,818	60,212	63,937	71,026
Community of Valencia	46,583	53,719	67,291	87,455	105,494	131,813
Murcia	4,534	4,998	7,477	13,024	17,997	22,894
Catalonia	51,062	57,277	62,366	69,790	75,304	81,878
Madrid	39,739	42,990	44,899	63,872	77,005	86,321
Others	46,247	48,839	49,599	59,003	68,868	81,911
Total	325,511	355,857	398,150	489,337	559,001	649,792
% living in tourist areas (highlighted)	58%	58%	61%	61%	60%	62%

*Data from 2004, 2005 and 2006 correspond to the Extended European Area.

The geographic distribution of nationals of the European Economic Area shows that around 60% live mainly in tourist areas (Andalusia, Balearic and Canary Islands, Valencia and Murcia, highlighted in the table). This figure has maintained consistent over the last lustrum.

Aliens Paying Social Security Contributions (by economic sector)

EEA				
	2002	**2003**	**2004**	**2005**
Agriculture	7,103	12,909	14,738	12,685
Industry	14,904	16,241	19,567	21,880
Construction	16,141	19,605	30,225	41,337
Services	141,425	159,156	186,724	210,988
Total EEA	179,573	207,911	251,254	286,890
Third countries				
	2002	2003	2004	2005
Agriculture	110,595	117,656	110,920	169,680
Industry	60,398	67,066	77,405	107,089
Construction	112,044	126,532	160,311	276,903
Services	368,608	405,419	476,512	847,857
Total Others	651,645	716,673	825,148	1,401,529
Total workers	831,218	924,584	1,076,402	1,688,419

Source: Ministry of Employment and Social Affairs 2002, 2003, 2004, and 2005.

We can finally regard the economic sectors where the European nationals are employed. Data from the Ministry of Employment and Social Affairs show that most of the EEA nationals work on the Services Sector (74% in 2006, versus the 60% of non EU nationals). Additionally, referring to foreign workers´ professional level, data from the Survey on Active Population (average 2006) reveal that most of the nationals of EEA (50%) are employed at high professional levels (44% Spanish workers); less than 10% of third countries´ citizens had reached that level.

CHAPTER X. SOCIAL SECURITY

Judicial Practice

First of all, we stress that litigious questions are still being raised as regards access to health care for the workers who move within the EU due to the refusal of the Spanish Health Care Services to repay the health care expenses paid by citizens of the EU resident in Spain, when they move outside Spanish territory in order to receive health care assistance. However, the subject of controversy in this case will be the complementary expenses paid due to the journey and not the direct expenses deriving from the health care assistance.

We refer to 2006, regarding the *Decision of the European Union Court of Justice of June 15, 2006* which resolves the pre-judicial question raised by the High Court of Justice of the Autonomous Community of Cantabria concerning the interpretation of articles 22 and 36 of Regulation (EEC) 1408/71 in the litigation raised by Mr. Acerada Herrera due to the refusal of the Health Care Service of Cantabria to pay the travel, stay and meal expenses incurred by Mr Acereda Herrera, resident in Spain, who had received hospital treatment in France, as well as the expenses incurred by a member of his family who accompanied him.

The litigation arose as the Spanish legislation (Royal Decree 63/1995, of January 20) maintains the requirement that the repayment of the expenses for health care received outside Spain is only possible *"in the cases of urgent, immediate and vital health care assistance, which has been attended outside the Spanish National Health Care System*" and once it is demonstrated *"the Spanish services could not be used and that this does not constitute "a deviated or abusive use of this exception*" (article 3 Royal Decree 63/1995).

In its interpretation of articles 22.1 and 36 of Regulation (EC) 1408/71, the ECJ points out that the payment of the costs of travel, accommodation and meals of the insured person and the person accompanying him or her, in the case of hospital treatment in another member state, depends on the way in which these costs are met in the state of insurance. In this case, Spanish authorisation for an insured person to go to another Member State in order there to receive hospital treatment appropriate to his medical condition *does not confer* on such a person the right to be reimbursed by the competent institution for the costs of travel, accommodation and subsistence which that person and any person accompanying him incurred in the territory of that latter Member State, with the exception of the costs of accommodation and meals in hospital centre for the insured person himself.

The Spanish Courts continue to address the question of the *calculation of the fictitious contributions* made to the Spanish Social Security (Mutual Employment Association) by the migrant workers *previous to January 1, 1967* and taking this into consideration in order to access the retirement pension, that is to say if the years of allowance for the age reached on January 1, 1967 which is laid down by the Second Transitory Provision of the Ministerial Order of January 18, 1967 in order to calculate the proportion payable by the Spanish Social Security to the retirement pension recognised for the worker. The European Union Court of Justice had had the opportunity to pronounce on the litigious question in the case of *Barreira Pérez* against the National Institute of the Social Security and the Treasury of the Social Security, (C-347-00), in which the European Union Court of Justice maintains that the periods of fictitious allowance established by the Ministerial order of January 18, 1967 must be considered to be periods of insurance in the sense of article 1 r) of the Regulation, and must be taken into account when effectively calculating the pension. For the Court, if the Regulation is interpreted otherwise, the result would prejudice the emigrant worker and this would penalise the exercise of free movement in comparison with the other workers who work all their lives under the legislation of one Member State.

