# REPORT
## on the Free Movement of Workers in the United Kingdom in 2007

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## Introduction

There have been a series of very important developments in the UK over the past year as regards the ability of migrant EU nationals to exercise EU rights in the UK. These include changes to practice and court decisions as well as clarification by the administration of important rights.

On the positive side, there has been an overhaul of the system of access to jobs in the public sector which has resulted in increased access for nationals of other Member States to jobs in this sector in the UK. It has also resulted in much greater clarity as regards how the system of exclusions operates. Secondly, as far as access to the labour market is concerned, in the region of 796,000 A8 nationals have at one time or another exercised an employed activity in the UK since 1 May 2004. The geographic distribution of these A8 nationals is very wide – covering the whole country. While the numbers are now diminishing and may well continue to do so if the anticipated economic downturn takes effect, their presence in the UK's labour force has undoubtedly helped the economy grow over the period.

On the less positive side, family reunification with third country national family members remains problematic. The biggest issue is that left from an arguable lack of clarity in the jurisprudence of the ECJ: where third country national family members of EU nationals seek to join their family members in the UK do they need already to have had residence in another Member State? Put another way, does EU family reunification law only apply to movement of family members already within the EU? Along with Ireland, the UK is applying this interpretation of EU family reunification law increasingly strictly. The result is that where third country national family members are not also visa nationals, they can arrive at UK ports of entry as visitors and make their claim to entry as family members at the post. On production of the documentation, they are entitled to enter to join their EU family member in the UK. But if they are visa nationals they cannot travel if they have not got a visa and if they apply for a visa for family reunification to come to the UK national rules (which are more restrictive than EU rules) apply. Thus these family members are excluded on the basis of national law and visa requirements. So far the UK courts have upheld the UK Government's interpretation of the EU rules and refused to refer the question to the ECJ.

Similarly, on the problematic side, the UK's creation of a new test – the right to reside – and its application to limit access to social benefits for migrant EU nationals in the UK is starting to bite as regards an increasing number of persons. Again, the UK courts have so far upheld the validity of the new test of right to reside notwithstanding the fact that academic commentators suggest that it is not clearly compatible with EU rights of migrant workers. There has been no reference to the ECJ on the issue.

Finally, the issue of delay has once again arisen. While in 2004 – 5 the UK authorities managed to turn around applications with an EU law element quickly, delays have once again become substantial. Information provided by the UK authorities resulting from a freedom of information request indicate that in Q3 2007, 510 registration certificates for EEA nationals took more than six months to be issued. In Q3 2007 of 4,843 applications for residence cards, 807 took more than six months to be resolved.

In general, the UK's implementation of EU free movement of workers law is something of a mixed bag. The credit which the UK enjoyed as a result of opening its labour market to

nationals of the A8 states[1] in May 2004 is now less striking as there are only five pre 2004 Member States which are still restricting access to their labour markets for these workers. The failure of the UK to open its labour market to Bulgarian and Romanian workers contrasts unfavourably with the opposite decision made in ten of the 25 Member States, including Finland and Sweden where labour markets have been opened.

[1] These are nationals of: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia to whom the transitional restrictions on free movement of workers were included in the Accession Treaty of their states.

# Chapter I
# Entry, Residence and Departure

## A ENTRY

### *Texts in Force*

Immigration Act 1971, Immigration Act 1988
- Immigration and Asylum Act 1999
- Immigration (European Economic Area) Regulations 2000
- Anti-Terrorism, Crime and Security Act 2001
- Immigration (Swiss Free movement of Persons) (No. 3) Regulations 2002
- Nationality, Immigration and Asylum Act 2002
- Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003
- Accession (Immigration and Worker Registration) Regulations 2004
- Immigration (European Economic Area) and Accession (Amendment) Regulations 2004
- Immigration (European Economic Area) (Amendment) Regulations 2006
- Accession (Immigration and Worker Authorisation) Regulations 2006
- UK Borders Act 2007
- European Casework Instructions (ECIs) at: http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/

### *Admission*

The 2006 report provides a comprehensive guide to Immigration (European Economic Area) Regulations 2006 ("the Regulations") which regulate the admission of EEA nationals The European Caseworker Instructions (ECIs) continue to provide guidance on the administrative practice to be applied to EEA nationals. The ECIs have been significantly reduced in respect of guidance given to Immigration Officers on the admission of EEA nationals, which now no longer features as a separate Instruction.

The admission of EEA nationals does not appear to be a problem generally and the UK Immigration Service (now part of the UK Border Agency) exercise a light control over such admissions.

Your rapporteurs continue to receive anecdotal evidence that Bulgarian and Romanian citizens ("A2 nationals") who are working in the UK are routinely asked if they are working in the UK and are requested to produce either their Accession Worker Card or Registration Certificate. Under the Regulations, Immigration Officers may not examine EEA nationals on entry unless they have "reason to believe" that there may be reasons for exclusion on grounds of public policy, public security or public health. While it is now a criminal offence for an A2 national to take employment without authorisation under Regulation 13 of the Accession (Immigration and Worker Authorisation) Regulations 2006, firstly no examination of this type should take place at the border and secondly it is clear that the offence of unauthorised working clearly does not fall with ambit of public policy.

### *Refusal of admission*

The Regulations provide Immigration Officers with wide powers to deal with EEA nationals arriving in the United Kingdom (Regulation 22), to those who are not permitted to enter (Regulation 23), and to people subject to removal (Regulation 24). These provisions were reviewed in detail in the 2006 report. The grounds on which an Immigration Officer may have reason to believe that an EEA national falls to be excluded are not set out and there remains a large degree of discretion in this area.

Access to employment: in general this issue is dealt with in Chapter 3, suffice it here to state that EU nationals who come to the UK as job seekers do not normally encounter difficulties as regards their residence unless they seek benefits. Here the right to reside test described in Chapter 3 becomes an obstacle though this rarely seems to become a ground to remove an EU national.

## B. RESIDENCE

Regulation 13 implements the right to reside for three months subject to the public policy, security or health provisos and the "unreasonable burden on the social assistance system" test. Beyond the three months, Regulation 14 defines those exercising free movement rights as "qualified" person" including job seekers, workers, the self employed, the self-sufficient and students. The definition of workers and self employed is not dealt with in the Regulations and some very brief guidance is contained in the ECI's Chapter 1 while both self-sufficient persons and students are carefully defined.

### *Administrative Practice*

*Processing of EEA registration certificates*

The issuing of residence certificates to EEA nationals is governed by Part 3 of the Immigration (European Economic Area) Regulations 2006. Regulation 16 provides that the UK authorities *must* issue a registration certificate *immediately* on application.

Where an application for a registration certificate is submitted by post, the Home Office's published aim in 2007 was to process these within 20 days. Processing times varied widely and there appeared to be no particular logic in the way in which applications were processed. These cases appear to be linked to applications where a non-EEA family member is also applying for a residence card.

While applications for registration certificates can be submitted through the Border and Immigration Agency same day service via its Public Enquiry Office, EEA nationals (in contrast with third country nationals obtaining extensions of their leave to remain) may not use authorised representatives to submit applications on their behalf. Non-EEA family members remain excluded from applying via the PEO, despite the fact that spouses of British nationals can apply to remain on the basis of marriage via the PEO.

Certificates of Application for EEA nationals and their non-EEA family members are issued within one to two weeks of application. The certificates confirm that non-EEA family members have the right to work pending the outcome of the application. However, one significant failing in giving effect to the directly effective right to work for third country family members is that Certificates of Application were not listed as one of the documents which

employers could check as proof of a person's entitlement to take employment. This has been remedied by new guidance effective from 29 February 2008.

Details of timescales for applications submitted to the Home Office for registration certificates, residence cards and permanent residence were made available following a request made to the Home Office under the Freedom of Information Act. These disclose that in the first three quarters of 2007 the UK authorities were failing to comply with the six month requirement contained in articles 10 and 20 Directive 2004/38 as significant numbers of applications for residence cards, documents certifying permanent residence and permanent residence cards were not issued within 6 months of application.

In the first three quarters of 2007, in excess of 1700 applications for registration certificates had not been completed within six months. For residence card applications, the figures show the percentage of applications exceeding the six month limits as 29.87% (Quarter 1), 25.50% (Quarter 2)and 16.66% (Quarter 3).

Despite the requirement contained in Article 19 (2) of Directive 2004/38 to issue documents certifying permanent residence "as soon as possible", again significant numbers of these applications failed to meet the standards imposed by the Directive. In Quarter 1 of 2007 38.77% took over 6 months.

In addition to the ground of public policy, security or health for refusal to issue documentation, Regulation 20 permits revocation where the person no longer qualifies under the Regulations. This power is also given to Immigration Officers who can revoke residence cards and EEA family permits at the frontier. Thus third country national family members are under a specific regime when they appear at the border as they are at risk of having their entry document revoked if the Immigration Officer is not satisfied that they are family members of a qualified person etc. In effect this means that at each entry into the UK third country family members, irrespective of the nature of the document they have, may be subject to an inspection by the Immigration Officer as to whether the conditions of their presence in the UK are still valid. This regime does not apply to EU national family members and appears to constitute discrimination between one group of EU nationals and another depending on the nationality of their family members.

***Permanent residence***

The right to permanent residence is contained in Regulation 15. This restricts the right of permanent residence to EEA nationals who have "resided in the United Kingdom *in accordance with these Regulations* [our emphasis] for a continuous period of five years". The Home Office's interpretation of the provisions of Article 16 (1) of the Directive which were referred to in the 2006 report remain and have been confirmed by the Asylum and Immigration Tribunal in the case of GN(EEA Regulations: Five Years Residence) Hungary [2007] UKAIT 00073. The case concerned a Hungarian national who had been lawfully resident in the UK since 1997 and who applied for permanent residence on the basis of five years lawful residence in the UK. His application was refused but allowed on appeal by an Immigration Judge. The Secretary of State appealed. The Court stated:

> "10. We are unpersuaded by the appellant's submissions. Looking first at Article 16 of the Directive we find there, as we have indicated, the word "legally". The appellant's submission incorporates an implication that that word means "lawfully in accordance with national law". We see no basis for reading that meaning into the word "legally" in Article 16 of the Directive. When one sees a word of that sort in any legal instrument, one interprets it normally within the instrument's own legal context. The context of the Directive is European law: and for that reason we read "le-

gally" in Article 16(1) as meaning in accordance with European law. If there were any doubt about that it would in our view be resolved by paragraph 17 of the preamble, to which the appellant has referred us, which indicates that the intention is to give a right of permanent residence to those "who have resided in the host Member State in compliance with the conditions laid down in this Directive" for five years. That, it seems to us, is sufficient to show that the provisions of the Directive are properly reflected in the regulations, which indicate that the period of five years in question is a period during which the applicant was exercising Treaty rights or was a spouse or family member of someone doing so. In the appellant's case he was not exercising any direct Treaty rights before Hungary, the country of which he is a national, became a member of the European Union.

11. So far as concerns the other matters to which the appellant referred, we note the interpretation posited by a member of the Commission on the words of Article 16, but note also that it did not purport to be authoritative, and makes no reference to the preamble, which we regard as a valuable aid to interpretation.

12. We also reject the appellant's submission that the application of the Directive and the regulation in this way amounts to discrimination on grounds of nationality. The position simply is, as Mr Ouseley put it, that the decision is made on the facts of the case. Of course from time to time there will be groups of people, the facts of whose cases are similar; but the position is that, like any other Union citizen, the appellant will be able to apply for a right of permanent residence when he has resided in a Member State in accordance with the provisions of the UK Regulations or in accordance with the terms of the Directive for five years.

13. The parties told us that there were no additional facts for us to take into account if we were substituting our own determination. For the reasons we have given we find that the Immigration Judge materially erred in law in making her determination. On the facts, which are that the appellant has been residing in the United Kingdom as a Union citizen or as a national of EEA state for a period of less than five years, we substitute a determination dismissing his appeal."

This narrow reading of Community law appears to have been taken in a significant numbers of cases decided by the Immigration and Asylum Tribunal in 2007.

***Nationality***

The new provisions on permanent residence have also been transposed into the requirements for British nationality. Applicants for British nationality must demonstrate that their permission to stay is not subject to any time restrictions under UK immigration law and (except in cases of the spouses of British citizens) and that they have held this status for at least 12 months. Previously, EEA applicants would need to demonstrate that they had obtained permanent residence or indefinite leave to remain. Since 1 May 2006, applicants simply need to provide evidence of the acquisition of permanent residence through the exercise of free movement rights for five years and residence for a further year. The Nationality Directorate internal Guidance (Nationality Instructions, Volume 2, General Information Section) contains clear guidance on the effect of Directive 2004/38 and the right to permanent residence on applications for British nationality. Despite this guidance, your rapporteurs are aware of a number of refusals of nationality applications based on the lack of the physical granting (rather than automatic acquisition) of permanent residence. These refusals appear to have been reconsidered and approved.

## C. DEPARTURE

The provisions on exclusion and removal implement the requirements of the Directive in providing enhanced protection for long term residents and those with permanent residence. These provisions have been amended and are a clear improvement on the 2000 Regulations.

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

- A relevant decision may not be taken to serve economic ends.
- A relevant decision may not be taken in respect of a person with a permanent right of residence except on serious grounds of public policy or public security.
- A relevant decision may not be taken except on "imperative grounds of public security" in respect of an EEA national who
  (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
  (b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989

Where a relevant decision is taken on grounds of public policy or public security it must be taken in accordance with the following principles:

- the decision must comply with the principle of proportionality;
- the decision must be based exclusively on the personal conduct of the person concerned;
- the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
- a person's previous criminal convictions do not in themselves justify the decision.

The public health ground is carefully circumscribed to those permitted under the directive.

Finally, the Regulations now specify that before taking a decision on the grounds of public policy or public security the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin. This list come straight from the Directive without amendment and also owes its existence to the jurisprudence of the European Court of Human Rights.

The public health ground is carefully circumscribed to those permitted under the Directive.

## D. REMEDIES

The appeal regime which applies to EU nationals and their family members is modified as a result of the fact that they do not require leave to enter. There is a right of appeal under SI 2006/1003 reg 26 against any negative EEA decision (e.g. refusal of a residence card etc.). This is a decision which is made under the Immigration (European Economic Area) Regulations 2006. The appeal will be either to the Asylum and Immigration Tribunal (the first instance court responsible) or if a question of national security is engaged to the Special Immigration Appeals Commission. A person can only appeal against a decision if he or she can show that he or she is an EEA national via an ID card or passport (Reg 26(2)). If the person claims to be a family member that he or she can show a valid EEA family permit or other proof of the relationship in order to be able to appeal against a negative decision (Reg 26(3)).

Where a decision is made to remove an EEA national or family member there is a right of appeal again either to the AIT or SIAC (Reg 28 & 29). The appeal has suspensive effect.

***UK Borders Bill***

The UK Borders Act came into force in October 2007 and contains important new provisions on the deportation of foreign nationals including citizens of the Union. These were set out in detail in the 2006 report. Section 28 of the Act, which contains provisions on automatic deportation of foreign criminals, is not yet in force. There are ongoing concerns that the presumption of deportation contained in the Act may be contrary to Community law principles.

***Practice***

The guidance given to Immigration Officers on refusal of admission and deportation of EEA nationals on grounds of public policy, public security and public health are contained in the European Casework Instructions (EDIs), Chapter 8 Section 3. The guidance on public security and public health has been amended, in particular deleting the list of offences which would justify deportation without the need to show personal conduct or evidence of propensity to offend.

***Deportation of Irish nationals***

Following a campaign by the Irish Commission for Prisoners Overseas and the Irish Government on the plight of Irish prisoners, who were being detained pending deportation proceedings initiated as a result of the April 2006 Government policy on deporting foreign prisoners (see 2006 Report), the Government reviewed that policy in relation to Irish nationals. In a Ministerial statement to the House of Commons on 19 February 2007, the Immigration Minister Liam Byrne clarified the circumstance under which Irish nationals may be deported from the UK as follows:

> "Lin Homer, the director general of the immigration and nationality directorate, has today provided a comprehensive update to the Home Affairs Committee on the progress being made by the IND in deporting foreign national prisoners. In addition to this update, I would like to set out the Government's position on the deportation of Irish nationals.
> In my oral statement to the House on the prison estate, 9 October 2006, *Official Report*, column 32 I explained the Department was considering treating Irish citizens as a special case in respect of pursuing their deportation from the United Kingdom. A number of hon. Members have asked me to review the Government's position on deporting Irish nationals in the light of the acknowledged close historic and political ties between the UK and the Irish Republic and I have done so.
> Since April last year, we have ensured that all nationals from European economic area countries who have received custodial sentences in the United Kingdom for two years or more have been considered for deportation. This has lead to deportation action being pursued against a number of Irish nationals who have committed criminal offences here.
> Following recent discussions with the Irish Government, I am able to confirm that the approach to be taken with Irish nationals will now be as follows:
> Irish citizens will only be considered for deportation where a court has recommended deportation in sentencing or where the Secretary of State concludes, due to the exceptional circumstances of the case, the public interest requires deportation.
> In reviewing our approach in this area we have taken into account the close historical, community and political ties between the United Kingdom and Ireland, along with the existence of the common travel area.

