# REPORT
# on the Free Movement of Workers in the United Kingdom in 2006

Rapporteur: Prof.dr. Elspeth Guild,
(with C. Barnard, A. Hunter, V. Mitsilegas,
N. Rogers, N. Rollason, B. Ryan,
S. Roberts and H. Toner)

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**CONTENTS**


| | | |
|---|---|---|
| Introduction | | 1063 |
| Chapter I: | Entry, residence, departure | 1064 |
| Chapter II: | Access to employment | 1071 |
| Chapter III: | Equality of treatment on the basis of nationality | 1076 |
| Chapter IV: | Employment in the public sector | 1081 |
| Chapter V: | Members of the family | 1084 |
| Chapter VI: | Relevance/Influence/Follow-up of recent Court of Justice judgments | 1089 |
| Chapter VII: | Policies, texts and/or practices of a general nature with repercussions on the free movement of workers | 1094 |
| Chapter VIII: | EU enlargement | 1097 |
| Chapter IX: | Statistics | 1103 |
| Chapter X: | Social security | 1105 |
| Chapter XI: | Establishment, provision of services, students | 1111 |
| Chapter XII: | Miscellaneous | 1115 |

## INTRODUCTION – ELSPETH GUILD

2006 has not been a particularly auspicious year of migrant citizens of the Union. While over the period 2004 – 2005 there was a very positive public portrayal of workers from other member States, particularly the 2004 Member States, this rosy picture changed towards the middle of 2006 when opinion in government began to harden against opening the UK labour market to the two 2007 Member States' nationals. The UK's decision to use the transitional restriction on free movement of workers from Bulgaria and Romanian nationals has also had something of a knock on effect in that the public appreciation of workers from the 2004 Member States seems to have been questioned more than had previously been the case.

Thus the first area where there has been a worsening of the situation for EU nationals working in the UK is in respect of public opinion regarding workers from the 2004 and 2007 Member States. Negative press coverage of these groups does not, for the moment, appear to be deterring the arrival of nationals from the 2004 Member States seeking employment. However, as the statistics which are available are not particularly up to date it is not clear whether there is a levelling off or not.

The second area which continues to be a matter of concern in the UK is the treatment of third country national family members of EU migrants. The entry into force of directive 2004/38 and its transposition into domestic law has been used as an opportunity to harden the rules on access to the territory of third country national family members of citizens of the Union working and living in the UK. The current legislation in force in the UK makes it effectively impossible for third country national children over 18 who are dependent on their EU national parent and who are living in a third country to come to the UK to join their EU national parent working in the UK. Similarly, dependent relatives in the ascending line who should be entitled to join their EU national principal in a host Member State even where they are arriving from a third country. The UK measure transposing Directive 2004/38 makes this particularly difficult. The argument of the UK authorities is that national law applies to third country national family members seeking visas to come to the UK from third countries to join their EU national principals in the UK. This interpretation of EU law runs counter to the wording of Directive 2004/38 and very much against the jurisprudence of the European Court of Justice in the cases of C-459/99 *MRAX* and C-503/03 *Commission v Spain*.

The third area of concern relates to access to social benefits. In three chapters access to social benefits arises as an issue in respect of which the UK authorities are taking a restrictive approach to EU rights – see chapters III, VI and VIII). Here the combination of a restrictive approach adopted by the legislator and the approach of a number of courts in the UK has had the effect of limiting the scope of access to benefits of migrant citizens of the Union. This trend, if consistent with developments in other Member States, may be worth further consideration by the Commission.

## CHAPTER I. ENTRY, RESIDENCE, DEPARTURE – NICOLAS ROLLASON

### *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

There was no draft legislation at the end of 2006 but the UK Borders Bill had first reading on 25 January 2007.

#### *The New 2006 EEA Regulations*

The Immigration (European Economic Area) Regulations 2006 were made on 30 March 2006 and came into force on 30 April 2006. They are designed to bring UK law into line with Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. According to the Explanatory Note, "a Transposition Note setting how the Government has transposed into UK law the main elements of this Directive will be available on the Office of Public Sector Information website".

The 2006 Regulations replace the 2000 Regulations which they revoke (except for the provisions on posted workers which are required to make sense of the Swiss posted worker provisions). All the various amendments to the 2000 Regulations are also revoked though the Immigration (Swiss Free Movement of Persons) (No 3) Regulations 2002 are retained for posted workers. Similarly, the Accession Regulations (regarding A8 nationals) are also preserved.

The Regulations are divided into 7 parts: Part 1 (regulations 1 to 10) of the Regulations contains the interpretation provisions for the Regulations. Part 2 (regulations 11 to 15) sets out the free movement rights conferred on EEA nationals including:

- the right of EEA nationals and their family members to be admitted to the United Kingdom provided they have the relevant documents (*regulation 11*);
- the right of EEA nationals and their family members to reside in the United Kingdom for an initial period of 3 months (*regulation 13*);
- the right of a "qualified person" (a jobseeker, worker, self-employed person, self-sufficient person or student), a family member as qualified person, and a "family member who has retained the right of residence" (for example, a family member of a deceased qualified person who satisfies specified conditions) to reside in the United Kingdom for as long as they have this status (*regulation 14*); and
- the right of EEA nationals and their family members to permanent residence in the United Kingdom in specified circumstances (for example, after they have resided in the United Kingdom under the Regulations for 5 years (*regulation 15*)).

Part 3 (regulations 16 to 18) provides for the issue of residence documentation, which can be used as proof of the rights of residence provided for in the Regulations. Part 4 (regulations 19

to 21) provides for the exclusion and removal of EEA nationals and their family members on grounds of public policy, public security and public health. Part 5 (regulations 22 to 24) contains procedural provisions relating to persons who claim admission under the Regulations, who are refused admission, or are being removed. Part 6 (regulations 25 to 29) and Schedule 1 set out the appeal rights in relation to decisions taken under the Regulations.