This will be followed by the Spanish Courts as in the *Decision of the High Court of Justice of Castile and León (Valladolid) on January 23, 2006*: in this case, the claimant requests the Spanish Social Security to revise the amount of the retirement pension to be paid by the Spanish Social Security in application of the decision of the *"Barreira*" case, and the litigation focuses on the date to which the effects of the revision of the proportion applicable

to the retirement pension must retroact and not to the subsequent revision of the amount, as intended by the National Institute of the Social Security.

Also as regards the claim for the retirement pension, the question continues on the *theoretical contributions and the allowances for age* in order to calculate the regulation base of the pension, this time for *migrant sea workers*, as in the Decision of the Supreme Court of May 31, 2006 which involves the claim of a Spanish worker who had worked in Spain and Holland, requesting a retirement pension in accordance with the bases whereby he contributed to the Dutch system, and the claim for the application of the Bilateral Hispano-Dutch Agreement on Social Security as this was more beneficial instead of the Community Regulations and, in a subsidiary fashion, the case law theory of "average bases". This same defence of the bilateral agreements as opposed to the Community legislation appears in the *Decision of the High Court of Justice of the Principality of Asturias of April 21, 2006* and the Court defends the application of the Agreement made by Spain and Holland as its provisions are more beneficial. Thus, what was established by the European Union Court in the *Röndfedlt (C-227/89) cases* and, which was repeated more recently in the Hervein and Lorthiois (C-393/99 and C-394-99) cases of March 19, and the *Kaske* (C-277/99) case, of February 5, 2002 is followed in a more consolidated manner.

The application of the "*pro rata temporis*" is also addressed as concerns retirement in the *Decision of the Supreme Court of July 11, 2006*, this time with contributions to the German system. The problem is the possible contradiction between the mandates of articles 45 and 46 of the Community Regulation 1408/71 and the need to make a harmonious interpretation among these in the sense that, in order to decide the proportion, all the insurance contributions of the working life of the worker affected must be calculate. Pronouncements were made along the same lines in the *Decision of July 21, 2006 of the Supreme Court*, the *Decision of High Court of Justice of Madrid of May 26, 2006* and the *Decision of the High Court of Justice of Extremadura of July 6*, although this last case dealt with old age and invalidity insurance.

Finally, in relation to the non-contributory services, the Decision of the High Court of Justice of Aragón of January 31 involved the claim for a service for a son under the charge of an Algerian citizen, resident in Spain, and whose children live in Algeria. The service was refused by the Spanish Social Security as legal residence of the beneficiary in Spain is required, and the Spanish authority also required the residence of the children generating the right.

CHAPTER XI. ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS

In 2006 the possible obstacles to the freedom establishment in Spain are centred on the problem of the recognition of professional qualifications which make it possible to exercise the professional activities involved in establishment. All these problems of recognition and validation of qualifications has been dealt with in detail in Chapter II to which we refer this question and the questions on the Ministerial Order of 11 May 2006 on complementary training in order to have foreign qualifications approved.

As concerns the free provision of services, no norms or practices which might a priori entail obstacles have been detected. In services of a temporary nature, the principle of the recognition of professional qualifications of the State of origin which considerably reduces the problem.

With regard to possible quotas or restrictions for Community students, it should be pointed out that an analysis of the Recent Organic Law on Education 2/2006 of 3 May, in force since 30 January 2007,[32] which affects all the educational levels in Spain, no quota systems or limitations which might negatively affect the nationals of other Member States who wish to study in Spain have been detected.

32 *Official State Gazette*, May 4, 2006.

CHAPTER XII. MISCELLANEOUS.

Books:

Solé, Carlota (dir.), *Inmigración comunitaria: ¿discriminación inversa? (Communitarian Immigration: Discrimination a sensu contrario?*, Barcelona: Anthropos, 2006.

Reviews

Blázquez Agudo, Eva María: "El futuro de la libre circulación de trabajadores". Repensando su contenido a partir de la Directiva Marco sobre mercado interior (The future of free movements of workers: Rethinking its content from the point of view of the Directive on internal market"). *Revista del Ministerio de Trabajo y Asuntos Sociales. 2006,* Nº 62.

Manrique López, Victor Fernando: "La normativa comunitaria actualmente vigente en el llamado Derecho europeo de la Seguridad Social" (The EU legal framework in force on Social Security). *Estudios de Deusto Revista de la Universidad de Deusto*. 2006, Vol. 54, Nº. 1.

Seminars

Jornada informativa sobre *Movilidad laboral en Europa: oportunidades para empresas y trabajadores*, Madrid, 4 de octubre de 2006. Entidad organizadora: Cámara Oficial de Comercio e Industria de Madrid. (Seminar on "Worker Mobility in Europe: opportunities for the enterprises and workers").

Seminario *La movilidad de los trabajadores en la Unión Europea*, Oviedo, 26 de octubre de 2006. Entidades organizadores: Cámara de Comercio de Oviedo, Dirección General de Relaciones Exteriores y Asuntos Europeos del Principado de Asturias, Ayuntamiento de Oviedo, Fundación Universidad de Oviedo, Universidad de Oviedo (Seminar on "Workers mobility in the European Union").

Jornadas *Andalucía en el año europeo de la movilidad*, Málaga 8 y 9 de Noviembre de 2006. Entidad organizadora: Servicio Andaluz de Empleo de la Junta de Andalucía- (Seminar "Andalucia in the European year of mobility").