> Those Irish prisoners whose cases are not considered exceptional, whose sentences have expired and who are currently in custodial detention awaiting deportation will be released over the next week. I have already asked that the necessary arrangements be put in place to ensure that these prisoners receive proper supervision on their release from the probation service."

These conditions are now repeated in the Border and Immigration Agency's internal IDIs (Chapter 13, section 1, paragraph 2.6, December 2007) and in the Enforcement Instructions and Guidance Chapter 15. The latter clarifies the meaning of exceptional cases as follows:

> "The cases, by definition, will be rare. However, as a guide deportation may be considered where an offence involves national security or crimes that pose a serious risk to the safety of the public or section of the public. This might be where a person has been convicted of a terrorism offence, murder or a serious sexual or violent offence and is serving a sentence of 10 years or more (a custodial period of 5 years or more)."

The guidance is intended to be read in conjunction with other guidance on the deportation of EEA nationals and the above test must assume that all other conditions for exclusion on public policy grounds must apply.

***Probation Circular PC11/2007-Deportation of European Economic Area (EEA) National Prisoners, June 2007***

As reported in our 2006 Report, the UK Government's 2006 policy on deportation of EEA nationals sentenced to 24 months was abandoned in 2007. New guidelines were issued by the Probation Service in June 2007 to ensure closer cooperation between offender managers and the Criminal Casework Directorate of the Border and Immigration Agency. The guidelines aim to assist offender managers in collating and providing relevant information of the likelihood of re-offending and risk of serious harm presented by EEA prisoners. This guidance appears to have been issued following serious criticism of the Home Office's policy of considering all EEA nationals for deportation without careful consideration of these factors.

***Annex: UK Statistics on length of time to issue EEA documents:***[2]

*Decisions made on registration certificates and residence cards from the date application was received (1st Jan 2006 to 31st Aug 2007)(P)*

**A) Document Certifying Permanent Residence**

| | Q1 2006 | Q2 2006 | Q3 2006 | Q4 2006 | Q1 2007 | Q2 2007 | Q3 2007 |
|---|---|---|---|---|---|---|---|
| *Applications received* | 2,275 | 2,186 | 1,675 | 1,669 | 1684 | 1644 | 946 |
| *Applications where decision made within 6 Months* | 2,021 | 1,783 | 1,471 | 1,192 | 1031 | 1195 | 802 |
| *Applications where decision made Over 6 Months* | 254 | 403 | 204 | 477 | 653 | 449 | 144 |

**B) Permanent Residence Card**

| | Q1 2006 | Q2 2006 | Q3 2006 | Q4 2006 | Q1 2007 | Q2 2007 | Q3 2007 |
|---|---|---|---|---|---|---|---|
| *Applications received* | 1,623 | 1,409 | 997 | 950 | 1253 | 1385 | 950 |
| *Applications where decision made within 6 Months* | 1,397 | 1,114 | 789 | 484 | 806 | 1043 | 804 |
| *Applications where decision made Over 6 Months* | 226 | 295 | 208 | 466 | 447 | 342 | 146 |

**C) Registration Certificate**

| | Q1 2006 | Q2 2006 | Q3 2006 | Q4 2006 | Q1 2007 | Q2 2007 | Q3 2007 |
|---|---|---|---|---|---|---|---|
| *Applications received* | 13,047 | 14,032 | 12,572 | 15,626 | 17,427 | 15,657 | 7,968 |
| *Applications where decision made within 6 Months* | 12,682 | 13,575 | 12,234 | 15,290 | 16,884 | 14,979 | 7,458 |
| *Applications where decision made Over 6 Months* | 365 | 457 | 338 | 336 | 543 | 678 | 510 |

**D) Residence Card**

| | Q1 2006 | Q2 2006 | Q3 2006 | Q4 2006 | Q1 2007 | Q2 2007 | Q3 2007 |
|---|---|---|---|---|---|---|---|
| *Applications received* | 6,416 | 6,186 | 5,936 | 6,223 | 6,876 | 7,425 | 4,843 |
| *Applications where decision made within 6 Months* | 5,809 | 4,941 | 4,801 | 4,446 | 4,822 | 5,531 | 4,036 |
| *Applications where decision made Over 6 Months* | 607 | 1,245 | 1,135 | 1,777 | 2054 | 1894 | 807 |

*(P) Provisional data*

Statistical information in this message is provisional and for internal use by Border & Immigration Agency only and is subject to change.

Statistics to be used publicly or for other government departments or agencies must be agreed with IRS.

[2] Freedom of Information Reply: UK Border Agency, 16 April 2008 to Mr Cox, Ref: 9144

# Chapter II
# Access to Employment

***Text(s) in force***

- Race Relations Act (RRA) 1976 as amended by The Race Relations Act 1976 (Amendment) Regulations 2003
- The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660)
- SI 2007/2781 The European Communities (Recognition of Professional Qualifications) Regulations 2007

***Draft legislation, circulars, etc.***

http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/ contain guidance and information for caseworkers dealing with European applications under the Free Movement of Persons Directive (2004/38/EC).

## 1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

***The European casework instructions***

http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/ contain guidance and information for caseworkers dealing with European applications under the Free Movement of Persons Directive (2004/38/EC). However, they focus primarily on entry and residence requirement, not equal treatment.

The border agency's website gives detail as to how to apply to work in the UK: (http://www.bia.homeoffice.gov.uk/workingintheuk/eea/).

It lays down the detailed rules which apply to nationals of Bulgaria and Romania (http://www.bia.homeoffice.gov.uk/workingintheuk/eea/bulgariaromania/liveworkuk/.

It also gives detail of the worker registration scheme which applies to the A-8 nationals (Czech Republic; Estonia; Hungary; Latvia; Lithuania; Poland; Slovakia; and Slovenia) (http://www.bia.homeoffice.gov.uk/workingintheuk/eea/wrs/)

http://www.directgov.gov.uk/en/Employment/Jobseekers/index.htm is a government website listing all jobs in, say childcare, for particular regions. There is no limit on the website as to nationality.

For those on benefits, Jobcentre plus provides a personal adviser to help an individual look for work: http://www.jobcentreplus.gov.uk/JCP/Customers/Lookingforwork/index.html. JobCentre Plus is covered by the Department of Work and Pensions (http://www.dwp.gov.uk/). Jobcentre Plus is part of a network of *public* employment services that belong to the European Employment Services (EURES). Under the Race Relations Act 1976, JobCentre Plus cannot discriminate on the grounds of nationality of the applicant (see further below), although some of the benefits that it can advise on are subject to residence criteria.

As the 2006 Report made clear, under s.14 of the *Race Relations Act (RRA) 1976* employment agencies cannot discriminate on racial grounds which includes nationality.[3] Equally, employers are not allowed to discriminate on the grounds of nationality either in respect of the arrangements they make for the purposes of determining who should be offered that employment[4] or the terms on which that employment is granted[5] or by refusing or deliberately omitting to offer employment. Section 1 RRA prohibits both direct and indirect discrimination on racial grounds which are defined in s. 3 as to include 'colour, race, nationality or ethnic or national origins'. The reference to colour and nationality, which was found in the original 1976 Act, shows that the British legislation is broader in scope than the EC Race Directive 2000/43. The 1976 Act has, however, been amended by *The Race Relations Act 1976 (Amendment) Regulations 2003* to implement those aspects of the EC Directive not already covered by the 1976 Act. In particular, the Regulations introduced a new definition of indirect discrimination and the prohibition of harassment. However, these changes apply only to those areas falling within the scope of the Directive (i.e. race, ethnic or national origins but not colour or nationality). The Race Relations Act applies to all those employed at an establishment in Great Britain (s.8). It is not subject to a nationality or residence requirement.

In addition, under *The Employment Equality (Religion or Belief) Regulations 2003* (SI 2003/1660) which implement the religion and belief strand of EC Directive 2000/78 employers cannot discriminate on the grounds of religion and belief. In addition, Reg 18 makes it unlawful for an employment agency to discriminate against a person in the terms on which the agency offers to provide any of its services; by refusing or deliberately not providing any of its services; or in the way it provides any of its services.

## 2. LANGUAGE REQUIREMENT

There is no statutory requirement to speak English for specific jobs. However, as the JobCentre Plus website used to point out, 'The official language of the United Kingdom is English and the ability to speak and write it is an important requirement for jobseekers. Welsh is also spoken in parts of Wales and some jobs require you to be able to speak this as well as English.' (http://www.jobcentreplus.gov.uk/JCP/Customers/Workingortrainingineurope/Dev_009861.xml.html). This has now been replaced by more general advice on how to find a job: http://europa.eu.int/eures/main.jsp?catId=7930&acro=living&lang=en&parentId=7734&countryId=UK&living=

ACAS, the Advisory, Arbitration and Conciliation Service, confirms there is no statutory language requirement for posts.

## 3. RECOGNITION OF DIPLOMAS

SI 2007/2781 The European Communities (Recognition of Professional Qualifications) Regulations 2007 implement in part Council Directive 2005/36/EC. They came into force on 19th October 2007. The following is taken from the explanatory memorandum accompanying the Regulations:

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3 On nationality, see *BBC Scotland v Souster* [2001] IRLR 150.

4 *Nagarajan v London Regional Transport* [1999] IRLR 572.

5 *Anya v University of Oxford* [2001] IRLR 377.

> These Regulations establish rules for the recognition of professional qualifications enabling migrants, referred to in these Regulations as "applicants", from the States of the European Economic Area or Switzerland to gain access to the professions in which they are qualified and to practise under the same conditions as professionals in the United Kingdom where those professions are regulated. These rules set out provisions for facilitating the provision of temporary and occasional professional services cross-border, and also provisions in relation to applicants seeking to establish themselves on a stable basis in the United Kingdom.
>
> These Regulations implement the Directive in relation to all regulated professions other than the sectoral professions. They also implement the Directive in part in relation to the sectoral professions, and the extent to which these Regulations apply to applicants in the sectoral professions is set out in regulation 3. The provisions of the Directive relating to the sectoral professions which are not implemented by these Regulations will be implemented in regulations to be prepared by the Department of Health, the Department of Communities and Local Government and the Department for Environment, Food and Rural Affairs.
>
> Part 1 of the Regulations sets out provisions relating to the application of the Regulations and the functions of competent authorities. Articles 23, 27, 33, 37, 39, 43 and 49 of the Directive, referred to in regulation 3(9)(a), relate to sectoral professionals whose qualifications were acquired before certain dates of reference. Articles 21(1), 23 and 27 of the Directive, referred to in regulation 3(9)(c), concern the principle of automatic recognition for sectoral professionals and on the basis of acquired rights.
>
> Part 2 of the Regulations sets out the rules for recognition of professional qualifications where an applicant moves to the United Kingdom seeking to provide professional services on a temporary and occasional basis. It sets out the role of a competent authority in relation to such an applicant, including specific provisions for professions having public health or safety implications, and it sets out the procedures and formalities with which an applicant must comply. It also makes provision for administrative cooperation between competent authorities of relevant European States.
>
> Part 3 of the Regulations makes provision for recognition of professional qualifications where an applicant moves to the United Kingdom seeking to provide professional services on a permanent basis. Chapter 1 of Part 3 sets out the rights of applicants to practise in the United Kingdom on a permanent basis. It imposes duties, subject to certain conditions and exceptions, upon competent authorities not to refuse, on grounds of inadequate qualifications, applicants who seek to practise a regulated profession in the United Kingdom if they hold the qualifications required by a relevant European State to practise the profession in that State. It also provides for competent authorities, in certain cases, to require an applicant to complete either an aptitude test or an adaptation period before authorising the applicant to practise the regulated profession in the UK. Chapter 2 of Part 3, which applies only to the professions of farriers and harbour pilots, makes provision for automatic recognition of professional experience by way of a certificate.
>
> Chapter 3 of Part 3 of these Regulations sets out the procedure for the issue and revocation of a Certificate of Experience in respect of relevant experience and qualifications gained in the United Kingdom. Chapter 4 of Part 3 makes provision concerning the evidence to be provided by an applicant or a competent authority in a relevant European State, the procedures to be followed by competent authorities when making decisions and the rights of an applicant to use the professional title or designatory letters applicable to the profession in the United Kingdom.
>
> Part 4 of these Regulations makes provision for rights of appeal against decisions of competent authorities, the right of an applicant to use the lawful academic title acquired by the applicant in his home State, and for the provision of information by competent authorities in the United Kingdom. It also revokes previous Regulations governing the functioning of the First, Second and Third General Systems (except for the profession of company auditor where the provisions of the European Communities (Recognition of Professional Qualifications) (First General System) Regulations 2005 still apply).

At a practical level, what was the Department for Education and Skills (DfES), now the Department for Children, Schools and Families (DCSF), devotes part of its website to 'Europe

open for Professions' (http://www.dfes.gov.uk/europeopen/index.shtml). The website makes clear that 'Any national of a Member State of the European Union (EU), European Economic Area (EEA) or Switzerland has the right to work, to seek work, to set up business or to provide services in any other Member State. There are a number of European Directives in place which aid mobility between Member States of the EU, EEA and Switzerland. These directives apply to regulated professions.' There are then links for those wishing to go from the UK to the EU and vice versa. There are details about the way of contacting the relevant authority (http://www.dfes.gov.uk/europeopen/eutouk/eutouk_search_form.shtml). The NARIC website which provides information on comparability between UK and EU academic qualifications (http://www.naric.org.uk/). The UK National Reference Point for Vocational Qualifications (UK NRP), an independent unit under the management of UK NARIC, serves as a first point of contact for national vocational qualifications and is a central information resource for UK skilled worker, trade and technician level qualifications.

UK NRP also acts as a national agency representing the UK in a European network of reference points for vocational qualifications in Member States (http://www.uknrp.org.uk/pages/about%5Fnrp/.)

There are virtually no British cases on the mutual recognition issue which tends to suggest that the practical application of the law has not proved too contentious. There is also very little academic literature on the subject.

# Chapter III.
# Equality of Treatment on the Basis of Nationality

## 1. WORKING CONDITIONS, SOCIAL AND TAX ADVANTAGES (DIRECT, INDIRECT DISCRIMINATION)

A number of problems as regards discrimination against EU nationals in the UK relate to A8 and A2 nationals. First, the application of the right to reside test has had a substantial impact on their ability to access social benefits (see below), secondly, some unions have expressed concerns about their exploitation in the labour market, mainly via employment agencies, thirdly, the Worker Registration Scheme's application appears to be resulting in a number of troubling cases where employees appear to be having difficult convincing their employers to sign forms to regulate the change of employment. According to information from the Trade Union Congress a common problem for EU workers is being charged a fee by employment agencies simply for finding individuals a job or putting them on their books. Similarly there are problems of agencies withholding pay where the agency fails to receive payment from the end contractor or where the end contractor has failed to sign the employees' time sheets. The TUC has also received complaints about the failure of agencies and employers to provide written particulars of the contract. The TUC has produced a leaflet entitled Living and Working to the UK which is available, including on line in Czech, Estonian, French, Hungarian, Latvian, Lithuanian, Polish, Russian, Slovak and Spanish. Among other things it provides the reader with the names and addresses of organisations which can be contacted for help. Nonetheless, as can be seen from chapter IX, the average wages of A8 workers is rising much faster than inflation, indicating a fairly rapid level of work place integration.

The problem of agency abuse of migrant workers was given a higher profile in 2007 when the TUC published in February a report on the issue. Among the discriminatory practices which it highlights are: more than ¼ of agency staff are in assignments of more than one year; they are paid on average 80p for every pound paid to permanent staff; they have no job security. Additionally, they lose out on sick pay and pensions. Exploitation by agencies was found to be particularly problematic in the hospitality sector and in respect of migrant workers. In August the TUC called for the Government to enforce minimum wage law and to crackdown on employment agencies. Once again it highlighted the fact that migrant workers are particularly vulnerable. The bad practices which the TUC noted include making illegal deductions from pay, failure to pay income tax and national insurance contributions, denying statutory leave and holiday pay, insisting that workers put in illegally long hours, ignoring health and safety law, arranging accommodation for migrant workers that is overcrowded or unfit for human habitation and charging migrant workers fees or bonds for their placements.[6] However, as can be seen from chapter 7, while the Government introduced new penalties for employers hiring workers without the right to take employment there was less emphasis on labour inspections for the purpose of rooting out exploitative practices.