*Admission*

The admission of EEA nationals is regulated by the Immigration Act 1988, section 7 which confirms that EEA nationals are not required to obtain leave to enter or remain in the United Kingdom and by the Immigration (European Economic Area) Regulations 2006 ("the Regulations"), which provide detailed regulations on the admission, residence and deportation of EEA nationals. Guidance on the administrative practice to be applied to EEA nationals is given to Immigration Officers at UK ports of entry in the European Directorate Instructions (EDIs). The latter were first published in the course of 2005. The EDIS have been updated to take into account the changes introduced through the Regulations.

Regulation 11 provides that an EEA national *must* be admitted to the UK on production of a valid national ID card or passport (issued by an EEA state). If the individual does not produce a document, the immigration officer *must* give the individual every reasonable opportunity to obtain the document or to have it brought to him (clearly detention is anticipated here) or to prove by other means his or her status (Regulation 11(4)). This appears to be in compliance with Article 5 of the Directive, though as regards detention the ECJ's judgment in C-215/03 *Oulane* placed important limitations on its use for identity purposes.

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.

One of the key obstacles for EU workers coming to the UK which does not apply in 13 other Member States is a border control check on all persons entering the UK. As the UK remains on the wrong side of the Schengen border though inside the border of the internal market, there is a constant tension between delivering the right of free movement of workers without controls and the maintenance of border controls on the movement of persons into the UK. Two reports were published in 2006 which have a relevance to the compliance of the UK with its obligations regarding the control of its intra-Member State frontier – the annual report of the Independent Race Monitor and a special study prepared by the Home Office on decision making of Immigration Officers examining non-EEA passenger stops and refusals at UK ports. Both reports are primarily about non EEA nationals however, in view of the fact that there are many non EEA nationals with EEA movement rights (eg family members of citizens of the Union) a brief summary of the relevant issues raised in the two reports is justified.

The Independent Race Monitor is mandated to examine the effects of Ministerial Authorisations to discriminate on grounds of nationality and ethnic origin in relation to the operation of immigration and nationality functions and to monitor exceptions made under Ministerial Authorisations. 12 Authorisations to discriminate were in operation in 2006:

- Asylum work streaming;
- Permission to work for three specified schemes;
- Translation of documents;
- Language analysis;
- Sector-Based Scheme;
- Removals directions;
- Examination of passengers;
- Passengers wishing to travel to the UK, leave to enter before arrival;
- Examination of Eritrean nationals'; UK ancestry claims of Zimbabweans;
- Examination of top five nationalities most subject to third country action;
- Examination of fingerprints of top ten nationalities most subject to third country action (replaces examination of top five authorisation).

The most important Authorisation permits the Immigration Service to prioritise arriving passengers according to their nationality. A list of nationalities is issued monthly on the basis of those nationalities for whom there have been more than 5 breaches and adverse decisions per 1000 admission decisions during the previous three months. Persons of these nationalities are then subject to more rigorous examination than others. Thus the basis for the enhanced examination is the decision making of the same officials the previous three months. The most recent data on arrivals in the UK dates from 2004 when 68.2 million British citizens entered the UK, 17 million EU nationals entered and 12 millions non EEA nationals. Of the non EEA nationals, 7.2 million were admitted as visitors and just under 300,000 as students. The top five non EEA nationalities admitted were:

| *Nationality* | *Admitted* | *Refused Admission* | *Refusal rate* |
|---|---|---|---|
| USA | 4,050,000 | 1,485 | 0.04% |
| Australia | 917,000 | 335 | 0.04% |
| Canada | 852,000 | 455 | 0.05% |
| India | 616,000 | 555 | 0.09% |
| Japan | 593,000 | 245 | 0.04% |

The top five nationalities most refused admission (on the refusal rate) to the UK (excluding asylum seekers) were:

| *Nationality* | *Admitted* | *Refused Entry* | *Refusal rate* |
|---|---|---|---|
| Jamaica | 19,900 | 995 | 4.76% |
| Brazil | 141,000 | 5,180 | 3.54% |
| Mauritius | 37,400 | 420 | 1.11% |
| Romania | 66,300 | 605 | 0.90% |
| Ghana | 78,300 | 595 | 0.75% |

There was one Member State among the most refused group – Romania though it was not a Member State yet in 2004. As regards categories of passenger most likely to be held up – business visitors were the least likely (fewer than 0.1%) while students were the most likely (at 1%).Very substantial differences were noted as regards where the passenger arrived. Refusals of the ten nationalities varied between 14% at Heathrow to 7% at London City airport. In her observations on the practice of immigration controls in the UK the Monitor states "I saw examples in which nationals from Kazakhstan, Colombia, Nigeria, Ghana, Uganda and Iran were being questioned very closely about their proposed visits. These questions included making checks on sponsors, and asking for detailed evidence of financial status… Many times I have observed young US, Australian and Canadian passengers, with vague travel plans and intentions to stay with friends, being landed with minimal questions." (para 2.18)

The Home Office published its report Exploring the decision making of Immigration Officers: a research study examining non-EEA passenger stops and refusals at UK ports in January 2007 based on research carried out in 2006. The study has two aims to explore the process by which Immigration Officers (IOs) decide whether or not to hold passengers for further questioning and to explore the potential for monitoring ethnicity of arriving passengers. The key findings of the study are that Immigration Officers believe that their assessment of the credibility of a passenger is the key determining factor in whether to examining in depth a case. IOs may factor in assumptions about what is 'typical' or 'normal' in a range of circumstances or cultures which assumptions are drawn, inter alia from the personal life experiences of the IO. In the classifications which the study gave as *White* and *Black, White Northern* passengers were least likely to be stopped for further questioning. *Black* passengers were stopped 17 times more frequently than *White Northern* passengers.

*Refusal of admission*

Regulations 22-24 give Immigration Officers power to deal with individuals who would otherwise be free from controls under the Immigration Acts because of the exercise of Treaty rights. They work by applying specific provisions from the 1971 Immigration Act to people 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).

In so far as decisions under the above Regulations are made in accordance with the principles of Community law, powers to give effect to them are not controversial. Since anyone with an enforceable Community right to enter or reside is not subject to control under the Immigration Acts, control powers cannot be applied without specific extension, operating 'as if' people who claim such a right were subject to control.

Regulation 22 applies, first, to *all* non-EEA family members, and also to any EEA national '...where there is reason to believe he may fall to be excluded...' on the usual grounds. Whether 'there is reason', is evidently left to the discretion of the UK immigration officer.

The powers given by Regulation 22 include the right to question and detain passengers, both on arrival and on departure (though it is unclear why it should be necessary to examine an EEA national leaving the UK), the duty of passengers to produce documents required and the power to hold documents while passengers are being examined (this will need to be read with reference to those parts of the Regulations covering documents), and the power to order medical examination after entry (subject only to the restrictions that it cannot be required 'as a matter of routine', and not beyond three months from the date of arrival). There is no specific right of appeal against such decisions at this stage, as this is not 'an EEA decision' within the Regulations, or 'an immigration decision' under the 2002 Act. Any challenge would be by way of Judicial Review or an application for a writ of habeas corpus.

More significantly, an Immigration Officer can exercise the broad Schedule 2 power to detain anyone subject to examination under these provisions, and has the power of arrest for this purpose. The concomitant power to grant temporary admission, and the bail arrangements for port detainees are also applied. Anyone detained or released under these powers is 'deemed not to have been admitted' to the U.K. Amongst other effects, this preserves the power of arrest throughout the time until 'admission' is confirmed. Breaches of temporary admission or bail conditions would not seem to amount to offences, because the relevant parts of the Immigration Acts (principally s 24 IA 1971) are not extended. They can nonetheless give rise to the power of arrest, exercisable independently of the criminal sanction.

Regulation 23 (Persons refused admission) is applied to anyone refused admission, under either of two earlier provisions, where a passenger has been refused admission (under Regulation 19) or has been found on arrival not to be eligible (under Regulation 11). In these cases an Immigration Officer is given the powers to set removal directions, and issue instructions to carriers. These powers give rise again to the power to detain, with the discretion to give temporary admission or the right to seek bail

*Administrative practice*

Statistics relating to the number of EEA nationals admitted to the UK in 2006 are not yet available from the UK authorities.

UK immigration continues to exercise "light control" on nationals of other Member States, to the UK. The EDIs (European Directorates Instructions) referred to in this report do not deal specifically with the question of entry. Although not specifically covered in this report, it is worth noting that there is anecdotal evidence that some Bulgarian and Romanian nationals who were in the United Kingdom prior to 1 January 2007 and who have Home Office files relating to their immigration history have been questioned on entry and their entry delayed. Refusals on grounds of public policy, public security and public health must be cleared by a specialist unit within the Home Office.

## *B. Residence*

*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
- Nationality, Immigration and Asylum Act 2002
- Immigration (European Economic Area (Amendment) Regulations 2003
- Accession (Immigration and Worker Registration) Regulations 2004
- Immigration (European Economic Area) and Accession (Amendment) Regulations 2004
- Immigration (European Economic Area) Regulations 2006

Regulation 13 provides an entitlement to reside for 3 months subject to two provisos: (a) public policy, security or health; (b) the EU national and family must not become an unreasonable burden on the social assistance system in which case the right is extinguished. Regulation 14 extends the three month residence period indefinitely as long as the person remains a "qualified" person" under Regulation 6 or a family member. The public policy, security and health proviso applies. "Qualified person" includes job seekers (undefined), workers, self employed, self sufficient and students.

Workers and self employed persons are defined by reference to the Treaty (eg "within the meaning of Article 39…"). Service provider and recipients are not defined at all. By contrast, workers and self-employed persons who have ceased activity are carefully defined. This group retain rights under the Regulations after ceasing economic activity and the Regulations reflect article 17 of the Directive. Those no longer working continue to be treated as workers if they were employed for more than 12 months before becoming unemployed or have been unemployed for no more than 6 months or can show that they are seeking employment and have a genuine chance of being engaged (the *Antonissen* test). The requirement for 12 months prior employment appears to have no basis in Community law. The requirement for 12 months seems to be based on Article 7§3b of the Directive though the requirement that it be prior is problematic.

Self sufficient persons are carefully defined as those with sufficient resources not to become a burden on the UK social assistance scheme and with comprehensive sickness insurance.

Students are defined as those enrolled in public or private establishments whose "principal purpose" is following a course of study. It is questionable whether this is in line with the Directive or Community law. Students have to have sufficient resources and sickness insurance too, but they only need to assure the Secretary of State by a declaration that they have such resources.

The Regulations define continuity of residence for the purpose of accruing rights of extended residence and permanent residence: The general rules is six months absence out of every 12 does not break residence. 12 months absence is permitted for an important reason such as maternity, illness, vocational training or overseas posting and military service of any length (in an EEA state) does not break continuous residence.

*Processing of EEA residence certificates*

The issuing of residence certificates to EEA nationals is governed by Part 3 of the Immigration (European Economic Area) Regulations 2006, regulations 16 to 18, which provide for the issue of residence documentation, which can be used as proof of the rights of residence provided for in the Regulations.

Regulation 16 provides that the UK authorities *must* issue a registration certificate *immediately* on application. The EU citizen must produce (a) a valid passport or identity card; (b) proof he or she is a qualified person. For workers this means a confirmation from the em-

ployer or certificate of employment. There is no clarification on what the others have to produce.

In recognition of the requirement for residence certificates to be issued "immediately", EEA nationals may now apply for a residence certificate via the Home Office's Public Enquiry Office (PEO). The PEO enables applicants to submit straightforward applications for these to be processed on a same-day basis. However, it should be noted that there continue to be significant discriminatory obstacles in access to the PEO, the most important of which is that EEA nationals may not use an authorised representative to submit an application on their behalf. Thus, while third country nationals can have their immigration applications processed without the need to attend in person, EEA nationals must take time off work, studies or business to apply for their residence certificate.

Non-EEA family members remain excluded from applying via the PEO. As we have stated in previous reports, this is clearly discriminatory as 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.