[6] TUC 8 August 2007.

## 2. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS?

Migrant workers moving to the UK face the general problems of finding housing, particularly in the South East. This difficulty is exacerbated when workers new to the labour force have more difficulty accessing banking facilities and credit than domestic workers. In a study produced by the Institute of Public Policy Research in September 2007 entitled Britain's Immigrants: An Economic Profile, a section on EU workers, focusing on A8s indicates that less than ¼ intend to settle in the UK. It is unclear whether this is the result of obstacles to enjoyment of rights or other factors.

## 3. SPECIFIC ISSUES

### *Frontier workers: - existence of residential clauses C-212/05 Hartmann*

There are two main places where the treatment of frontier workers has been particularly problematic in the UK. The first is in Northern Ireland. UK benefits regulations have not permitted persons who live in Ireland but work in Northern Ireland to claim Working Families Tax Credit, a social benefit (cf. the ECJ's decision in C-212/05 *Hartmann*). The North/South Ministerial Council (a joint body of the UK and Irish authorities) provides cross border mobility information. It's website advises individuals who are affected by the regulations (a) that they are entitled to the social benefits irrespective of the apparent residence requirement; (b) that many people resident in Ireland are in receipt of the benefit (i.e. that the UK authorities have accepted the principle that they are obliged to pay the benefit). There are inter-dependencies between the UK benefit and other benefits available in Ireland. A second problem which has resolved in 2007 has been in respect of frontier workers and taxation. The Irish authorities agreed that frontier workers who are seconded to the Republic for six months or less by their employers will not be required to pay income tax (PAYE) in Ireland as long as they are making these payments in the UK.

There is a substantial community of frontier workers who live in Spain and work in Gibraltar. While many of them are Spanish nationals there is also a substantial community of Moroccan workers (whose entitlement to equal treatment in social security arises from the EC Morocco Association Agreement) as well as Gibraltar nationals who live in Spain but work in Gibraltar. There treatment under Gibraltar law as regards social benefits has been a source of contention in respect of frontier workers for some time. Changes to the Gibraltar state pension scheme was a source of friction for many years. La Asociación Socio Cultural de Trabajadores Españoles en Gibraltar (Ascteg), the association of Spanish workers in Gibraltar, has campaigned for better treatment of these workers and former workers in particular claiming that they suffered discrimination in the way in which the pension changes were implemented. In the context of the Cordoba Trilateral Dialogue instituted in 2004, agreement was reached among the Gibraltar, Spanish and British authorities on 18 September 2006 on a settlement of the outstanding pensions issue. Those pensioners who signed up to the agreement received lump sum payment in settlement of their claims, the first installment of which was paid in April 2007 and the second in April 2008. Ascteg has not been fully satisfied regarding the terms of the benefits claims settlement of Spanish workers and former workers in Gibraltar.

From 1 July 2007 a change to the Gibraltar tax system meant that frontier workers living in Spain and working in Gibraltar pay on a Gross Income Based System of taxation re-

sulting in a reduction of tax for many. However, at the end of the tax year this may cause their tax liability in Spain to rise.

***Sportsmen/women***

For the sports considered here, there is no evidence of systematic discrimination against nationals of other Member States in access to the sport.

*Ice Hockey*: Under the International Ice Hockey Federation rules players must be citizens of the country he or she represents in championships. The British Ice Hockey Association does not apply quotas but the requirements to obtain a work permit for a player who is not an EEA national (or otherwise has the right to work in the UK) are onerous.

*Volleyball*: there is no mention of nationality requirements in the Rules of the Volleyball Association.

*Cycling*: In order to participate in cycling events a licence is required from British Cycling. Nationality is requested on the form but the only requirement is an address in the UK.

*Football*: The UK has had a lively debate in 2007 about foreign players. In May 2007 the Fifa president, Blatter, stated that he wanted a limit of five foreign players in European teams. This was widely reported in the UK and received a welcome from the Celtic chief executive. The Football Association chairman also hinted that the idea might be given consideration but a number of coaches from premier league teams are very sceptical about the benefits of such a system. However, there is general agreement that such an introduction of quotas would be in contravention of EU law.

*Basketball*: The England Basketball Equal Opportunities and Equality Policy states that there is no discrimination on the basis of nationality.

***Maritime Sector***

Pay based on nationality in the UK shipping industry may be about the end. The question of discrimination against EU nationals in wages on UK registered ships has been the subject of controversy. The problem arises in law through an exception to the Race Relations Act 1976 which permits discrimination against seamen who are recruited abroad. On 13 March 2007 a consultation by the UK Department for Transport opened where the Government posed three options: maintain the status quo of discrimination; amend the legislation only to prohibit discrimination as regards EEA nationals; repeal of the offending provision so no discrimination at all would be permitted. On 21 August the Department also issued a consultation questionnaire on amending the legislation to give effect to Article 39 EC. This has been followed by a Summary of the Consultation Responses published on 17 December 2007. Nothing further has happened. In the consultation 28 responses were received from 22 companies, organisations unions and others. In the summary of the consultation responses, the Department confirms the Government's position that "all Government Departments should avoid overimplementing European legislation, unless there are exceptional circumstances supported by a cost benefit analysis".

The summary includes information about the minimum and maximum pay according to the responses. The differentials are considerable, for instance a Master UK at the maximum receives £ 8,500 while an EEA/accession Master £ 6,490. A UK Chief Officer gets between £ 2,250 - £ 6,403 while an EEA/accession one gets between £ 1,666 and £ 4,197.

***Researchers/artists***

According to a recent study on the treatment of artists and cultural operators for tax and social security purposes (J Staines *Tax and Social Security a basic guide for artists and cultural operators in Europe* 2003-2007) in the UK problems arise for artists whose income in the UK is below the threshold for national insurance payments. This problem applies also to other sectors but seems to be more common in the cultural field. The problem is that as the artist is not required to pay contributions in the UK if he or she also works in another Member State, acknowledgement of affiliation to the UK system is not accepted for the period of work in the UK by other Member States.

Discrimination against researchers has been more problematic. In 2004 D. Hazelrigg presented a petition to the European Parliament regarding discrimination against non British EU nationals in the allocation of research studentships by the UK research councils. This was the object of a reply by the Commission in 2006. The *Bidar* judgment proved critical to the problem as the change in the UK rules so that EU nationals who are not permanent residents under national law can still enjoy their right to non discrimination in this field should result in equality for researchers.

## 4. RELATIONSHIP BETWEEN REGULATION 1408/71 AND ARTICLE 39 AND REGULATION 1612/68

***Introduction***

There are an increasing number of cases that raise important issues concerning the compatibility of the Right to Reside Test with EU law coming before UK Tribunals and Courts the lead cases being *Abdirahman* and *Ullusow* as well as that of Ms Zawelska (C6/05-06(IS). The cases of *Abdirahman* and *Ullusow* and *Zawelska* have been heard by the English and the Northern Ireland Court of Appeal respectively and have given rise to discussion about the interpretation of EU legislation in UK courts (Cousins, 2007; 2008).

In this section we will also look at the implications of the Judgment in Case C-299/05 *Commission of the European Communities v European Parliament and Council of the European Union* of 18th October 2007 for the classification and consequent portability of the UK benefits: Disability Living Allowance, Attendance Allowance, and Carer's Allowance.

***The Right to Reside Test***

The UK has attached increasingly stringent residence tests to the receipt of non contributory means-tested benefits (see 2007 report). The Habitual Residence Test was introduced in 1994 (Income-related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994 (SI 1994 No 1807) and now applies to the receipt of the non-contributory income-related benefits, Income Support, Pension Credit, Income Based Jobseeker's Allowance, Housing Benefit and Council Tax Benefit. EU nationals who have the right of residence under EU legislation because they have worked in the UK are exempt from the requirement to be habitually resident. At present other EU and UK nationals are subject to the test.

The Right to Reside Test was introduced by the Social Security (Habitual Residence) Amendment Regulations 2004 and became effective on May 1st 2004 to coincide with the introduction of the Workers Registration Scheme which granted conditional access to UK

labour markets to workers from the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. Nationals of these states are able to take up employment in the UK, providing they are authorised, under the scheme. If they do not have a job but come to the UK to seek employment they must be self-sufficient in order to have a right to reside.

Thus, since May 1st 2004, a claimant as well as being present and habitually resident as required by the 1994 test, also has to have a right to reside in the UK under UK or EU law. The Right to Reside Test applies to the same benefits as the Habitual Residence Test: Income Support, Pension Credit, Income Based Jobseeker's Allowance, Housing Benefit and Council Tax Benefit

The right of EEA nationals to reside in the Common Travel Area is set out in the Immigration (European Economic Area) Regulations 2006, which implement Directive 2004/38/EC and generally depends on economic status. EEA nationals who are lawfully employed or are self-employed have a right to reside as an employed or self-employed person. Those who are economically inactive – such as students, pensioners, or lone parents – have a right to reside provided they have sufficient resources to avoid becoming a 'burden' on the social assistance system.

### *Abdirahman v Secretary of State for Work and Pensions* and *Ullusow v Secretary of State for Work and Pensions*

Both Abdirahman and Ullusow had entered and were living in the UK as EEA nationals. Each claimed income-related social security benefits, but the claim was rejected on the grounds that the claimant was not a worker and did not have the right to reside in the UK. Each claimant appealed against the decision. As described in last year's report the Commissioners accepted that the Right to Reside Test involved indirect discrimination because it was more easily satisfied by UK nationals than by non-nationals but that the test was justified by the government's policy aim of preventing benefit tourism.

Before the Court of Appeal the Secretary of State presented the argument that the cases did not fall within the scope of the EC Treaty because EU law did not extend to cases where no right of residence exists under either the Treaty or the relevant domestic law and that therefore the question of indirect discrimination contrary to Article 12 does not arise. The court accepted this argument and added that if, as had been conceded before the Commissioners, there was indirect discrimination against non-UK nationals, they had correctly held that the requirement was justified as a legitimate response to the manifest problem of benefit tourism.

Cousins argues that the Court of Appeal is wrong on two counts (Cousins, 2008). Firstly that the Court was incorrect in its view that there is no need to justify the Right to Reside Test and secondly, that the Commissioners had applied an incorrect standard as to the level of justification required and failed to consider whether the test was proportionate which the Court of Appeal had in turn failed to give proper attention to because it had already (wrongly) concluded that the case did not fall within the scope of the Treaty (Cousins, 2008).

### *Zalewska v Department for Social Development*

Ms Zalewska, a Polish national, initially worked in Northern Ireland under the Worker Registration Scheme but failed to notify the Home Office when she changed jobs (C6/05-06(IS).

She subsequently claimed Income Support but was refused on the grounds that she did not have the right to reside and was therefore not habitually resident and so had no entitlement.

As discussed in last year's report, the Commissioners had found that Community law permits Member States to restrict rights of residence to workers within Regulation 1612/68 and to those who are self-sufficient; may remove those rights if the conditions on which they are granted are no longer met; and are entitled to take measures to prevent a person from becoming an unreasonable burden on the host country, at least during an initial period of residence. The Commissioners concluded that the limitation imposed by the Right to Reside Test are within the permitted derogations and are proportionate to attain the legitimate aim of regulating access to the labour market to Accession State nationals.

Regulation 21(3E) of the Income Support (General) Regulations provides that "for the purposes of the definition of a person from abroad no person shall be treated as habitually resident in the United Kingdom … if he does not have a right to reside there". As the claimant did not have the right to reside the Commissioners concluded that she therefore cannot satisfy the Habitual Residence Test and has no entitlement to Income Support.

The appellant argued before the Court of Appeal that while the Act of Accession permits derogation from Articles 1 to 6 of Regulation 1612/68 it does not permit derogation from Article 7 and that although she had lost her job she did not cease to be a worker for the purposes of Article 7(2). She also argued that that the Right to Reside Test indirectly discriminates against Accession workers and could only be supported if it was based on objective justification. The case of Collins made it clear that what justified the habitual residence test was the intention to prevent 'benefit tourism'. On the facts of the appellant's case the 'benefit tourism' justification could not apply and the test disproportionately affected Accession workers who had completed less than 12 months continuous registered employment (Cousins, 2008).

However, the Court of Appeal agreed with the Department that Article 7 only applies to discrimination against those formally in the labour market; that Collins established that the derogation in the Act of Accession was intended to protect the job markets of existing Member States if they wished to do so and conferred a power to limit the manner in which Accession workers were entitled to enter the labour market; and that the Workers Registration Scheme is reasonable and proportionate and consistent with a legitimate policy aim.

Cousins, while noting that the Accession Treaties do not provide for derogation in relation to Article 7 he suggests that the UK is not in fact attempting to derogate from Article 7(2). "Formerly employed Accession workers do, in theory, have access to social security on the same basis as national workers, i.e. subject to a right of residence." (Cousins, 2008).

In his discussion of these cases Cousins raises two important questions, one substantive about whether the Right to Reside Test can be justified, the other about the process in the UK for arriving at decisions in cases where EU law is involved. Cousins concludes that "if and when the issue of objective justification falls to be considered correctly it would seem that it may be difficult for the UK to justify it – particularly in the case of a person who has worked in the UK for some time" as was the case with Ms Zalewska where the question of 'benefit tourism' does not arise (Cousins, 2008).

***Case - CIS/408/2006***

In Case CIS 408/2006 the court found that the principle of proportionality required under the circumstances that a person has a right of residence under Article 18 even when they are not self sufficient.

The claimant a national of Cameroon came to the United Kingdom as an asylum seeker and subsequently married a French national who was working in the UK and therefore had a right to reside. One result of his marriage was that he acquired a right of residence as a member of her family. The claimant was diagnosed with cancer and had to give up work. His wife gave up work to care for him. His claim for Income Support was rejected on the ground that he retained his right of residence only for as long as his wife continued to retain hers by virtue of being a 'worker' and that she had lost that status when she gave up work to look after him. The Appeal Tribunal accepted his appeal on the ground that his wife had not lost her status of 'worker' because she was involuntarily unemployed while looking after him. The Secretary of State appealed against the tribunal's decision to the Commissioners.

The Commissioner found that the claimant's wife's right of free movement for the purpose of working, under Article 39 of the Treaty, would be infringed if she and the claimant were not recognised, under the circumstances, as having the right to reside in the UK. He pointed to the lacuna both in the directives in force at the time of the claim and currently in Directive 2004/38/EC. Nevertheless, he was satisfied that under the circumstances the claimant and his wife retained rights of residence by virtue of Article 18(1) of the Treaty and concluded:

> "If ever a case called for the "certain degree of financial solidarity between nationals of a host member state and nationals of other member states" recognised in *Grzelczyk*, this is it. To put financial pressure on a couple to leave the United Kingdom because the wife needs temporarily to cease work to care for her husband is not consistent with a "due regard for family life and dignity". While the United Kingdom is generally entitled to limit access to its social assistance schemes to those who have rights of residence under domestic law that is consistent with Council directives, Article 18 (1) of the Treaty and the principle of proportionality require that that entitlement give way in this case to the claimant's wife's rights as a citizen of the Union who has been exercising the freedom of movement guaranteed by Article 39 of the Treaty."

This is the only case to date since the introduction of the Right to Reside Test in which a court has found that a claimant has a right to reside under Article 18 when they are not self sufficient.

***Case C-299/05 Commission of the European Communities v European Parliament and Council of the European Union***

The relationship between Regulation 1612/68 and 1408/71 is set out in Article 42(2) of Regulation 1612, which states that "This Regulation shall not affect measures taken in accordance with Article 51 of the Treaty". As Regulation 1408/71 has its legal basis in Article 51 (now 42) of the EC Treaty the solutions it provides in cases where the Regulation is applicable take precedence over the solutions provided by Regulation 1612/68 (Versheuren, 2004).

Article 7(2) of Regulation 1612/68 cannot override specific restrictions in Regulation 1408/71, such as the restriction on exporting special non-contributory benefits, in Article 10a Case C–20/96 *Snares* (1997) ECR I–6057: Article 10a is compatible with Article 39 EC;

Case C–90/97 *Swaddling* (1999) ECR I–1075: the habitual residence test is compatible with Article 10a (see Denman (2006) for a discussion of the hierarchy of sources of equal treatment within EU law).

Article 10a of Regulation 1408/71 states that persons covered by the Regulation may be entitled to the benefits described in Article 4(2)(a) as special-non contributory benefits only in the territory of the member country in which they reside. Case C-299/05 Commission of the European Communities v European Parliament and Council of the European Union concerns whether three UK benefits (and some similar benefits of Finland and Sweden) are correctly included as special non-contributory benefits in Annex 11a of Regulation 1408/71.

The UK lists the following benefits under Annex IIa: State Pension Credit, Income-based Jobseeker's Allowance, Income Support, Disability Living Allowance, Attendance Allowance and Carer's Allowance.