On the whole, residence certificates are not issued "immediately". Although the EDIs clearly state that the fact that a non-EEA family member is also applying for a residence card should not delay the issue of a residence certificate, in practice it does. On current evidence, residence certificates take around two months to be issued.

The application procedure remains flexible, with applicants being encouraged to submit their applications using the relevant Home Office application forms, which are not mandatory. New forms for EEA applicants and their family members were issued by the Home Office in May 2006 to reflect the major changes. Applicants are able to submit applications without their passports to enable them to travel while the application is pending. It is possible to fax the Home Office with requests for priority, for example, where a person needs to travel. However, there are no published fax numbers for the European casework directorate available to the public.

There are no published statistics in respect of residence permits issued to EEA nationals United Kingdom in 2006. The Home Office have indicated that these will be produced in a revised format in the future and will be contained in the main statistics on immigration produced by the Home Office.

Resident certificates are not required by EEA nationals unless they wish to apply for their family members to obtain residence cards.

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 are in stark contrast to the wording of that provision which states "Union citizens who have resided le-

gally for a continuous period of five years in the host Member State shall have the right of permanent residence there". The UK has inserted into this requirement a restrictive requirement for EU nationals to have resided in the UK as EU nationals for the entire five year period, a condition not contained in the Directive. This has a significant impact on those who became citizens of the Union on 1 May 2004 and 1 January 2007 in particular. The EDIs Chapter 7, paragraph two, confirms:

> "The time spent in the UK prior to 1 May 2004 does not count towards permanent residence... This would also include people in self employment under the EC Association Agreement or those who were granted leave to enter or remain under the Immigration Rules in categories leading to settlement."

In a letter dated 18 January from E Crabit of DG Justice Freedom and Security at the European Commission, the Commission confirmed that:

> "The Directive only requires for the acquisition of permanent residence that Union citizens have resided legally for a continuous period of five years in the host Member State. Since the Directive does not provide for the condition that the five year residence has to be "on the basis of the Directive" this notion should cover also those persons who have recently become Union citizens and have legally resided in the UK for five years. Otherwise such person would have to wait for five years from the acquisition of citizenship of the Union which would be an additional condition not foreseen in the text."

It is clear that the UK's approach to permanent residence is fundamentally flawed and that this will have a major impact on the ability of accession national from A8 and A2 countries to obtain permanent residence.

*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.

### *C.Departure*

*Texts in force*

- Immigration Act 1971
- Immigration Act 1988
- Immigration and Asylum Act 1999
- Immigration (European Economic Area) Regulations 2000
- Nationality Immigration and Asylum Act 2002
- The Immigration (Swiss free movement of persons) Number 3 Regulations 2003
- Immigration (European Economic Area) (Amendment) Regulations 2006

The Immigration (European Economic Area) Regulations 2006 Part 4 (regulations 19 to 21) provides for the exclusion and removal of EEA nationals and their family members on public policy, public security and public health grounds.

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.

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.

***UK Borders Bill***

While not specifically covered in this report, The UK Borders Bill was published on 25 January 2007 contains important new provisions on the deportation of foreign nationals including citizens of the Union.

Clause 28 of the Bill contains provisions on automatic deportation of foreign criminals, who are defined as those who
- are not British citizens; and
- have been convicted of an offence and sentenced to period of imprisonment of at least 12 months; or
- have been sentenced to any period of imprisonment for an offence specified as serious under 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41); and
- the deportation of a foreign criminal is conducive to the public good.

If these conditions are met, the Secretary of State must make a deportation order in respect of a foreign criminal unless an exception applies under Clause 29. Exception 3 is where the "removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the Community treaties."

It appears that the UK government is therefore introducing a presumption of deportation which 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 Directorates Instructions (EDIs). The guidance on public security and public health appears to remain uncontroversial. However, your rapporteurs continue to have reservations with regard to the Home Office's interpretation of case C- 30/77 *Bouchereau* and in particular, the Home Office's prescriptive approach to the definition of serious offences (by reference to periods of custodial sentences) in particular to listing a number of offences which would justify deportation without the need to show personal conduct indicating a specific risk of new and serious prejudice to the requirements of public policy conduct as evidence of propensity to offend.

In the spring of 2006 a political crisis was ignited by the emergence of data that many "foreign nationals" who has been sentenced to terms of imprisonment in the UK had been released back into the community following completion of their sentences rather than being deported. Guidance in May to IND and prisons identified interim criteria, so that all non-EEA nationals sentenced to 12 months' imprisonment or more, either in one sentence or in two or three sentences over five years; and all EEA nationals sentenced to 24 months' or more, should be considered for deportation. In July 2006 the Home Secretary announced a change to the Immigration Rules with immediate effect to confirm the presumption that all such prisoners should be deported. The guidance sets out also that only rarely will factors other than international obligations weigh against deportation. Many EEA nationals were subsequently made subject of decisions to deport following convictions for relatively minor offences and without regard to their personal conduct. A person may appeal to the Asylum and Immigration Tribunal under the Immigration (EEA) Regulations 2006. Your rapporteurs are aware that many of those appeals were successful for the EEA nationals. As a result the Home Secretary announced that as a result of some many successful appeals the presumption in favour of deportation of EEA nationals who had been sentenced to 24 months or more could not effectively be operated.

As the House of Commons Joint Committee on Human Rights stated in its Thirty-Second Report:

> "133. Legally, there is little, if any scope for changing the approach to the deportation of EU and EEA nationals, which is governed by EU law (Council Directive 2004/38/EC) and implementing Regulations (The Immigration (EEA) Regulations 2006), which impose a high threshold on the removal of EU and EEA nationals. Baroness Scotland accepted that there is less scope to change the legislation and indicated that the presumptions planned for the new legislation will focus mainly on non-EEA nationals.[97] In light of this, we are concerned that the Home Secretary may be blaming the courts for something which he is powerless to do anything about because of the provisions of EU law, thereby helping to perpetuate the myth that it is the courts which are responsible for frustrating the Government's wish to deport more foreign nationals. "

*Judicial practice*

In light of the recent entry into force of the transposition measures there is no important judicial practice to report for 2006.

## CHAPTER II. ACCESS TO EMPLOYMENT – CATHERINE BARNARD

*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)
- The European Communities (Recognition of Professional Qualifications) (First General System) Regulations 2005 (SI 2005/18)
- The European Communities (Recognition of Professional Qualifications) (Second General System) Regulations 2002 (S.I. 2002/2934) as amended by the European Communities (Recognition of Professional Qualifications (Second General System) (Amendment) Regulations 2005, S.I. 2005/882 and The European Communities (Recognition of Professional Qualifications) (Second General System) (Amendment) Regulations 2006, SI 2006/3214.

*Draft legislation, circulars, etc.*

http://www.ind.homeoffice.gov.uk/documents/ecis/ contain guidance and information for caseworkers dealing with European applications under the Free Movement of Persons Directive (2004/38/EC)
This chapter addresses four specific aspects of the question about access to employment:
- Equal treatment
- Language requirements
- Mutual recognition of diplomas
- Nationality requirements of captains of ships

The striking feature of these areas of law is that much is achieved by guidance rather than hard law and that there are very few cases brought in any of these particular areas. Evidence about the current position has been obtained by consulting the relevant legal texts and government websites and talking to officials in government departments. We shall consider each issue in turn.

### *Equal treatment in access to employment (e.g. assistance of employment agencies)*

The European casework instructions (http://www.ind.homeoffice.gov.uk/documents/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 requriement, not equal treatment.

http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/your_status/european_citizens.html: The Home Office website provides more general information about EU citizens wishing to work in the UK. It refers individuals to JobCentre Plus, the main government agency responsible for helping individuals to find work (http://www.jobcentreplus.gov.uk/JCP/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. Its website provides details of the rules applicable to working in the UK (http://www.jobcentreplus.gov.uk/JCP/Customers/Workingortrainingineurope/Dev_009861.xml.html).

Under s.14 of the *Race Relations Act (RRA) 1976* employment agencies also cannot discriminate on racial grounds which include, as we shall see, nationality.[1] 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[2] or the terms on which that employment is granted[3] or by refusing or deliberately omitting to offer employment.

### *Language requirement*

There is no statutory requirement to speak English for specific jobs. However, as the JobCentre Plus website points 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). ACAS, the Advisory, Arbitration and Conciliation Service, confirms there is no statutory language requirement for posts.

### *Recognition of diplomas*

In terms of legal implementation, Directive 89/48 is now given effect in the UK through *The European Communities (Recognition of Professional Qualifications) (First General System) Regulations 2005* (SI 2005/18). The 2005 Regulations revoke the European Communities (Recognition of Professional Qualifications) Regulations 1991 and two amending Regulations and consolidate the provisions of the 1991 Regulations which are substantially re-enacted and incorporated. In addition, the 2005 Regulations have included a wider definition of "regulated profession" in the United Kingdom. According to the Explanatory memorandum, the scheme of the Regulations (subject to certain conditions and exceptions) is to impose a duty upon the designated authorities not to refuse, on grounds of inadequate qualifications, an application from a migrant to practise the relevant profession in the United Kingdom if he holds the qualification required by a relevant State to practise the profession in that State (Regulation 5). The Regulations further provide for the designated authorities, in certain cases, to require a migrant applicant to complete an adaptation period or to pass an aptitude test (Regulations 6, 7 and 8) and make provision for a migrant applicant, who has been granted authorisation to practise, to have the right to use the professional title and designatory letters applicable to that profession in the United Kingdom (Regulation 10). An appeals procedure is provided (Regulation 13) for migrant applicants to challenge decisions of the designated authorities made under the Regulations.

The implementation of Directive 92/51 is by *The European Communities (Recognition of Professional Qualifications) (Second General System) Regulations 2002* (S.I. 2002/2934) as amended by the European Communities (Recognition of Professional Qualifications (Second General System) (Amendment) Regulations 2005, S.I. 2005/882 and The European Communities (Recognition of Professional Qualifications) (Second General System) (Amendment) Regulations 2006, SI 2006/3214.

Craftspeople wishing to exercise their trade in the UK can apply to have their experience certificated under the UK Certificate of Experience (CoE) scheme. Individuals can request an application pack from the Department for Education and Skills at application.coe@dfes.gsi.gov.uk. The application pack contains a copy of Directive 1999/42/EC. The Directive lists the amount of experience required in a particular craft or trade to qualify for a CoE. There is an administrative charge of £105 for the issuing of a CoE.

At a practical level, the Department for Education and Skills (DfES) devotes part of its website to 'Europe open for Professions'

1 On nationality, see *BBC Scotland v Souster* [2001] IRLR 150.
2 *Nagarajan v London Regional Transport* [1999] IRLR 572.
3 *Anya v University of Oxford* [2001] IRLR 377.

(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 is also a link to 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/).

The Directives listed on the DfES website are all the old general system Directives (89/48, 92/51 and the sectoral Directives). There is no reference to Directive 2005/36 except in the news section which says that Directive 2005/36/EC was adopted and that Member States have two years until 20 October 2007 to implement in national law the revisions of this Directive.

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.

### *Nationality condition for captains of ships*

According to the Royal Navy's website (http://www.royalnavy.mod.uk/server/show/ConWebDoc.7264/changeNav/3533) 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.

*Nationality Requirements for Career Options*

**Officer**

| Specialisation or Branch of Choice | Full British | British/ Dual | Common-wealth/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 | Common- wealth/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.

In respect of the Merchant navy, cadetships are awarded to hose who are nationals of a Member State of the European Union who are ordinarily resident in the UK: http://www.clydemarinetraining.com/content/training/cadet_reqs.asp. To be a captain within the British merchant navy, you have to have trained under the STCW (Standards of Training, Certification & Watchkeeping), have lived in the UK for a year and be part of the EEA.

Again, it could be argued that the temporal residence requirement is not compatible with EC law. No explanation is offered as to how it could be objectively justified.