However, the Court found in the case of *Jauch* Case 215/99, that for a benefit to be a non exportable special non-contributory benefit it is not sufficient simply to be listed in Annex IIa but must meet the criteria of 'special' and 'non-contributory' (Fitzpatrick, 2006). The point has been reiterated in subsequent cases (For example, *Leclere and Deaconescu* Case C-43/99, *Hosse* Case C-286/03; *Hendrix* Case C-287/05).

Regulation 647/2005 amended Annex IIa to reflect these judgments. However, the UK Disability Living Allowance, Attendance Allowance and Carer's Allowance were still listed in the annex as special non-contributory (and therefore non-exportable) benefits.

In July 2005 the Commission took annulment proceedings against the Council of Ministers and European Parliament on the grounds that in including Attendance Allowance, Carer's Allowance and Disability Living Allowance (and the similar Finnish and Swedish benefits) in the list of permitted benefits set out in Annex IIa they failed to take account of the criteria laid down by the Court of 'special' benefits within the meaning of Article 4(2a) which, in the Commission's view, are not satisfied by the contested benefits.

The Judgment delivered on 18th October 2007 found that the UK benefits, Disability Living Allowance – with the exception of the mobility component , Attendance Allowance and Carers Allowance are sickness benefits within the meaning of Article 4 (1) (a) and are therefore exportable.

The position of Disability Living Allowance is complicated by the mobility component which the Court considers meets the criteria for inclusion in Annex IIa. However, Disability Living Allowance is listed as a whole, without mentioning the care and mobility components separately, so the entry can only be removed as a whole.

The Advocate General acknowledged that would mean removing, from Annex IIa, a benefit, parts of which satisfy the conditions for special benefits. However, he concluded that, in the interest of legal certainty, the entry as a whole cannot be maintained because it would be unclear to those Disability Living Allowance claimants who do not qualify for the mobility component, that the benefit is not in fact a special non-contributory benefit that can only be claimed in the place of residence.

The Court confirmed that the UK could reintroduce the mobility component of the Disability Living Allowance into the Annex as a separate benefit (Roberts, 2007).

Representatives of Britons living abroad welcomed the judgment and advised claimants who had their entitlement to one of these benefits ended after moving to another EU country to claim backdated benefits.

Immediately following the judgment Anne McGuire the Parliamentary Under-Secretary of State for Work and Pensions made a statement on 23 October to the House of Commons in which she said:

> "This means that these disability benefits may, in certain circumstances, be paid to some people who move from the UK to live in another member state of the European Economic Area.
> The status of the mobility component of Disability Living Allowance is unaffected by this judgment.
> I will look very carefully at the implications of paying disability benefits to customers living abroad, including any additional steps that are necessary to tackle fraud and error. I am considering the terms of the judgment and will make a further statement to the House before the end of the year, setting out the details of the judgment and our implementation plans." (Hansard, 23 October 2007)

On 13th December 2007, the Minister reported to the House of Commons that:

> "Department officials met recently with officials from the European Commission to clarify the extent of the Government's responsibilities following this judgment and discussions are continuing on this complex area of European legislation.
> The Disability and Carers Service is currently preparing new guidance for staff and making arrangements to handle cases from abroad. In particular proper controls must be put in place to gather medical evidence from abroad to ensure that UK decision-makers are properly able to assess claims. We expect to provide full details on eligibility criteria by 5 April 2008. We anticipate that first payments could be made to eligible claimants shortly afterwards." (Hansard, 13 December 2007)

On 3rd April the Minister reported to the House that she has published details of the new eligibility criteria for payment of Disability Living Allowance (care component), Attendance Allowance and Carer's Allowance within the European Economic Area and Switzerland (EEA). However, she reported to the House that the UK is continuing discussions with the European Commission on the eligibility of people already living in another EEA state who wish to claim from abroad (Hansard 3 April, 2008).

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# Chapter IV
# Employment in the Public Sector

***Texts in force***

- Aliens' Employment Act 1955
- SI 2007/617 The European Communities (Employment in the Civil Service) Order 2007
- Civil Service Nationality Rules November 2007
- Race Relations Act 1976

## 1. ACCESS TO PUBLIC SECTOR

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

*a) Public Sector Generally*

EC law requires equal access to employment for EEA nationals, subject to the Article 39(4) EC exemption for the 'public service'.[7] The concept of 'public service' has been given a restrictive interpretation by the Court of Justice, to exclude only posts which involve both "direct or indirect participation in the exercise of powers conferred by public law" and "duties designed to safeguard the general interests of the state or of other public authorities".[8] A European Commission Communication of 5 January 1988 sought to apply the ECJ case-law in this area.[9] In the Commission's assessment, the exemption applies to:

> specific functions of the State and similar bodies such as the armed forces, the police and other forces for the maintenance of order, the judiciary, the tax authorities and the diplomatic corps. This derogation is also seen as covering posts in State Ministries, regional government authorities, local authorities and other similar bodies, central banks and other public bodies, where the duties of the post involve the exercise of State authority…

This analysis has influenced the rules on eligibility for employment in the civil service in the United Kingdom.

The rules on eligibility for the civil service have a long and distinguished history. According to the Memorandum accompanying SI 2007/617 The European Communities (Employment in the Civil Service) Order 2007:

> 4.1 The Act of Settlement of 1700 provides, in section 3, that no person born out of the Kingdoms of England, Scotland or Ireland or the Dominions thereunto belonging… shall be capable of enjoying any office or place of trust, either civil or military, under the Crown. This prohibition does not apply to Commonwealth citizens or citizens of the Irish Republic (see section 52(6) of, and Schedule 7 to, the British Nationality Act 1981) or to British protected persons employed in a civil capacity (see section 1(1) of the Aliens' Employment Act 1955).
> 4.2 Section 6 of the Aliens Restriction (Amendment) Act 1919 provides that no alien shall be appointed to any office or place in the Civil Service of the State. An alien is now defined in sec-

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7 This section builds on Bernard Ryan's submissions made last year.

8 Case 149/79 *Commission v Belgium (No 2)* [1982] ECR 1845, para 10.

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

tion 51(4) of the British Nationality Act 1981 as a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland.

4.3 Under the Aliens' Employment Act 1955 the prohibitions were relaxed so that aliens could be employed if they were either:

a) appointed in a country outside the UK, the Channel Islands and the Isle of Man in a capacity appearing to the Minister to be appropriate for aliens; or

b) employed in accordance with a certificate issued by a Minister with the consent of the Minister for the Civil Service. In this connection, either there must be no suitably qualified UK nationals available to do the work or the alien must possess exceptional qualifications or experience to do the job. Certificates last for 5 years and must then be renewed.

4.4 The European Communities (Employment in the Civil Service) Order 1991 (SI 1991/1221) amended the Aliens' Employment Act 1955 to allow nationals of member states of the European Communities (and their spouses and certain children) to take up civil employment under the Crown apart from "public service" posts within the meaning of the EC Treaty (see Article 39(4) of the EC Treaty, which excludes from the freedom of movement of workers posts in the "public service").

4.5 The rights of nationals of member states of the European Communities were extended to nationals of member states of the European Free Trade Association by section 2(1) of the European Economic Area Act 1993.

4.6 In 1996 an amendment to the Civil Service Management Code was made to restrict Commonwealth and Irish nationals (who are not subject to the prohibitions in the Act of Settlement 1700 or the Aliens Restriction (Amendment) Act 1919) from being employed in posts which were reserved for UK nationals.[10] This put Commonwealth citizens and Irish nationals in the same position as nationals of other EEA member states.

4.7 The effect of the existing rules, therefore, is that foreign nationals may be employed abroad in any civil post under the Crown (which includes HM Diplomatic Service) if the Minister considers it appropriate. As regards civil employment, or the holding of office, under the Crown within the UK, Commonwealth citizens, British protected persons and nationals of EEA member states may be employed in posts other than reserved ones. Nationals of other countries may be employed in UK non-reserved posts only if an aliens' certificate is in force.

The position in respect of 'reserved posts' was radically overhauled in 2007 by SI 2007/617 The European Communities (Employment in the Civil Service) Order 2007. These amend the Aliens Employment Act 1955 and list those eligible to work for the civil service.[11] The

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10 Statement by Roger Freeman (civil service minister), *House of Commons Debates*, 1 March 1996, col 751. Until 1 June 1996 these posts were also open to Irish citizens on the grounds that they were not statutorily barred from employment in any post in the Civil Service. However, the rules were changed on that date by amending the Civil Service management code to exclude all future new entrant Irish nationals from employment in these posts. This was done to ensure that Irish nationals were treated in the same way as nationals of other EU member states as regards access to Civil Service posts.

11 **2.-**(1) Amend the Aliens' Employment Act 1955 as follows.

(2) In subsection (1) of section 1 (provision for civil employment of aliens), for paragraph (c) substitute "(c) if he is a relevant European and he is not employed in a reserved post;".

(3) After subsection (4) of that section insert—

"(5) In subsection (1)(c) "a relevant European" means—

(a) a national of a EEA State or a person who is entitled to take up any activity as an employed person in the United Kingdom by virtue of Article 23 of Council Directive 2004/38/EEC (right of family members of nationals of EEA States to take up employment where that national is employed);

(b) a Swiss national or a person who is entitled to take up any activity as an employed person in the United Kingdom by virtue of Article 7(e) and Article 3(5) of Annex 1 of the Agreement between the European Community and its member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons signed at Luxembourg on 21st June 1999 (right of spouses and certain family members of Swiss nationals to take up economic activity, whatever their nationality); or

(c) a person who is entitled to take up any activity as an employed person in the United Kingdom by virtue of Article 6(1) or 7 (rights of certain Turkish nationals and their family members to take up any economic activity, whatever their nationality) of Decision 1/80 of 19 September

exceptions are for those in 'reserved posts'. These are defined in the Order in the following terms:[12]

> (6) In subsection (1)(c) "a reserved post" means:
> (a) a post in the security and intelligence services; or
> (b) a post falling within subsection (7) or (8) which the responsible Minister considers needs to be held otherwise than by a relevant European.
> (7) The posts falling within this subsection are:
> (a) a post in Her Majesty's Diplomatic Service and posts in the Foreign and Commonwealth Office; and
> (b) posts in the Defence Intelligence Staff.
> (8)The posts falling within this subsection are posts whose functions are concerned with:
> (a) access to intelligence information received directly or indirectly from the security and intelligence services;
> (b) access to other information which, if disclosed without authority or otherwise misused, might damage the interests of national security;
> (c) access to other information which, if disclosed without authority or otherwise misused, might be prejudicial to the interests of the United Kingdom or the safety of its citizens; or
> (d) border control or decisions about immigration.
> (9)In this section "the security and intelligence services" means:
> (a) the Security Service;
> (b) the Secret Intelligence Service; and
> (c) the Government Communications Headquarters."

More detailed guidance about 'reserved posts' is contained in the *Civil Service Nationality Rules*, published by the Cabinet Office, most recently in November 2007.[13] Section 3 of this guidance lists 'Reserved Posts' in the civil service in which '[o]nly UK nationals may be employed'. Reserved posts are 'generally those which, due to the sensitive nature of the work, require special allegiance to the Crown such that they can only be held by a UK national'.[14] It continues '*3.2 Under no circumstances may any other nationals be employed in reserved posts.*'[15] The guidance then spells out the posts covered:

1. All posts within the security and intelligence services (that is, the Security Service, the Secret Intelligence Service, and the Government Communications Headquarters) are automatically reserved to UK nationals.
2. Certain other categories of posts are capable of being reserved if the Minister responsible for the department or agency considers that to be necessary (that is, that special allegiance to the Crown is required in respect of that post such that the post must be held by a UK national).These categories of posts are:
   - posts within the Defence Intelligence Staff within the Ministry of Defence; and
   - posts whose functions are concerned with:
   (i) access to intelligence information received directly or indirectly from the security and intelligence services;
   (ii) access to other information which, if disclosed without authority or otherwise misused, might damage the interests of national security;

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1980 of the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963.

12 The Order makes equivalent amendments for Northern Ireland.

13 http://www.civilservice.gov.uk/documents/doc/nationality/November_2007_Guidance.doc.

14 Para. 3.1.

15 Emphasis in original.

(iii) access to other information which, if disclosed without authority or otherwise misused, might be prejudicial to the interests of the United Kingdom or the safety of its citizens;

(iv) border control or decisions about immigration.

Where a post falls within one of the categories in this paragraph the Minister responsible for the department or agency must consider whether it is necessary to reserve that post for UK nationals only. Where the responsible Minister does not consider that to be necessary, the post will not be reserved for UK nationals.

3. In relation to posts within the Diplomatic Service and the Foreign and Commonwealth Office, it has been determined that special allegiance to the Crown is required in respect of these posts such that it is necessary to reserve these posts to UK nationals. Therefore only UK nationals are eligible for employment in posts in the Diplomatic Service and the Foreign and Commonwealth Office[16] unless the responsible Minister decides otherwise in relation to a specified post or posts.

The Rules then spell out additional restrictions that may be imposed on UK nationals. For example, for posts in the Diplomatic Service and Home Civil Service posts in the Foreign and Commonwealth Office, individuals are only eligible if:

a) they are a British citizen; and

b) they have resided in the United Kingdom for at least two of the previous ten years immediately prior to their application, at least one year of which must have been a consecutive twelve-month period, unless they have served overseas with HM Forces or in some other official capacity as a representative of Her Majesty's Government, or have lived overseas as a result of their parents' or partner's government employment. A lack of sufficient background information may preclude them from being granted security clearance.

The government anticipates that about 5 per cent of the posts in the Civil Service (27,000) will be reserved. [17]

The 2007 Rules are much less prescriptive than the 2004 Rules discussed by Ryan in last year's Report. As he demonstrates, the 2004 Rules identified with much greater precision the posts that were covered under the heading 'reserved posts'.[18] The striking feature of

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16 Except for those local staff in FCO posts abroad. These posts are open to persons regardless of their nationality. See paragraphs 2.5 and 2.6 above.

17 Hansard, 21 Feb 2007: Column 1137. See also Mr McFadden's answer to the PQ posed by Mr Dismore: http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070328/text/70328w0024.htm

18 The 2004 *Rules* list the following as "reserved" posts:
Auditors
Crown Prosecution Service
Defence (This is qualified by the requirement that "special allegiance to the State is of direct relevance to, and essential for, the post".)
Departmental security staff
Enforcement powers of arrest, entry, search or seizure
Fast-stream trainees (Here, the guidance says: "most posts".)
Foreign and Commonwealth Office (The guidance adds, "all posts in HM Diplomatic Service and most Home Civil Service posts".)
Department for International Development (The guidance adds: "posts primarily at the former G5 level and above".)
International negotiators (The guidance adds: "primarily at the former G7 and above".)

the 2007 Rules is that they restrict still further the posts confined to UK nationals. In essence now, except in relation to posts in the security and intelligence services, which will continue to be reserved, Ministers must consider the justification for reserving a post that falls within the other categories set out in the order.

In other words more posts are being opened up to non-nationals.[19] This was the intention of the new Regulations. As Lord Davies said in the House of Lords:[20]

> The Cabinet Office guidance on the nationality rules lists a number of categories of posts to assist departments and agencies in assessing whether or not a post should be reserved. The list was first assembled in 1992 and has remained unchanged since 1996. For example, one category requires, without qualification, that all posts which are concerned with revenue collection and assessment should be reserved for UK nationals. One effect of this is that Irish and other EEA nationals who enter HM Revenue and Customs at an administrative level are prevented from taking up a promotion within the department as the more senior post is reserved for UK nationals only. The non-specific nature of the current guidance has required a similar approach to be applied to the Customs side of the department, with the result that of the 97,000 posts – or 18 per cent of the total number of posts in the Home Civil Service – which are reserved for UK nationals only, 79,000 are to be found in HM Revenue and Customs. This is much more than is operationally necessary.

In last year's report, Ryan was critical of the 2004 Rules for two reasons. The first was that uncertainty remains as to the classification of particular posts due to the qualifications "most", "primarily" and "special allegiance" used within the *Civil Service Nationality Rules*. At the same time, there is no evidence of an internal procedure for the classification of posts in particular cases. The new Rules have dropped the language of "most" and "primarily" but have still not introduced any procedures for classifying posts in respect of, for example, category 2 posts (posts capable of being reserved if the Minister responsible for the department or agency considers that to be necessary).

A second weakness, he argued, is the exemption of aspects of civil service recruitment from the Race Relations Act 1976. While section 75 of the 1976 Act extends the Act's coverage to Crown employment, section 75(5) provides that "nothing in this Act shall … invalidate any rules … restricting employment in the service of the Crown … to persons of particular birth, nationality, descent or residence." The effect of the sub-section is that a claim

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Judicial appointments administration
Lord Chancellor's Department Court Staff
Policy advice and legislation proposals (The guidance adds: "primarily at the former G7 level and above")
Ministers' Private Offices
Revenue departments' collection and revenue assessment
Security and Intelligence Agencies.
The 2004 Rules also contained the following information on 'non-reserved' posts:
"This category will include, for example, the following:
Executive Agency and other service delivery/operational posts generally (unless requiring special allegiance to the State) e.g. Accommodation, Auditors (mostly internal), Court representational work, Finance and accounting, Office services, Personnel, Delivery of Social Security benefits
IT (most posts)
Investigation (most posts)
Market tested equivalent work
Scientific/technical questions (management of or advice on)."

19 For further details see http://www.civilservice.gov.uk/about/eligibility/nationality.asp.

20 Hansard, 21 Feb 2007: Column 1137.

may not be taken to an employment tribunal for compensation for nationality discrimination in civil service recruitment, even if such discrimination is prohibited under EU law. The only alternative in such a circumstance would appear to be administrative law proceedings before the High Court. This restricted alternative is arguably incompatible with EU law requirements as to the equivalence and effectiveness of national procedures and remedies. The revised rules do not address this concern.

According to a statement made by Lord Davies of Oldham,[21]

> Civil Service posts are of a varied nature. Most of them, such as those responsible for general administration and service delivery, do not require any special bond of allegiance to the state and do not need to be carried out by a UK national. These are known for the purposes of recruitment and appointment as "non-core" or "non-reserved" posts. On the basis of a survey conducted in 2005, about 82 per cent of Home Civil Service posts are designated as non-reserved and are open, in addition to UK nationals, to citizens of the Commonwealth countries, EEA nationals of other member states and certain members of their families who are non-EEA nationals, and nationals of other countries who are granted an aliens' certificate in accordance with the provisions of the Aliens' Employment Act 1955. The circumstances under which a certificate under this Act may be granted are strictly defined so that in recent years the number of aliens employed at any one time has been very small. For example, during 2005-06, only 67 aliens' certificates were in force throughout the Home Civil Service. The nationality rules have been a source of much frustration throughout the Civil Service for many years as they are complex and administratively very difficult to apply.

He concludes:

> The draft order is not being made in response to any new European legislation or directive. Instead, its purpose is to increase the efficient running of the Civil Service by making the criteria for reserving posts more specific and more relevant to the business of departments and agencies in response to the evolving Civil Service agenda.

### *Captain of Ships*

According to the Royal Navy's website, British, Irish and Commonwealth citizens may join the Royal Navy or Royal Marines. However, as the table below demonstrates, certain career paths are available only to British citizens:[22]

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21 Hansard, 21 Feb 2007: Column 1137.

22 http://www.royal-navy.mod.uk/server/show/conWebDoc.979.

| **Officer Specialisation or Branch of Choice** | **Full British** | **British/ Dual** | **Commonwealth/ Irish** |
|---|---|---|---|
| Warfare Officer - General Service | Yes | Yes | |
| Warfare Officer - Submarine Service | Yes | | |
| Warfare Officer – Pilot | Yes | Yes | |
| Warfare Officer – Observer | Yes | Yes | |
| Warfare Officer - Air Traffic Control | Yes | Yes | |
| Supply Officer | Yes | Yes | |
| Engineering Officer – Marine | Yes | Yes | Yes |
| Engineering Officer – Weapon | Yes | Yes | |
| Engineering Officer – Air | Yes | Yes | |
| Information Systems Officer | Yes | Yes | |
| Training Management Officer | Yes | Yes | Yes |
| Doctor/Dentist/Nurse- Officer | Yes | Yes | Yes |
| All Submarine Officers | Yes | | |
| Royal Marines Officer | Yes | Yes | |

**Rating/Other Rank**

| **Specialisation or Branch of Choice** | **Full British** | **British/ Dual** | **Commonwealth/ Irish** |
|---|---|---|---|
| Operator Mechanic * - General | Yes | Yes | |
| Operator Mechanic * - Submarine | Yes | Yes | |
| MEM - General | Yes | Yes | Yes |
| MEM - Submarine | Yes | | |
| AET | Yes | Yes | |
| Chef - General | Yes | Yes | Yes |
| Chef - Submarine | Yes | Yes | |
| Steward - General | Yes | Yes | Yes |
| Steward - Submarine | Yes | Yes | |
| Stores Accountant - General | Yes | Yes | Yes |
| Stores Accountant - Submarine | Yes | Yes | |
| Writer - General | Yes | Yes | |
| Writer - Submarine | Yes | Yes | |
| Diver | Yes | Yes | |
| Naval Airman (Aircraft Handler) | Yes | Yes | Yes |
| Naval Airman (Survival Equipment) | Yes | Yes | |
| AE Artificer | Yes | Yes | |
| WE Artificer - General | Yes | Yes | |
| WE Artificer - Submarine | Yes | Yes | |
| ME Artificer - General | Yes | Yes | Yes |
| ME Artificer - Submarine | Yes | Yes | |
| Communications Technician * | Yes | Yes | |
| Medical Assistant - General | Yes | Yes | Yes |
| Medical Assistant - Submarine | Yes | | |
| Dental Surgery Assistant | Yes | Yes | Yes |
| Nurse | Yes | Yes | Yes |
| Royal Marines & Royal Marines Band Service | Yes | Yes | Yes |

The following RM sub-specialisations require specific Nationality Requirements.

| | | |
|---|---|---|
| RM Communications Technician | Yes | |
| RM Yoeman of Signals | Yes | Yes |
| RM Combat Intelligence | Yes | Yes |
| RM Information Systems | Yes | Yes |
| Clerks * | Yes | Yes |
| Signals * | Yes | Yes |

There is a possibility for waiver of the nationality requirements in the following circumstances:

- The Secretary of State for Defence can grant a waiver for candidates who are British citizens at the time of application regardless of place of birth or former nationality;
- In exceptional circumstances a waiver of these requirements may be granted by the Secretary of State for Defence to persons who are Commonwealth citizens or citizens of the Irish Republic at the time of their application regardless of place of birth or former nationality.

No nationality waivers are considered for the submarine service: only candidates holding British nationality will be considered.

In addition, there is a requirement that the person has resided in the UK for three years immediately prior to making an application although this can be reduced where the applicant is British or has resided in a country where security checks can be carried out.

It could be argued that the Royal Navy would have difficulty under the public service exception under EC law in justifying the apparently discriminatory treatment between Commonwealth and Irish nationals who can be captains in most circumstances but other EU nationals who cannot, especially in light of the more radical overhaul of the nationality requirements for the civil service more generally.

### *1.2. Language requirement*

There is no information on the language requirement for access to the civil service. However, for immigration purposes for third country nationals a language test is being implemented for the acquisition of permanent residence as well as for naturalisation.

### *1.3. Recruitment procedures*

The procedures for applying to the civil service are clearly set out on the web: see eg http://www.faststream.gov.uk/index.asp?txtNavID=95.

### *1.4. Recognition of diplomas*

As we have seen in chapter II, EU law places various requirements upon Member States as regards the recognition of professional qualifications and experience. Where a qualification is a precondition for the practice of a profession in a member states, equivalent qualifications obtained in other Member States must be accepted. Where there are differences between qualifications as to duration and content, there is an obligation to make an individual assess-

ment of an applicant's relevant professional experience which the individual has obtained.[23] In any event, recruitment processes must permit an applicant's professional qualifications and experience obtained in other Member States to be taken into account.[24]

As Ryan pointed out last year, there is room for disagreement as to the extent to which the above principles apply to public sector recruitment. Firstly, it is unclear whether these requirements govern not only Member States rules on access to professions, but also the recruitment policies of parts of the public service. If recognition is to be required in recruitment, this is perhaps because of the principle of non-discrimination on grounds of nationality, rather than the specific principle of recognition of qualifications. Secondly, to the extent that recruitment practices are governed by recognition obligations, it is unclear whether that is the case for the exempt section of the public service. While the Court of Justice in *Burbaud* appeared to treat it as significant that the career in question there was non-exempt,[25] the point cannot be taken to be resolved.

In the case of the UK, the system of public service recruitment is open to criticism for the lack of published requirements as regards the recognition of qualifications and experience. That said, if it is thought that a refusal of recognition amounts to unjustified indirect nationality discrimination, there is the possibility of legal action under the Race Relations Act, as its section 75(5) of the 1976 Act does not protect such a practice.

### *1.5. Recognition of professional experience for access to the public sector*

This is not spelled out. There is no evidence of the UK having rules, found in some Member States, giving candidates additional points for having done military service or equivalent in the UK.

## 2. EQUALITY OF TREATMENT

### *2.1 Recognition of professional experience for the purpose of determining the professional advantages (e.g. salary; grade)*

EC law requires equal treatment on grounds of nationality in conditions of employment. This requirement is set out in Article 7(1) of Regulation 1612/ 68, and has been held to follow from the provision for free movement of workers in Article 39(2) EC.[26] The requirement of equal treatment applies to both the exempt and the non-exempt public service.[27]

In the United Kingdom, the remedy for a breach of this principle is a claim of nationality discrimination under the Race Relations Act 1976. Such a claim would not be ruled out by section 75(5).

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23 This requirement is derived from Articles 39 and 43 EC: see Case C-340/89 *Vlassopoulou* [1991] ECR I-2357.

24 Case C-285/01 *Burbaud* [2003] ECR I-8219 (in relation to Directive 89/48).

25 *Ibid*, para 40.

26 Case C-281/98 *Angonese* [2000] ECR I-4139.

27 Case 152/73 *Sotgiu* [1974] ECR 153.

# Chapter V
# Members of the Family

***Texts in force***

- Immigration Act 1971Immigration Act 1988 Immigration and Asylum Act 1999
- Nationality, Immigration and Asylum Act 2002
- The Asylum and Immigration (treatment of claimants etc.) Act 2004
- Immigration, Asylum and Nationality Bill 2005
- The Immigration Rules (HC395) as amended
- The Immigration (European Economic Area) Regulations 2006

***The Immigration (EEA) Regulations 2006***

These remain unamended since last year and therefore many of the issues and problems set out in the former report are still as applicable this year as they were last year.

*Family members*

In brief, the distinction between third country family members applying to join an EEA national in the UK who are inside the EEA and those who are outside and therefore have to comply with the UK national immigration rules remains problematic. This is particularly so, as set out before, for those categories of third country nationals who have rights under the Citizens Directive but who are unable to bring themselves within a category under UK immigration law (eg children over 18, grandchildren etc).

There have been a few challenges which have reached the courts on this issue and which have used *Akrich* in interpretation of the current position. However, the position for family members who do not fit within the Regulations remains at best uncertain and the guidance from the courts so far as been on a limited number of issues. So for example in the case of *CO (EEA Regulations: Family Permit) Nigeria [2007] UKAIT 00070*, which is discussed in detail in the ECJ follow up chapter, the understanding of *Akrich* to mean that a member state can regulate the first lawful entrance to the EEA, is applied. In this case the son of an EEA national who was in Nigeria could not fulfil the immigration rules. The Court in this case makes the ruling that although the individual could not bring himself within the immigration rules, he should still, if he falls within the definition of a family member as set out in Art 2.2 of the Directive, be entitled to prove his right to admission to an immigration officer, whether or not he has a family permit. The judge suggested that Regulation 11(4) Immigration (EEA) Regulations allows for this possibility by implementing *MRAX*. The problem remains though that visa nationals will not be able to exercise their rights in this way as they will never to able to travel to the UK to present themselves to an immigration officer. The situation is obviously highly unsatisfactory in practice when an individual is seeking to join his EEA family member.

The definition of 'descendant' was considered in the case of *FK and MK (Sierra Leone) [2007] AIT 00038.* The facts of the case were unusual as the appellant who had been married (although no longer was) to an EEA national exercising Treaty rights in the UK, wanted to bring his two children from Sierra Leone. DNA tests were carried out which confirmed that

both the children were in fact not his. His mother had been looking after the two children and he had been providing for them financially and the children believed, as did he, that he was the father. The judges decided that these children were not descendants or de facto adopted children and they were not granted family permits. This seems an unduly restrictive and harsh interpretation of 'descendant' and one has to wonder if the facts of the case had been different, if the restriction on the applicant's and the EEA spouse's rights to free movement would have led to a different outcome. In this case, the children were from two different women who had abandoned them very early in their lives and the applicant had not lived with them for any prolonged period. One is left to wonder whether the outcome may have been different if the applicant had been living with his children immediately before the application and intended to join his EEA spouse exercising Treaty rights. This could have left the applicant in the position of having to choose between leaving his children or the EEA spouse moving to the third country.

*Extended family members*

The distinction drawn above between those third country nationals who have resided with their EEA national family member inside the EEA and those coming from outside the EEA is maintained in relation to extended family members. However, Regulation 11(4), implementing *MRAX* would not be applicable to extended family members. Again the individual applying from a third country would need to satisfy the immigration rules and is subject to a right of admission which the UK government states is discretionary.

In relation to durable relationships, the Home Office position remains unchanged, namely that the couple have to have resided together for two years before their relationship can be said to be durable. As yet this issue has not been raised in reported court cases.

In *KG (Sri Lanka) and AK (Sri Lanka) [2008] WCA Civ 13*, a case relating to extended family members, (the facts are set out in brief in the ECJ follow up), once again underlines the understanding of *Akrich* to mean that first entry into the free movement area can be governed by national immigration law. Only after that lawful entry does Community law apply to movement within the EEA. The Court of Appeal also reviewed *Jia* and *Eind* in coming to their conclusion and have in essence allowed the government to continue with its interpretation of the necessity of falling within the immigration rules if applying for a family permit.

*Marriage/Civil partnership*

The Immigration (European Economic Area) Regulations specifically exclude from the meaning of spouse/civil partner anybody who has entered into a marriage of convenience or a civil partnership of convenience.

Although fiancé(e)s or proposed civil partners are not specifically recognised under European law, the United Kingdom Government does allow partners of EEA nationals to apply as if they were British nationals or people with permanent residence in the United Kingdom.

The last report set out that those subject to immigration control (which does not include EEA nationals) are not able to marry or enter a civil partnership unless they have entry clearance specifically for the purposes of marriage or to enter a civil partnership in the United Kingdom or they have written permission from the Secretary of State in the form of a certificate of approval from the Home Office. Once the notice has been accepted by the registrar in

the designated office, the couple can marry or enter a civil partnership at any register office. This has been relaxed somewhat after a Court of Appeal case stating that people who do not have regular immigration status in the United Kingdom should also be allowed to apply for a certificate of approval. The Home Office has put more onerous requirements on those in this position to obtain a certificate of approval and stated that it reserves its right to take enforcement action against an individual making an application for a certificate of approval. This does however improve the position of third country nationals marrying EEA nationals as if they are able to marry within in the UK, they can then apply for a residence card.

***Retained rights of residence***

The position in relation to cases which fall within a *Baumbast* type scenario remains problematic. Although the strict reading of *Baumbast* has been transposed, in similar situations where principles are arguably parallel, the Home Office is still taking a strict line and refusing them. So for example, there have been difficulties on divorce of parents where the EEA national has remained resident in the United Kingdom and the non-EEA national has not had the right to remain. Other difficult situations arise where the EEA national is out of touch with the non-EEA national family member and is unable to prove that he has left the country or for the mother who remained in the UK after the EU national father ceased to work and who then left the UK (rather than doing the two simultaneously) as Regulation 10(3) of the Immigration (EEA) Regulations seems to require. (The last set of facts relates to a case heard by the Court of Appeal on 17 January 2008).

In relation to retained rights of residence after divorce, the UK is requiring the couple to have been married for three years as set out in the Citizens Directive. However they have to prove not just that they spent one year in the UK, but also that they were cohabiting throughout the period. The UK authorities also require the applicant to show that they EEA national was exercising Treaty rights throughout the duration of their marriage. Given the nature of these cases they are naturally difficult to document and yet the Home Office has shown itself unwilling to be flexible in its approach, particularly when it comes to obtaining documents which would only be available from former spouses.

***Access to work, access to education and equal treatment***

Family members generally do not appear to have any specific problems with access to work, although A8 family members will need to register under the workers' registration scheme if they intend to work. The difficulties currently faced by the family members of A2s and A8s are set out in more detail in Chapter 8. Non EEA third country family members are finding it necessary to document their right to work by obtaining a residence card as employers are not willing to employ them without it and the delay in issuing these (see below) can lead to delayed access to the labour market.

In general family members are entitled to the same access to education as their EEA family member. To obtain 'home' rates (which are substantially lower than 'overseas' rates) for university fees, the third country national family member needs to show that the EEA national has lived in the EEA and/or Switzerland for three years before the start of the course. If this applies they will probably also be able to apply for a loan to help with tuition fees and living expenses. There appear not to have been any significant problems in this area.