*Cases*

*BBC Scotland v Souster* [2001] IRLR 150.
*Nagarajan v London Regional Transport* [1999] IRLR 572.
*Anya v University of Oxford* [2001] IRLR 377.

## CHAPTER III. EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY - ELSPETH GUILD

*Texts in force*

- Race Relations (Amendment) Act 2000
- Nationality, Immigration and Asylum Act 2002
- Race Relations Act 1976 (Amendment) Regulations 2003
- Immigration (Provision of Physical Data) Regulations 2003
- Immigration (Provision of Physical Data) (Amendment) Regulations 2004

- 27 March 2001 Authorisations – asylum workstream;
- 25 October 2001 Authorisation – language analysis;
- 30 May 2003 Authorisation – sector based scheme;
- 12 February 2004 Authorisations examination of passengers and leave before arrival;
- 24 February 2004 Authorisation – extended 21 May 2004 revoked March 2006 – third country cases;
- 27 October 2005 (expired 28 January 2006) – Eritreans;
- 16 January 2006 Authorisation – UK ancestry from Zimbabwe;
- 2 March 2006 Authorisation – third country cases.

### *Working Conditions, social and tax advantages*

In 2006 the main issues which have arisen for citizens of the Union on equality of treatment have been in respect of the differential treatment of A8 nationals whose access to the labour market has been subject to obtaining a worker registration document. Although these documents are supposed to be issued very rapidly and amended very quickly when a worker changes job, in practice problems do arise. See the chapter on enlargement regarding this issue.

As regards working conditions, we are not aware of any complaints in 2006 that UK labour legislation discriminates directly against workers, nationals of other Member States, other than in respect of A8 nationals.

Problems continue to exist for EU nationals to open bank accounts which may be a necessary adjunct to taking work and is certainly a social advantage. In 2005, according to the British Banking Association (www.bba.org.uk) banks differ according to the documents which they require from individuals. For EU citizens, the BBA advises that a national identity card, residence permit issued by the Home Office and national driving licence should be sufficient to prove identity. But the individual must also prove his or her address in the UK and may be required to prove their previous address either in the UK or abroad. Here the number and variety of documents varies quite substantially. We understand that problems are still occurring.

As regards tax advantages, there has been little coverage in the UK of the comparative situation of EU nationals and British residents. However, the House of Lords applied the ECJ's judgment (*Metallgesellschaft Ltd and Others* (C-397/98)) providing a remedy in respect of tax paid under a mistake of law finding that such claims are subject to the same liability period for claims against private parties.[4] According to the Adjudicator responsible for complaints against the UK tax authorities, no complaints have come to their attention over the 2006 period regarding discriminatory treatment. The office advised, however, that they would not be aware of complaints which had been resolved directly between the tax payer and the authorities.[5]

4 *Deutsche Morgan Grenfell (DMG) v HM Commissioners of Inland Revenue* [2006] UKHL 49.
5 Email response under the Freedom of Information Act, 22 February 2007.

As regards social advantages, two cases came before the UK Social Security and Child Support Commissioners[6] in 2006 which are relevant here (these are also considered in chapter VI) which were followed by two later cases in October. The two were decided on the same date (12 May 2006) and deal with similar sets of issues. In one case a Swedish national (born in Somalia according to the judgment) in the second a Norwegian national (born in Somalia according to the judgment). They arrived in the UK in March and April 2004 respectively. The Swedish national came to join family members in the UK. She had the intention to remain permanently in the UK but she is not a worker according to the Tribunal. She claims income support (and also housing and Council tax benefit) for herself and her three children. The applications were refused on the basis that she had no right to reside in the UK and under the UK regulations is categorised as "a person from abroad" thus eligible for an amount of income support of nil. She appealed against the refusals. The decision only relates to the application for income support as the other appeals are still outstanding.

In the second case, the Norwegian national (born on 5 December 1936) applied for a pension credit. This credit was also refused on the basis that he had no right to resident in the UK, is not habitually resident in the UK and fails to meet all the conditions of entitlement to the benefit. He appealed against the decision.

In the first case, the Tribunal considered the national legislation which excluded from the text of 'a person from abroad' those EU citizens protected under Regs 1612/68, 1251/70, 68/360 or 73/148. From 1 May 2004, no person shall be treated as habitually resident if he or she does not have a right to reside in the UK. The Tribunal considered it was required to decide whether the applicant was habitually resident in the UK and whether the applicant had a right to reside. The applicant argued a right of residence under Article 18 EC. The Tribunal had regard to Directive 90/364 as implemented in the UK and the UK Government's policy to require EU nationals to be tax payers before receiving social benefits (quoted extensively in the decision). The attention of the Tribunal was also drawn to the ECJ's decision in *Trojiani*. Nonetheless, the Tribunal held that:

(i) Regulation 21(3G) of the Income Support (General) Regulations 1987 does not merely qualify regulation 21(3)(a)-(d) in the definition of "persons from abroad" but is general in its application;
(ii) (a) The claimant did not have a right under United Kingdom domestic law to reside in the United Kingdom, (b) nor did she have a right under European law to reside in the United Kingdom as any such right was restricted by European law and, in particular, EEC Directive 90/364.
(iii) Regulation 21(3G) is discriminatory under Article 12 of the Treaty of Rome;
(iv) However, any discrimination is objectively justified and is proportionate.[7]

In the second case, the Norwegian national came to find his daughter who had come a few days previously to the UK. Neither work or have resources in the UK. The Tribunal considered in depth the application of the EEA Agreement to the situation of the applicant. But it found that the non-discrimination provision of the Agreement has no relevance for the situation of the applicant. Even if it did, the Tribunal held that it would have rejected his application on the same grounds as the previous case.[8]

Both decisions indicate the unwillingness of the UK authorities to extend social benefits to EU and EEA citizens who have not exercised free movement rights as workers. The emphasis of the Tribunal on the Government's policy statements regarding the duty to contribute as taxpayers before seeking benefits gives a fairly clear indication of the motivation of the decisions.

### *Specific issue: frontier workers*

When the Commission's Communication on free movement of workers (COM (02)694) was cleared from scrutiny in the UK Parliament in 2003 it noted the Minister's statement:

6 An independent tribunal.
7 The link to the judgment is included in the annex to this chapter.
8 The link to the judgment is included in the annex to this chapter.

> "There are no policy implications for the UK in this document. The UK makes every effort to comply fully with all the Community law on free movement of workers and their families and there are no points of dispute with matters covered in the document. The document does not indicate whether the Commission receives more enquiries and complaints relating to some Member States than to others. It does not suggest that migrant workers in the UK experience particular difficulty in exercising their rights related to free movement."

The House of Commons Scrutiny Committee considered that there was a less rosy picture than presented by the Minister but cleared the document http://www.publications.parliament.uk/pa/ cm200203/cmselect/cmeuleg/63-x/6310.htm.

The main UK frontier which gives rise to questions under this heading is between Northern Ireland and the Republic of Ireland. According to colleagues in the Republic we have been advised of the following kinds of problems: issues regarding Social Insurance Payments (PRSI), access to health services, carers benefit, tax liabilities and tax relief on pension payments. A case in relation to Carers Benefit, for example, concerned a woman who could not claim the benefit in the Republic of Ireland because she did not have the relevant PRSI contributions and could not claim a UK carer's benefit because the person for whom she was caring did not reside in the UK. The accountancy firm, Price Waterhouse Coopers carried out a study on obstacles to mobility between the two states in Ireland in November 2001. The problems identified in that study are still current according to our sources.[9]

The situation in *Gibraltar*, has however, moved on somewhat.[10] As the UK is responsible for Gibraltar as regards the EU, these developments are relevant here. In September 2006 Trilateral Dialogue between British, Spanish and Gibraltar Governments took place which considered a range of issues which have obstructed relations among the parties. At the Forum two issues of importance for this report were considered (1) the pensions of Spanish workers formally employed in Gibraltar and who left when the border was closed in 1969; (2) border delays and administrative issues. On these issues the points of agreement were that the UK would offer all pre 1969 Spanish pensioners a lump sum on the basis of their length of contribution as an inducement to withdraw from the Gibraltar pension scheme (to be paid by April 2007 – the Spanish authorities will advance the payments and then be reimbursed by the UK). Those who do not accept the offer with receive a Gibraltar pension which will be unfrozen and updated by the local Government. There will be improved fluidity at the border with the red and green channels at the border being doubled.

*Recent Legal Literature*

Anderson, B., Martin Ruhs, Sarah Spencer, Ben Rogaly, 2006, *Fair Enough? Central and East European migrants in low wage employment in the UK*, Report written for the Joseph Rowntree Foundation, published as a COMPAS Report

M. Cousey, *Annual Report for 2005-6 of the Independent Race Monitor*

E. Markova and B. Reilly, *Bulgarian Migrant Remittances and legal Status: Some Micro-level Evidence from Madrid*, Sussex Centre for Migration Research Working Paper, 2006.

V. Miller, *Gibraltar: diplomatic and constitutional developments* House of Commons Research Paper 06/48, 11 october 2006

C. Parsons, *Quantifying the trade-migration nexus of the enlarged EU: A Comedy of Errors or Much Ado about Nothing?*, Sussex Centre for Migration Research Working Paper, 2005.

M. Thomson, *Migrants on the edge of Europe – Perspectives from Malta, Cyprus and Slovenia*, Sussex Centre for Migration Research Working Paper, 2006.

9 Price Waterhouse Coopers, *Obstacles to Mobility,* November 2001, North/South Ministerial Conference. Hikkla Becker, solicitor, Immigrant Council of Ireland.

10 See House of Commons research Paper 06/48, *Gibraltar: Diplomatic and constitutional developments* ,V Miller, 11 October 2006; http://www.parliament.uk/commons/lib/research/rp2006/rp06-048.pdf.

K. Woodfield et al, *Exploring the decision making of Immigration Officers: a research study examining non-EEA passenger stops and refusals at UK ports* Home Office Online Report 01/07.

*Annex – Chapter III*

http://www.bailii.org/uk/cases/UKSSCSC/2006/CIS_3573_2005.html
http://www.bailii.org/uk/cases/UKSSCSC/2006/CIS_3182_2005.html

## CHAPTER IV. EMPLOYMENT IN THE PUBLIC SECTOR - BERNARD RYAN

### *Access to employment in the civil service*

EC law requires equal access to employment for EEA nationals, subject to the Article 39(4) EC exemption for the 'public service'. The concept of 'public service' has been give a restrictive interpretation by the Court of Justice, to exclude only posts which involve both "direct of 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".[11] A European Commission Communication of 5 January 1988 sought to apply the ECJ case-law in this area.[12] 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. Previously, British, other Commonwealth and Irish citizens were eligible for all civil service positions, while other persons (classed as 'aliens') were not. As a result of developments at the EU level, the UK rules on eligibility were amended in 1991 in order to permit the employment of EU nationals and qualifying family members of such persons.[13] Pursuant to EU law, the benefit of this rule on eligibility now also applies to EEA and Swiss nationals and their family members.[14]

Then, from 1 June 1996, a rule was introduced within the civil service to limit civil service posts requiring 'special allegiance to the State' to British citizens alone.[15] For this purpose, the dividing-line between senior and other posts is given by the concept of 'public service' in Article 39(4) EC.[16] Guidance as to the application of the concept of "special allegiance" is contained in the *Civil Service Nationality Rules*, published by the Cabinet Office.[17] These *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".)
- Judicial appointments administration

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

12 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.

13 Aliens Employment Act 1955, section 1, as amended by the European Communities (Employment in the Civil Service) Order SI 1991 No 1221. The 1955 Act is to be interpreted in the light of the European Economic Area Act 1993.

14 See Cabinet Office, *Civil Service Nationality Rules* (1 May 2004), Annex A. This is available from www.civilservice.gov.uk (accessed 25 February 2007).