In terms of equal treatment there have not been any significant issues which have arisen. If there were discrimination on the basis of nationality, the individual may have a claim under the Race Relations Act 1976.

### *Administrative Practice*

*Family permit*

It appears from the feedback of practitioners over the past year that, although initially family permits would occasionally be granted to those who were not within the rules (eg if three children were travelling to join their EEA national parent and one was over 18), the number of cases being allowed to come to the United Kingdom who do not fit within the Rules but within Art 2(2) Citizens Directive is decreasing. The overall picture is one of tightening up at entry clearance posts which in light of the recent court decisions is likely to be maintained.

It seems that in most cases, family permits are being given priority over other applications and are dealt with swiftly. It also appears that there is an understanding that no fee should be charged. Swiss nationals benefit from the same rules as other EEA nationals.

Family permits are granted for six months giving the applicant this window of space to travel to the United Kingdom. This in itself can cause problems in relation to the ability of the third country national to work as to obtain a five year residence card the family member must apply to the Home Office (see below).

*Residence cards*

These are usually taking about four months to be dealt with which can be problematic for third country nationals' ability to document their right to work. Although certificates of application are being sent out quickly from the Home Office stating that the person who has made an application can work, these have changed since the last report and no longer give a blanket right to work to all family members but differentiate between family members, who are allowed to work, and extended family members who are not allowed to work. This complex distinction is making employers unsure whether they are allowed to continue to employ a specific third country national leading to some difficulties for individuals.

Retained rights of residence applications and extended family member applications are regularly taking over 6 months before a decision is taken.

# Chapter VI
# Relevance/Influence/Follow-up of Recent Court of Justice Judgments

This section considers the application in the UK of specified decisions of the European Court of Justice.

### *Akrich, Jia, Eind*

These cases have raised serious issues in the UK courts and there is a great deal of uncertainty in the present position. The particular issues concerns the scope of Community law rights and how they relate to the provisions of the Immigration (EEA) Regulations 2006. The most important provisions of these Regulations for this purpose are those of Regulation 12 which provide in relation to 'core' family members:

> 12. – (1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and:
> (a) the EEA national:
> (i) is residing in the UK in accordance with these Regulations; or
> (ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and
> (b) the family member will be accompanying the EEA national to the United Kingdom or joining him there and:
> (i) is lawfully resident in an EEA State; or
> (ii) would meet the requirements in the immigration rules (other than those relating to entry clearance) for leave to enter the United Kingdom as the family member of the EEA national or, in the case of direct descendants or dependent direct relatives in the ascending line of his spouse or his civil partner, as the family member of his spouse or his civil partner, were the EEA national or the spouse or civil partner a person present and settled in the United Kingdom.

### *CO (EEA Regulations: Family Permit) Nigeria [2007] UKAIT 00070*

This case was heard in the Asylum and Immigration Tribunal in June. It concerned an application for an EEA Family permit by the son of a Polish migrant worker. The son was of Nigerian nationality and was present in Nigeria, not previously having resided in any Member State. The decision to allow the appeal against refusal was challenged on the basis of *Akrich* and of the provisions of Regulation 12 of the 2006 Regulations, which sets out conditions for granting entry clearance from abroad. This implements the particular understanding of *Akrich* that the application of Community Free Movement law is as a matter of general principle conditional on first lawful residence in another Member State – and in the absence of that the Host state may apply its own provisions of domestic law. Regulation 12 therefore provides that entry clearance must be granted only if the applicant is either lawfully resident in another Member State, or satisfies the Immigration Rules (these often pose additional conditions that would not be permissible under Community law, if it is applicable). In this case it is acknowledged that the applicant is not eligible for entry clearance nor to an EEA Family permit but it is made clear that an applicant who is covered by the provisions of the Directive and has a right of entry and residence under Community law – and the applicant having

proved the relationship and exercise of Treaty rights by his father – is not to be denied entry and residence, and the procedure under Regulation 11(4) is applicable.

Your rapporteurs understand that appeal was brought but the case settled before it was heard.

***KG (Sri Lanka) & AK (Sri Lanka) [2008] EWCA Civ 13***

We include this because it was heard in December 2007 and because of its significance. The same point is raised although in a somewhat different context, that of the facilitation of entry of 'Other Family Members' under Article 3 of the Directive and in particular the interpretation of the phrase 'in the country form which they have come'. In the instant case the applicants were failed asylum seekers seeking to remain in the UK by virtue of family connection as an extended family member of Union Citizens who had subsequently arrived from France and Germany. The applicants had been members of the household in their countries of origin but had never been in France or Germany, and indeed the EU Citizens had arrived in the UK after their initial arrival as asylum seekers.

The case therefore concerns a particular point on Article 3 of the Directive, and therefore its implications for other situations remains to be clarified in future cases. However, it does contain significant comments about *Akrich*, *Jia* and *Eind* and the scope of Community free movement law which give some significant indications of the overall approach the Court of Appeal favours. The Court is quite clear that it follows and favours a broad understanding of *Akrich* – that Community law applies to movement within the Community rather than first entry to Community territory, the condition of lawful residence in another Member State or compliance with domestic immigration law may be imposed is of general application. There is some discussion of cases in which this logic seems to break down – in particular for example the hypothetical situation of an EU Citizen who has never lived within an EU Member State or has spent a considerable period of time in a third country. Without giving a clear and final answer to that, it is apparent that the Court is reluctant to let such cases 'drive the interpretation of Directive 2004/38' away from what is undoubtedly the core situation that it addresses, of movement of a Union Citizen between one Member State and another.'

Your rapporteurs understand that the case may be appealed to the House of Lords but as yet the application for this appeal to be heard is still being considered.

***Comments and importance***

This is an issue of major significance. Your rapporteurs understand that the immigration authorities are becoming increasingly strict about insisting on the application of the requirements of the UK Immigration Rules to family members of migrant EU Citizens coming from outside the UK and requiring entry clearance, even to immediate family members. Some of the most problematic issues are the following: Maintenance and accommodation requirements, the definition of family members (particularly grandchildren and children from 18-21) and the position of extended family members is very problematic. Your rapporteurs note that there is considerable uncertainty concerning a very basic fundamental point that still remains unresolved since *Akrich*. The experience of the above cases in the UK demonstrates the ambiguity of the judgments and the fundamental fact that they seem to avoid answering the basic question – whether *Akrich* really means what it says in reading into the Provisions of Regulation 1612/68 (or Directive 2004/38) a requirement of lawful residence that does not

seem to appear on the plain reading of the text, or whether it is of considerably narrower scope than this. Your rapporteurs are concerned that the most recent judgments in *Eind* and *Jia* have left the law in a state of uncertainty that is unhelpful and open to divergent interpretation by National Courts. Your rapporteurs have concerns that this situation is a potential source of inconsistent and divergent practice in different Member States and moreover that the practice currently prevailing in the UK is highly unsatisfactory.

***GC v SSHD [2007] UKAIT 00056***

This is another case connected to *Akrich* and *Jia*. The facts are in many ways similar to *Akrich* but with one difference – whilst in *Akrich* both the EU Citizen wife and third country national husband travelled to Ireland, in this case the husband did not travel to Ireland but remained in the UK. The appellant had been refused permission to stay on the basis of a relationship and business partnership with a UK National. He then married and sought to rely on that marriage to secure a right to remain the UK as a spouse under Community law. His wife travelled to and worked in Ireland for six months, without him (he remained in the UK running the business, no effective enforcement action having been taken in the meantime) and sought to rely on the principle in *Surinder Singh*, as had the applicants in *Akrich*. The court concludes that *Surinder Singh* does not give a general right of entry to a spouse but a right to have the case dealt with under EC law not domestic law. Then the next question is whether Community law would give the applicant in these circumstances (who has not left the UK with his wife and then returned, but who has remained in the UK throughout) any rights of residence. The conclusion is that the Directive does not cover this situation and that *Surinder Singh* does not require this either. The applicant has not 'accompanied or joined' the EU Citizen but rather the other way round (this point is also made in the *KG & AK* case, above) and therefore the provisions of the Directive do not apply.

***Hartmann, Geven: Frontier Workers and child benefits***

The main consequence of these judgments has been in Northern Ireland. The North/South Ministerial Council (a joint body of the UK and Irish authorities) provides cross border mobility information to the public (http://www.crossbordermobility.info). In relation to child benefit and child tax credit the cross-border issue does not seem to have been problematic with the website indicating eligibility for frontier workers. However as we have noted in another chapter, in relation to Working Families Tax Credit (a means-tested benefit for families on lower incomes) UK benefits regulations have appeared not to permit persons who live in Ireland but work in Northern Ireland to claim. Following the ECJ's decision in C-212/05 *Hartmann* the Cross-Border Mobility website recognises that this requirement should be amended and advises individuals who are affected by the regulations (a) that they are entitled to the social benefits irrespective of the apparent residence requirement; (b) that many people resident in Ireland are in receipt of the benefit (ie that the UK authorities have accepted the principle that they are obliged to pay the benefit). Your rapporteurs however are not aware that the requirement in Regulations has yet been changed formally. There is a requirement that the applicant or partner for the benefit should be working 16 hours a week (but there does not seem to be a minimum remuneration amount). This kind of requirement in principle seems to be compatible with the Court's judgment in *Geven* which considered the German exclusion of minor employment (15 hours per week and a minimum monthly remuneration

requirement). There is another element of the benefit available for childcare costs – this is subject to a requirement that the child should be in the care of a registered childminder or other childcare facilities in Northern Ireland. There is no indication that there any are plans to alter this.

***Case C-299/05 Commission v Parliament & Council***

The UK authorities have had to consider the implications of this case concerning exportability of disability benefits and are considering what steps to take to ensure compliance. The guidance from the Department of Work and Pensions and other websites indicate that guidance should be published before 5th April, but at the time of writing nothing is available and we understand from the DWP that the full considered response to the judgment is still awaited. Claimants are being advised by welfare rights organisations such as Child Poverty Action Group (In the 'Welfare Rights Bulletin' publication) that they are not likely to be able to backdate claims but that individuals should submit fresh claims and appeal against any refusal.

# Chapter VII
# Policies, Texts and/or Practices of a General Nature with Repercussions on Free Movement of Workers

## THE POINTS BASED SYSTEM

Since 2005, the Government has been developing a major reform of the framework governing admission for economic purposes, known as the 'points-based system' (PBS).[28] The PBS involves both the rationalisation of economic categories into a number of 'tiers' and various changes to the substance of policy.

During 2007 and early 2008, two aspects of the PBS have been taken forward – Tier 1 for the highly skilled, and a change to the law on the employment of irregular workers – and are summarised here. Further developments – particularly with respect to Tier 2 on skilled workers – are to be expected during 2008.

## THE HIGHLY SKILLED

Within the PBS, Tier 1 covers the highly skilled. The details of this part of the new system were announced in December 2007 in a Border and Immigration Agency publication entitled *Highly Skilled Migrants under the Points Based System: Statement of Intent*.

The new Tier 1 will have four strands:

- A general category for the *highly skilled*, to enable them to seek employment and/ or to set up in self-employment. This is a replacement for the highly-skilled migrant programme, a points system for the highly skilled, as most recently reformed during 2006 (see the previous year's report). The points system will remain the same, except that the specific provision exempting those with certain MBA qualifications is to be removed.
- A category for *entrepreneurs*. At the initial admission stage, the central requirement for this category will be that the individual holds £200,000 "in a regulated financial institution and disposable in the UK" (SOI, Annex A). When they come to renew their leave after two years, they will need to show that the investment took place within 3 months of entry; that the business is registered; and, that at least two full-time equivalent posts were created for at least 12 months. This category will replace the current general business category. The main difference will be that the need to show additional employment will be retrospective at the extension stage (in principle, two years), rather than being assessed in deciding on the initial admission.
- A category of *investors*, to replace the current entry category of that name. For the initial admission, the core requirement is to be that the individual holds £1 million "in a regulated financial institution and disposable in the UK". When an extension of leave is sought (after two years), it will be necessary to show that at least £750,000 was invested within three months of arrival. Here too, the main change will be that the actual investment is tested retrospectively, rather than in the initial admission decision.
- A category of *post-study work*. This will replace two categories for graduates: the International Graduate Scheme and the 'Fresh Talent: Working in Scotland Scheme', which

[28] See in particular *Selective Admission: Making Migration Work for Britain* (July 2005) and *A Points-Based System: Making Migration Work for Britain* (March 2006).

currently permit graduates from UK universities to take employment for one and two years, respectively. Under the PBS, it appears that graduates will be allowed to stay for two years in all cases. This category is temporary, in that graduates are not permitted to stay longer unless they switch to a highly-skilled or skilled category (Tiers 1 or 2).

A key change within the PBS reforms is that English language knowledge has become central to admission for economic purposes.

The first step of this kind was the introduction of a formal English language requirement as part of the reform of the HSMP which came into effect on 5 December 2006. That requirement was satisfied either by having a Bachelors degree taught in English, or by obtaining a score at least Band 6 in an International English Language Testing Scheme (IELTS) test.[29]

The December 2007 *Statement of Intent* indicated that the English language requirement would also be applied to the highly skilled and entrepreneur strands within Tier 1. Those in the 'post-study' category are meanwhile to be assumed to meet this test by virtue of their qualifications. By contrast, investors are to be exempt, as "they should not need to work and consequently there will not be the same necessity to be able to speak English at the outset" (*Statement of Intent*, p 12).

The December 2007 *Statement of Intent* also announced the reformulation of the English language requirement for the highly skilled. The standard will now be met in one of three ways:

- By having passed a test in English equivalent to level C1 of the Council of Europe *Common European Framework for Language Learning*. (The tests which have been approved as meeting this threshold are listed in published *Policy Guidance* for Tier 1.)
- By having taken a degree taught in English.
- By being a national of "a majority English speaking country". In the new Appendix B of the Immigration Rules, the following sixteen states are listed as the qualifying countries: Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago and the USA.

Tier 1 of the PBS began with effect from 29 February 2008 for those already within the UK, and seeking an extension of stay. It will be extended to applications in India from 1 April 2008, and to other countries later in 2008.

## EMPLOYER SANCTIONS

The Immigration Asylum and Nationality Act 2006 (sections 15-26) set out a framework for a new approach to employer sanctions for hiring workers who lack permission under immigration law, based on administrative penalties rather than the criminal law. After further consultations during 2007,[30] this new system came into effect on 29 February 2008, under the Immigration (Restrictions on Employment) Order 2007 (SI 2007 No 3290). This has meant the replacement of the previous criminal sanctions, based on section 8 of the Asylum and Immigration Act 1996.

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29 *Highly-Skilled Migrants Programme: Guidance for Applicants* (26 January 2007), Annex E.

30 Home Office, *Prevention of Illegal Working: Consultation on the Implementation of New Powers to Prevent Illegal Migrant Working in the UK* (May 2007).

Immigration officers now have the power to issue penalty notices to employers found to be employing workers without permission. As under the 1996 Act, employers can avoid liability by checking and copying certain documents which evidence the worker's entitlement to work. One change with the new system is that, where documents are presented which do not give evidence of an unrestricted right to take employment, the status of the worker must be re- checked at least every twelve months in order for the employer defence to be maintained.[31]

Where an employer is found to have hired a worker lacking permission without adequate checks, the level of fines is determined according to a *Code of Practice*.[32] The maximum level is set at £10,000 per worker, which is higher than the £5,000 maximum under the 1996 Act for a summary offence (i.e. tried at the lowest criminal court level).[33] However, the *Code of Practice* allows reductions for a first breach, where partial checks have been made, where employers report employees to the immigration authorities, and where employers cooperate with the immigration authorities in enforcement action.

The role of the criminal law is much reduced within the new penalty system. Previously, it was necessary to have a criminal prosecution in order to establish an employer's liability, for which proof beyond reasonable doubt was required. The new penalties come to court only if an employer contests them, and any legal dispute will be assessed on the balance of probabilities. The role of the criminal law is now limited to the criminal offence of *knowingly* employing a person without permission.[34] Employer knowledge was also relevant under the 1996 Act system, in that it negatived the employer defence that they had checked and copied documents evidencing a worker's status. The key change within the 2006-2008 framework is therefore the new possibility for employers and employers' officers to be imprisoned for up to two years.[35]

Finally, it should be noted that the United Kingdom is not formally participating in the proposed EU directive on requiring member states to have an effective system of employer sanctions.[36] The Government has however indicated that it wishes to participate in the discussions, and that it may seek to opt-in if the terms of any subsequent directive are acceptable to it.[37]

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31 See Article 4(2), and List B in the Schedule to the 2007 Order.

32 Home Office, *Prevention of Illegal Working: Civil Penalties for Employers: Code of Practice* (February 2008).

33 It was also possible to have a conviction on indictment, in which case the maximum fine was unlimited.

34 Immigration, Asylum and Nationality Act 2006, section 21.

35 On the liability of officers, see section 22 of the 2006 Act.

36 COM (2007) 249.

37 See the summary of a letter of 9 October 2007 from Immigration Minister Liam Byrne, in House of Commons European Scrutiny Committee, Session 2006-07, *Thirty-Seventh Report*, section 5.

# Chapter VIII
# EU Enlargement

## 1. INFORMATION ON TRANSITIONAL ARRANGEMENTS REGARDING MEMBER STATES WHO JOINED THE EU IN 2004

In line with United Kingdom practice, the states which joined in 2004 and are subject to restrictions, are referred to as the 'A8'. Similarly, the states which joined in 2007 are referred to as the 'A2'.

### *Changes in national law and practice since previous national reports*

Two technical changes to national law and practice were made by Regulation 3 of the Accession (Workers Authorisation and Worker Registration) (Amendment) Regulations 2007, SI 2007 No 3012.

- Exemption of A8 nationals who are members of a diplomatic mission, or members of their families, from the requirement to register in order to take up employment. Such persons are generally exempt from British immigration law, and it is potentially at odds with the twelve-month rule in para 2 of the Accession Annexes for them to be subject to the transitional arrangements.
- Definition of A8 family members of A2 nationals who remain subject to the A8 transitional regime. This was a consequence of a parallel amendment of the A2 Regulations, to correct the initial failure to exempt the family members of students. Here, the new rule is that A8 family members of A2 nationals must register only if the A2 national is in the United Kingdom by virtue of their initial right to enter for up to three months, or because they are a worker.

### *Changes in position with regard to the second phase of the transitional arrangements*

There were no changes to United Kingdom policy with respect to the A8 in the second phase. For details of the continuing policy, see the answer to 1.3 below.

### *Details of the legal regime, including relevant legislation, applicable for the second phase*

When the EU was enlarged on 1 May 2004, the United Kingdom chose to open its labour market to nationals of the eight new Central and Eastern European states (known as the 'A8'). The only pre-condition is that an A8 worker must register under the Workers' Registration Scheme. In total, 766,000 A8 nationals had registered between 1 May 2004 and 31 December 2007, for an average of 204,000 new registrations each year.[38]

The legal provisions governing the employment of A8 nationals continue to be found in the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004 No 1219, as amended). A8 nationals are required to register under the Workers' Registration Scheme within one month of starting each employment. An individual's first registration leads to the issuing of a registration card, for which there has been a fee of £90 since 2 April 2007. Sub-

[38] See Border and Immigration Agency, *Accession Monitoring Report: May 2004-December 2007*.

sequent registrations by the same worker lead to the issuing of a registration certificate, for which there is no fee. Failure to register exposes the employer to a criminal law sanction (Regulation 9). Under general employment law principles, a worker may also be unable to enforce the employment contract and statutory rights arising out of it.

The twelve-month exception is given effect through the concept of 'legally working without interruption' in Regulation 2. Working 'without interruption' is defined to mean being in employment at the beginning and end of a period, with no more than 30 days without legal employment in the intervening time.

The Regulations exempt A8 nationals who are posted workers, those who had a United Kingdom immigration permission on 1 May 2004 which allowed them to take *all* employment, and diplomatic staff and their families (on which, see answer 1.1 above). There are also exemptions for A8 family members of EEA and Swiss nationals (see the next subsection).

***Practical problems, individual cases and national case law pertaining to the transitional arrangements***

*1. Family members*

The right to work of the family members of A8 nationals during the transitional period is a complex subject. Article 23 of the Citizens Directive provides a right of employment and self-employment for qualifying family members of EU citizens. This right is however qualified by paragraph 8 of the Accession Annexes, which allows restrictions on the employment of the *spouse and descendants* – but not other family members – of A8 *workers* – but not other categories of A8 resident. Moreover, no restrictions may be applied if any of three conditions is met: the spouse/ descendant was residing with the A8 worker in the given member state on the date of accession, and the worker had at that time been 'admitted to the labour market' for at least 12 months; the spouse/ descendant has resided with the worker in the given member state for eighteen months since accession; or, "from the third year following the date of accession".

There are arguably these deficiencies in United Kingdom implementation as regards family members:

- *Family members other than the spouse and descendants*. Their right of employment is not recognised at all in the A8 Regulations. This is of particular relevance to the position of civil partners and dependent parents.
- *The third year onwards*. The A8 Regulations continue to require the A8 family members of A8 workers to register, even after the beginning of the third year after accession (i.e. 1 May 2006). This is arguably incompatible with para 8 of the relevant Accession Annexes.
- *A8 spouse or civil partner of British citizen or non-EEA/ Swiss national settled in the United Kingdom.* There is no provision for this category, where the spouse or civil partner came to the UK after the date of accession. Such a provision appears to be necessitated by the standstill and EU preference obligations in para 14 of the Accession Annexes. (Note too that there is an exemption for A2 nationals in the equivalent position under the A2 Regulations.)
- *Non-EEA family members*. UK law makes no express provision for the entitlement to work of this group. That is because the focus of the two sets of Regulations is upon *A8 nationals'* obligations, and exemptions therefrom. It nevertheless appears that non-EEA

family members *even of workers* have an implied right to work, as they are eligible for a residence card (under Regulation 17 of the 2006 EEA Regulations) which, if presented, is sufficient for the employer to avoid liability for hiring an unauthorised worker.

*2. The 12 month exemption*

One problem in this area concerns the fact that A8 nationals are allowed to take *employment in the UK without restrictions*. In their case, it is arguable that they are 'admitted' to the UK labour market, not through actual employment, but instead through the general *permission* to take employment. On that view, the exemption from registration ought to cover at least those A8 workers who have been physically present in the UK for a twelve-month period, and either in employment or looking for work. Indeed, even periods outside the UK should count, so long as the A8 national in question has genuinely been seeking employment in the UK.

A second issue concerns the position when there are *discrepancies between work and immigration permissions*. That was the issue in *EA Bulgaria* [2008] UKAIT 17, a decision of the Asylum and Immigration Tribunal promulgated on 6 March 2008. While this concerns a Bulgarian national, it is equally relevant to A8 nationals. The Bulgarian national in question had an immigration permission which lasted for exactly one year from 12 April 2006, and a work permit which allowed employment for exactly one year from 14 April 2006. Because of the two day period during which he lacked immigration permission, the AIT concluded that he was not in lawful employment for 12 months, as required.[39]

In the opinion of the rapporteur, even if this conclusion is correct as a construction of the A8 or A2 Regulations, it may be doubted that it is compatible with the Accession Annexes. An individual with a one-year work permit is arguably "admitted to the labour market" for that period – as required by para 2 of the various Accession Annexes - even if there is a minor discrepancy with their immigration status. Moreover – even if immigration permission is in general required - the proportionality principle ought to apply, so that Member States should not be permitted to rely upon minor discrepancies in order to frustrate the free movement of workers, in circumstances in which it is intended to apply.

## 2. INFORMATION ON TRANSITIONAL ARRANGEMENTS REGARDING MEMBER STATES WHO JOINED THE EU IN 2007

The political reaction to the unanticipated level of A8 migration led to a denial of full labour market access to nationals of Bulgaria and Romania. Instead, A2 nationals have been required to obtain authorisation for employment since those states joined the EU on 1 January 2007.[40] In practice, this has meant that A2 workers who did not meet the standard rules on skilled migration are channelled into the lower-skilled schemes in agriculture (the seasonal agricultural workers' scheme, 'SAWS') and food processing (under the sectors based

[39] The AIT also refused to allow the right to enter the UK for up to three months (based on Article 5 of the Citizens Directive) to be relied upon to overcome the two-day gap, as the applicant had not in fact entered the UK in the three months up to 14 April 2007

[40] Home Secretary John Reid, *House of Commons Debates*, 24 October 2006, column 82WS.

scheme), for which they alone would be eligible.[41] On 30 October 2007, it was announced that the original policy would be followed at least until the end of 2008.[42]

The legal provisions governing the employment of A2 nationals are contained in the Accession (Immigration and Worker Authorisation) Regulations 2006 (SI 2006 No 3317), as amended.

The policy on authorisation is governed above all by the standstill and EU preference obligations set out in para 14 of the relevant Accession Annexes. That is, the possibility for A2 nationals to take employment reflects the position as it was on 1 January 2007, with allowance for any subsequent liberalisation of the labour market rules applicable to non-EEA citizens.

Accordingly, the main categories of A2 employment track the employment entitlements of non-EEA nationals. A2 nationals can obtain authorisation by meeting the criteria under the Highly Skilled Migrant Programme, the work permit scheme, the sectors-based scheme and the categories of 'permit-free employment' under the Immigration Rules. A2 nationals can stay for employment where they graduate with a degree awarded in England, Wales or Northern Ireland (the International Graduates Scheme), or a degree or Higher National Diploma awarded in Scotland (Fresh Talent: Working in Scotland Scheme). Students meanwhile are entitled to work for 20 hours a week during term-time, for an unlimited number of hours during vacations, and for four months after their course ends.[43] They are also eligible to participate in the SAWS, if recruited by one of the designated operators within it.

In practice, there has been a low rate of skilled employment for A2 nationals. During 2007, only 175 A2 nationals were admitted as highly skilled, and only a further 2265 A2 nationals were issued accession worker cards through eligibility for a work permit. An estimated 7295 work cards were issued to A2 nationals as seasonal agricultural workers during 2007.[44]

As regards potential problems with implementation, several of the points identified with respect to A8 workers (in answer to question 1.4 above) arise here too:

- The non-provision for *family members other than the spouse and descendants*.
- The failure to change the rules for family members from *the third year onwards*. Given the current policy on family members of A8 workers, there is no reason to believe that the United Kingdom plans to change the rules for family members of A2 nationals from the third year onwards (i.e. from 1 January 2009).
- The absence of provision for *non-EEA/ Swiss family members*.
- The interpretation of the 12 months exemption where there is a minor *discrepancy between work and immigration permission*.

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41 In practice, that result was achieved in stages. During 2007, of the 16,250 SAWS places, 40% were reserved to A2 nationals, and it was only from 1 January 2008 that SAWS came to be wholly limited to A2 nationals. All 3500 places on the sectors based scheme were reserved to A2 nationals from 1 January 2007.

42 Immigration Minister Liam Byrne, *House of Commons Debates*, 30 October 2007, column 34WS.

43 Note that the initial version of the 2006 Regulations provided only for 20 hours' employment a week. This was less than the entitlement of non-EEA students, and was amended with effect from 16 March 2007 by the Accession (Immigration and Worker Authorisation) (Amendment) Regulations, SI 2007/ 475.

44 This data can be found in the Border and Immigration Agency, *Bulgarian and Romanian Accession Statistics*, published quarterly. Note that A2 worker who fall within the sectors-based scheme are included in a miscellaneous category: 705 accession worker cards were issued to that category in total during 2007.

# Chapter IX
# Statistics

***Main sources***

- Home Office (Border & Immigration Agency), Department of Work and Pensions, HM Revenue and Customs, and Department of Communities and Local Government, *Accession Monitoring Report May 2004-December 2007*
- Home Office (Border & Immigration Agency) and Department of Work and Pensions, Bulgarian and Romanian Accession Statistics (January-March, April-June, July-September and October-December 2007)
- House of Commons Trade and Industry Committee, Europe Moves East: The Impact of the New EU Member States on UK Business, HC 592, October 2007
- House of Commons Home Affairs Committee, Bulgarian and Romanian Accession to the EU: Twelve Months On, 2nd Report, session 2007-08, HC 59, January 2008
- Office of National Statistics, Emigration from UK Reaches 400,000 in 2006, 15 November 2007 (including latest numbers of international migration to the UK)
- Department of Work and Pensions and Office of National Statistics, National Insurance Allocations to Overseas Nationals Entering the UK 2006/07

**A8 NATIONALS**

The main source regarding the flow of A8 nationals to the UK is the Accession Monitoring Report, based on registrations under the Worker Registration Scheme (WRS). It must be reminded that the WRS covers only the A8 nationals who are employed in the UK (and not the self-employed or those exercising freedom of establishment rights). According to the latest Report, a *cumulative total* of 796,000 applicants (as opposed to applications) an application is linked to a specific job, thus applicants who change jobs must submit a new application, and applicants with more than one jobs need multiple applications) have registered on the WRS between 1 May 2004 and 31 December 2007 – but the Report acknowledges that this does not indicate the number of long term migrants of A8 workers in the UK, as most of them come only for limited periods. The annual total of applicants *fell* from 234,725 in 2006 to 214,510 in 2007.

As far as the *nationality* of the applicants is concerned, the vast majority of applicants come from Poland. Between May 2004 and December 2007, more than 500,000 approved applications came from Polish nationals. In the same period, the highest proportion of approved applicants were Polish (66% of the total), followed by Lithuanian (10%) and Slovak (10%) nationals. However, 2007 saw a *drop* in Polish applications in comparison with 2006 (147,540 from 162,495 in 2006). Moreover, it is noteworthy that numbers of applicants from a number of other A8 countries (the Czech Republic, Estonia, Latvia and Lithuania) have been falling steadily since 2005. On the other hand, there has been a steady rise in applications by Hungarian nationals.

According to the Accession Monitoring Report, applicants continue to be of young *age*: Of those who applied between May 2004 and December 2007, 82% of registered workers were aged between 18-34 (43% aged between 18-24 and 39% between 25-34). In the same period, the percentage of workers aged between 35-44 was 11%, of those between 45-54 6%

and of those aged over 55 only 1%. In the last quarter of 2007 the percentage of 18-34 workers was 79% compared to 11% in the 35-44 age group. The *male to female ratio* of 2004-07 applicants was 57:43. According to the Report, as small minority (7%) of registered workers who applied between May 2004 and December 2007 declared that they had *dependants* living with them in the UK when they applied.

As far as *sectors of production* are concerned, administration, business and management has continued to overtake hospitality and catering as the group that employs the most A8 workers since May 2004. The proportion of registered workers in the administration, business and management sector between 2004 and 2007 is 39%, with 19% in hospitality and catering, 10% in agriculture, 7% in manufacturing and 5% in food processing. Following the steep rise in 2006, the proportion of workers in the administration sector rose to 50% in the last quarter of 2007, from 44% in the third quarter of the same year and 49% in the last quarter of 2006. The proportion of hospitality workers was 16% in the last quarter of 2007 (from 17% in the last quarter of 2006). The percentage of workers in the agriculture sector has been below 10% in 2007, with percentages fluctuating in accordance with the seasonal nature of work in this sector.

On the basis of the applicants' responses to the WRS application form, it transpires that 97% of registered workers in 2007 were working more than 16 *hours* a week and 87% more than 35 hours a week (these percentages for 2004-07 are 97% and 86% respectively). 71% of registered workers in 2007 stated that their *hourly rate* was £4.50-£5.99 per hour, while 22% stated an hourly rate of £6.00-£7.99. This reflects an increase in wages when compared to the total A8 workers registered between 2004 and 2007 (76% and 18% respectively). Among the workers who registered in 2007 52% were in *temporary* employment and 44% in *permanent employment* (for the period between 2004 and 2007 these percentages were 51% and 46% respectively). With regard to the *intended length of stay*, an impressive 59% of workers registered in 2007 declared that they intended to stay in the UK for less than three months.

Looking at the *geographical distribution* of WRS applicants, the greatest number of workers registered between 2004 and 2007 can be found in Anglia, followed by the Midlands and London. This confirms the *continuing fall in numbers of A8 workers in the London area*. According to the 2007 WRS Report, the proportion applying to London-based employers fell from 20% in 2004 to just 10% in the last quarter of 2007. As regards *regional distribution within sectors*, 27% of those working in Hospitality and Catering were in London – far more than in any other region. 26% of those in agriculture were in Anglia – while the highest proportion of those working in Administration (20%) was in the Midlands. As regards *nationalities within sectors*, a greater proportion of workers from Lithuania and Latvia worked in Agriculture than any other nationality (20% and 24% respectively, compared to 10% of all workers), and Polish workers making up the largest proportion in every sector (including 68% in administration and 64% in hospitality and catering).

About 7,765 *applications for income support* have been made between 2004 and 2007, 13,622 applications for job seekers allowance and 372 for state pension credit. According to the Report, *although increasing, the numbers of A8 nationals applying for tax-funded income-related benefits and housing support remain low.* In all, so far only 22% of applications have been allowed and the majority were disallowed on the basis of the Right to Reside Habitual Residence Tests. Between May 2004 and December 2007, 136,768 applications for *child benefit* were made, 65% of which were approved. In the same period, a total of 1,021 *homelessness applications* were approved (out of 2,900 applications) - this represents 0.3%

of the total number of acceptances over that period. All these data seem to confirm the point that the impact of A8 nationals on the UK social security system has been minimal.

According to the 2007 Accession Monitoring Report (based on the Department of Work and Pensions data on *national insurance numbers (NINo) allocations*) , between May 2004 and December 2007 the total NINo application number was just under 819,000. 97.6% of NINos were allocated for employment purposes, 0.8% for benefit purposes and 1.6% for tax purposes.[45] 55% of applicants were male and 45% female. Most applications were from Polish (66%), Slovak (10%) and Lithuanian (9%) nationals. The 2006-07 NINo Report by the Department of Work and Pensions states that NINo registrations to Accession nationals increased from 276,700 in 2005/06 to 321,200 in 2006/07- however, this number includes also the A2 Member States. Poland topped the list of countries whose nationals registered in 2006-07 (same as 2004-05 and 05/06). Slovakia was ranked 3rd in 2006/07 and Lithuania 6th (with France 7th and Germany 9th).

## A2 NATIONALS

The main source of information regarding employment of Bulgarian and Romanian nationals in the UK comes from quarterly accession statistics published by the Home Office and the Department of Work and Pensions. *Unlike the Accession Monitoring Report for A8 nationals, the A2 Reports do NOT include cumulative data* for all the periods covered- a full picture is thus possible only if one collates the information from the different quarterly reports. Drawing conclusions becomes even more complicated by the fact that tables in the A2 Reports do not include details on all schemes of employment of A2 nationals. This creates a fragmented picture. Four quarterly Reports for 2007 have been published, and the main information they include is as follows:

With regard to *numbers* of Bulgarian and Romanian nationals *applying for accession worker cards*:

*In the first quarter*: 1,115 applications for accession worker cards by A2 nationals (including family members)- 815 were approved (290 approvals out of 380 applications for Bulgarian nationals and 525 approvals out of 735 applications for Romanian nationals). These do NOT include participants in the Seasonal Agricultural Workers Scheme (SAWS) - provisional figures for the first quarter indicate that 1,535 SAWS work cards were issued to Bulgarian nationals and 890 SAWS to Romanian nationals (total of 2,425 SAWS cards).

*In the second quarter*: 1,320 applications for accession worker cards by A2 nationals (including family members)- 1,030 were approved (405 approvals out of 485 applications for Bulgarian nationals and 625 approvals out of 835 applications for Romanian nationals). These do NOT include participants in the Seasonal Agricultural Workers Scheme (SAWS) - provisional figures indicate that 3,105 SAWS work cards were issued to Bulgarian nationals and 875 SAWS to Romanian nationals (total of 3,980 SAWS cards).

*In the third quarter*: 1,385 applications for accession worker cards by A2 nationals (including family members)- 1,010 were approved (415 approvals out of 525 applications for Bulgarian nationals and 595 approvals out of 860 applications for Romanian nationals). These do NOT include participants in the Seasonal Agricultural Workers Scheme (SAWS) - provisional figures indicate that 100 SAWS work cards were issued to Bulgarian nationals and 95 SAWS to Romanian nationals.

[45] Note that NINos are required for both employment and self-employment purposes.

*In the fourth quarter*: 1,260 applications for accession worker cards by A2 nationals (including family members)- 860 were approved (470 approvals out of 590 applications for Bulgarian nationals and 390 approvals out of 675 applications for Romanian nationals – *reflecting a lower success rate for Romanian nationals in comparison to the previous quarters*). Again these do NOT include participants in the Seasonal Agricultural Workers Scheme (SAWS) - provisional figures indicate that 360 SAWS work cards were issued to Bulgarian nationals and 335 SAWS to Romanian nationals.

With regard to *numbers* of Bulgarian and Romanian nationals granted *registration certificates*:

*In the first quarter*: A total of 9,305 applications and 7,120 approvals (with 1,650 outstanding applications) of which: 3,740 applications and 2,520 approvals for Bulgarian nationals; 5,830 applications and 4,595 approvals for Romanian nationals. Taking into account the outstanding applications, 93% of decisions are positive. The largest proportion of applications (40%) is for registration certificates confirming that the applicant is exercising a Treaty right as a self-employed person. 30% concern exemptions from a worker authorisation requirement. Very low numbers of applications for study (4%) and access to the labour market as highly skilled workers (1%).

*In the second quarter:* A total of 9,565 applications and 8,305 approvals (with 550 outstanding applications) of which: 2,680 applications and 2,210 approvals for Bulgarian nationals; 6,885 applications and 6,095 approvals for Romanian nationals. Taking into account the outstanding applications, 91% of decisions are positive. The largest proportion of applications (60%) is for registration certificates confirming that the applicant is exercising a Treaty right as a self-employed person. 15% concerns exemptions from a worker authorisation requirement. Low numbers of applications for study (8%) and access to the labour market as highly skilled workers (less than 1%).

*In the third quarter:* A total of 8,075 applications and 6,445 approvals (with 320 outstanding applications) of which: 2,460 applications and 1,895 approvals for Bulgarian nationals; 5,615 applications and 4,550 approvals for Romanian nationals. Taking into account the outstanding applications, 80% of decisions are positive (a noteworthy fall from the first two quarters). The largest proportion of applications (56%) is for registration certificates confirming that the applicant is exercising a Treaty right as a self-employed person. It is noteworthy that the Report states that 15% of these applications have been refused. The second largest group now (14%) is those applying for registration certificates on the basis that they are family members although, as the Report notes, numbers of applications in this category have actually fallen. Applications on the basis of study have increased (14%), explained by the start of the academic year. Highly skilled-led applications remain very low (less than 1%).

*In the fourth quarter:* A total of 8,855 applications and 4,990 approvals (with 2,760 outstanding applications – *a sharp increase in outstanding applications*) of which: 2,800 applications and 1,625 approvals for Bulgarian nationals; 6,055 applications and 3,365 approvals for Romanian nationals.. The largest proportion of applications (53%) is for registration certificates confirming that the applicant is exercising a Treaty right as a self-employed person. It is noteworthy that the Report states that 13% of these applications have been refused. The second largest groups(17%) are those applying for registration certificates on the basis that they are family members and on the basis of study . Highly skilled-led applications remain very low (less than 1%).

With regard to *age* and *gender*:

*In the first quarter*: 50% of applicants were aged 25-34 (43% of Bulgarians compared to 53% of Romanians). 19% were aged between 35-44 and 16% between 18-24. 53% of applicants were male and 47% female (50-50 for Bulgarian applicants and 55-45 for Romanian applicants).

*In the second quarter*: 48% of applicants were aged 25-34 (43% of Bulgarians compared to 50% of Romanians). 17% were aged between 35-44 and 23% between 18-24. 60% of applicants were male and 40% female (54-46 for Bulgarian applicants and 62-38 for Romanian applicants).

*In the third quarter*: 45% of applicants were aged 25-34 (43% of Bulgarians compared to 46% of Romanians). 16% were aged between 35-44 and 26% between 18-24. This reflects *a steady rise in the proportion of young applicants*. 57% of applicants were male and 43% female (54-46 for Bulgarian applicants and 58-42 for Romanian applicants).

*In the fourth quarter*: 46% of applicants were aged 25-34 (42% of Bulgarians compared to 47% of Romanians). 15% were aged between 35-44 and 27% between 18-24. This reflects *a steady rise in the proportion of young applicants*. 57% of applicants were male and 43% female (55-45 for Bulgarian applicants and 58-42 for Romanian applicants).

With regard to *sectors of employment and occupations (on the basis of accession worker cards)*:

*In the first quarter*: the most significant sectors are entertainment and leisure services (28%), hospitality and catering (15%) and health and medical services (15%) - - this is the case for both nationalities. With regard to occupations, senior cares, chefs and circus artistes top the list for Bulgarian nationals, whereas circus artistes lead in the occupations for Romanian nationals, followed by chefs and musicians (who tie with senior carers).

*In the second quarter*: the most significant sectors were entertainment and leisure services (17%), financial services (17%) hospitality and catering (15%) – the greatest proportion of approvals for work permits for Bulgarians were for financial services (25%) and for Romanians for entertainment and leisure (22%). With regard to occupations, significant changes have occurred in comparison to the first quarter, in particular a rise in financial and managerial occupations: for Bulgarian nationals, work permits were given mainly for financial occupations (35), for managerial occupations (20) and for agriculture (20) (with chefs following with 15 and circus artistes disappearing from the list). For Romanian nationals, 25 permits were granted for financial or engineering occupations and 20 for chefs and IT occupations (circus artistes remain on the list here with 15 permits).

*In the third quarter*: there are again (like in the second quarter) a number of significant changes in sectors: the most significant for this quarter were administration business and management services (17%), financial services (17%) and educational and cultural activities (12%). *This seems to confirm a move from the entertainment and to some extent the catering sector to financial- and to some degree education- services.* The greatest proportion of work permits for Bulgarians were for financial services (27%) and for Romanians for administration business and management (19%). With regard to occupations, financial and managerial top the list for Bulgarian nationals and engineering leads by far for Romanian nationals, followed by IT, financial, health/medical and research occupations. University lecturers and teachers also make an appearance at the bottom of the lists.

*In the fourth quarter*: The situation remains similar to the third quarter, with financial and administration, business and management services being the leading occupations (with

hospitality and catering, education and culture, and health and medical services following).The lists of occupations are also very similar to the third quarter.

With regard to the *geographical distribution of employers*:

*In the first quarter*: the North West leads with 125 approved applicants (21%), followed by London with 105 (17%) and Anglia with 95. The lowest numbers were in the South West and Wales (15 each). In the North West, 77% of applications by employers for A2 workers in the sectors-based scheme resulted in permits for low-skilled work in the food-processing sector. By contrast, in London permits have mostly been issued for skilled employment.

*In the second quarter*: significant changes have occurred her as well in comparison to the first quarter: London and Northern Ireland tie in the first place for work permits with 140 each (19% each), with the North West following with 90 (Wales continues to be bottom of the list). There is a sharp contrast in the kind of employment however: while in London, 96% of applications in the work permit and sectors-based schemes were for skilled employment, in Northern Ireland 95% of permits under the sectors based scheme were for low-skilled work and most sectors based scheme permits are issued for employment in the food processing sector.

*In the third quarter*: the situation is similar with the second quarter. Northern Ireland leads with 130 permits followed by London with 125. Wales and the North East remain at the bottom of the list. The situation with regard the nature of occupations in London and Northern Ireland remains the same as in the second quarter.

*In the fourth quarter*: London now leads with 120 permits, followed by the North West with 110 and Northern Ireland with 85. The Midlands are now bottom of the list, followed by Wales. 91% of permits in the North West have been issued for low-skilled work; 93% of applications in London relate to skilled employment.

With regard to *national insurance number allocations*:

*In the first quarter*: the number of NINo applications for A2 nationals was just under 4,500 (including those who were resident in the UK prior to accession). The total allocated was 3,985. 98.3% of NINos were allocated for employment purposes, 1.1% for benefit purposes and 0.6% for tax credit purposes. 64% of applications were from Romanian nationals and 36% from Bulgarian nationals. 60.5% of applicants were male and 39.5% female. A noteworthy 77.2% of applicants were aged 18-34 years old. The vast majority of NINo applications took place in London (2,817).

*In the second quarter*: the number of NINo applications for A2 nationals was just over 10,000 (including those who were resident in the UK prior to accession). The total allocated was 9,033. 98.9% of NINos were allocated for employment purposes, 0.8% for benefit purposes and 0.2% for tax credit purposes. 66% of applications were from Romanian nationals and 34% from Bulgarian nationals. 65.8% of applicants were male and 34.2% female. 77.7% of applicants were aged 18-34 years old. The vast majority of NINo applications took place in London (6,996).

*In the third quarter*: the number of NINo applications for A2 nationals was just over 10,500 (including those who were resident in the UK prior to accession). The total allocated was 8,851 (*a relative decline in comparison to the second quarter)*. 98.7% of NINos were allocated for employment purposes, 1% for benefit purposes and 0.3% for tax credit purposes. 61.2% of applications were from Romanian nationals and 38.8% from Bulgarian nationals. 62.5% of applicants were male and 37.5% female. *On the rise again, 79.2% of appli-*

*cants were aged 18-34 years old*. The vast majority of NINo applications took place again in London (6,262).

*In the fourth quarter*: the number of NINo applications for A2 nationals was just under 9,330 (including those who were resident in the UK prior to accession). The total allocated was 7,521. 97.6% of NINos were allocated for employment purposes, 1.5% for benefit purposes and 0.9% for tax credit purposes. 67.5% of applications were from Romanian nationals and 32.5% from Bulgarian nationals. 62.1% of applicants were male and 37.9% female. 77.2% of applicants were aged 18-34 years old. The vast majority of NINo applications took place again in London (6,501).

## OTHER EU NATIONALS

According to the NINo statistics, there has been a continuous and significant increase in the numbers of NINos allocated to EU nationals (excluding accession nationals). The numbers for 2006/07 are 103,700 (from 97,600 in 2005/06 and 81,300 in 2004/05). This is still less than 1/3 of NINos allocated to accession nationals in 2006/07. As mentioned above, France and Germany continue to be in the top-10 NINO countries for 2006/07.

According to the International Migration Statistics published by the National Statistics Office, the inflow of EU 15 nationals to the UK in 2006 was 71,000 (from 70,000 in 2005 and 75,000 in 2004), whereas the outflow was 44,000 (from 39,000 in 2005 and 38,000 in 2004). This leads to a surplus of 27,000 for 2006. According to the statistics, EU citizens (but this would include A8 and A2 nationals) were more likely to migrate to the UK for work related reasons than for citizens outside the EU. On the other hand, 80% of those coming to the UK to study come from outside the EU.

## TRENDS

2007 witnessed a continuing debate in the UK with regard to the credibility and accuracy of statistics on immigration. This was coupled with projected uncertainty regarding the volume of immigration in the UK, which could lead to the perpetuation of a climate of insecurity towards immigration, including the movement and residence of EU citizens from new Member States to the UK. Numbers after all (and the prospect of too many immigrants coming into the UK) seem to have played a significant part in the UK Government's decision not to repeat its policy on A8 nationals with regard to A2 nationals. The tone of mistrust towards Government numbers on migration –including the movement of A8 and A2 nationals – is evident even in the context of parliamentary inquiries on the subject.[46] However, the answer to this uncertainty has not necessarily been greater transparency. This is clearly reflected in the Reports on A2 nationals in the UK, which, unlike the A8 precedent, do not include clear cumulative data which could help to identify clearly trends in A2 employment in the UK.

From an overview of Government reports, parliamentary inquiries and press articles, it undoubtedly appears that movement of citizens from 'new' Member States from Central and Eastern Europe remains a predominant feature of movement of EU workers in the UK. The features of A8 movement remain largely similar to earlier years- a predominantly work active, young population working primarily in the service industry. However, there is a significant change: *the 2007 statistics indicate that we may be witnessing a slowdown in the move-*

[46] See for instance the Home Affairs Committee Report on Bulgarian and Romanian Accession to the EU, in particular the oral evidence session with the Immigration Minister, Questions 24-27.

*ment of Polish workers in the UK.* Indeed, numbers are down in comparison with 2006, and newspaper articles suggest that for the first time more UK-based Polish nationals are returning to Poland than are entering the UK.[47] In this context, it is important to note the conclusion by the House of Commons Trade and Industry Committee that *'in the longer term, the evidence suggests that migration from the A8/A2 to the UK is likely to slow'*.

For now, some interesting conclusions can also be drawn from the statistics on A2 nationals. Numbers of permits may be limited, but a quarter by quarter examination of movement in 2007 demonstrates a number of interesting features, in particular: the young age of workers from the A2 countries; the focus of many of these workers on skilled work, reflected by their occupation in the financial, administrative and education sector; and the magnet pull of London for the highly skilled.

[47] See *The Times*, Tide Turns as Poles End Great Migration, 16 February 2008.

# Chapter X
# Miscellaneous

There have been 5 seminars and workshops dedicated to free movement of persons in EU law in the UK in 2007. The main provider of these training opportunities has been the Immigration Law Practitioners Association. They have been well attended by practitioners in the field and provide an important source of information regarding the current state of the law.

There have been a number of important publications on free movement of workers and immigration generally in the UK. The LexisNexis Immigration Law loose-leaf has now been updated to include EU free movement of persons materials and the most important decisions of the ECJ. A new book *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (eds Elspeth Guild, Anneliese Baldaccini and Helen Toner) Hart, Oxford, 2007 covers EU law including citizens of the Union. There have been a number of important articles published on free movement of workers, not least a special issue of the Journal of Immigration, Asylum & Nationality Law devoted to the subject.

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