15 *Ibid*, para 8.

16 Statement by Roger Freeman (civil service minister), *House of Commons Debates*, 1 March 1996, col 751.

17 See Cabinet Office, *Civil Service Nationality Rules* (1 May 2004), Annex C.

- 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 *Civil Service Nationality Rules* also contain 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)."

Two weaknesses of current arrangements may be highlighted. The first is that uncertainty remains as to the classification of particular posts. This is the consequence of 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.

A second weakness 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 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.

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.

### *Recognition of qualifications and experience*

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.[18] Where there are differences between qualifications as to duration and content, there is an obligation to make an individual assessment of an applicant's relevant professional experience which the individual has obtained.[19] In any event, recruitment processes must permit an applicant's professional qualifications and experience obtained in other Member States to be taken into account.[20]

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18 See Directive 89/ 48 on a general system for the recognition of higher-education diplomas, OJ 1989 L 19/16, which applies to qualifications which require a minimum of three years' study. Other qualifications are covered by Directive 92/51 (OJ 1992 L 209/25) and Directive 1999/42 (OJ 1999 L 201/77).

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

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

There is room for disagreement as to the extent to which the above principles apply to public sector recruitment. 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.

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.

### *Equal treatment in conditions of service*

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.[21] The requirement of equal treatment applies to both the exempt and the non-exempt public service.[22]

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).

*Texts in force*

- Civil Service Nationality Rules
- Race Relations Act 1976

21 Case C-281/98, *Angonese* [2000] ECR I-4139.
22 Case 152/73, *Sotgiu* [1974] ECR 153.

## CHAPTER V. MEMBERS OF THE FAMILY - ALISON HUNTER

*Texts in force*

- Immigration Act 1971
- Immigration 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*

One of the significant and most controversial changes in the Immigration (European Economic Area) Regulations 2006 is the distinction regarding family members of an EEA migrant principal between non-EEA nationals who are lawfully resident in a member state and non-EEA nationals living in the European Union.

### *Family members' residence rights*

If the application by third country national family members to join a UK based EEA national principal is being made from another member state, the non-EEA national family member needs to demonstrate lawful residence in the member state from which they are making the application. It seems that the United Kingdom will require that the applicant has leave to enter or remain in the United Kingdom before making an application from within the country. The Guidance in relation to family members in other EEA states, says "lawful residence... would normally be in the form of either the local equivalent of leave to enter/remain as a family member of a national of the member state in which they are residing or an EEA residence card if he/she is the family member of an EEA national residing in a member state of which he/she is not a national" (chapter 2- 2.2 European Casework Instructions). However, it appears that the United Kingdom would also accept applications from people who are within another member state legally in any immigration capacity, for example, as visitors or tourists.

One of the most controversial aspects of the 2006 Regulations is that if an application is being made by a person resident outside the European Union, the family member, unlike before, would be expected to meet the requirements in the Immigration Rules "other than those relating to entry clearance" to come to the United Kingdom as the family member of the EEA national. The EEA national is to be considered as present and settled in the United Kingdom for this application.

This provision has given rise to a large number of problematic issues. Entry clearance provisions under the Immigration Rules have strict maintenance and accommodation provisions for dependants. Previously, as long as the EEA national could show that they were exercising a treaty right, family members were to be allowed to enter the United Kingdom without having to show that they had adequate accommodation and maintenance.

Spouses under the Immigration Rules (para 281) have to show that they have an adequate amount of money to be able to live in the United Kingdom without recourse to public funds and have suitable accommodation.

The situation is even more difficult when it comes to children. There are no provisions for children in UK immigration law for children over 18 to come to the United Kingdom which is in complete contrast to European Union law which allows children under the age of 21 and other dependent children to join an EEA national parent exercising treaty rights.

Another area of concern in relation to children is where they are coming to join one parent. UK immigration law has a so-called "sole responsibility" test. This means that the parent whom the child is joining in the United Kingdom has to have "sole responsibility" for the child. Facts taken into account are the period the parent in the United Kingdom has been separated from the child, the previous arrangements for the care of the child, who has had day-to-day control of the child, who supports the child financially and who takes important decisions about the child's upbringing and the degree of contact between the parent having sole responsibility for the child and the role the other parent and relatives outside the UK have played in the child's upbringing. It is an extremely high test to satisfy. The alternative to showing sole responsibility is to show that there are "serious and compelling family or other considerations which make the children's exclusion undesirable and suitable arrangements have been made for the child's care" in the United Kingdom.

There is also some concern in relation to adopted children. To be allowed into the United Kingdom, the UK would have to recognise the adoption as valid. If it does, the child could be recognised as a family member. If the UK does not recognise the adoption, the application would need to be considered under the Immigration Rules and practice would normally mean that the child would need to be re-adopted in the United Kingdom. One of the problems that arises here is that in the United Kingdom, children over the age of 18 cannot be adopted. (European Casework Instructions chapter 2 – 2.3.1 and chapter 5 – 1.5).

Other dependent relatives such as parents or grandparents would also have to fit within the rules. Parents and grandparents aged 65 or over have to show that they are wholly or mainly financially dependent on the EEA national who is in the United Kingdom. In addition, they must have no other close relatives in their own country and they must be accommodated together with any dependants in accommodation which the EEA national owns or occupies exclusively without recourse to public funds. They must also be able to maintain themselves in the United Kingdom without recourse to public funds (Immigration Rule 317). If they are under the age of 65 they will need to show that there are the most exceptional compassionate circumstances and that they are wholly or mainly financially dependent on their relative. They would also need to show that they have no other close relatives in their own country to whom they could turn for financial support and that they will be accommodated in accommodation which their relative owns or occupies exclusively without recourse to public funds and that they can be maintained in the United Kingdom without recourse to public funds. (Immigration Rule 317).

### *Extended family members*

Regulation 8 of the 2006 Regulations covers extended family members but also direct family members (for example, parents, or children over the age of 21 who fail to provide evidence of financial dependency (chapter 5 – 1.4 European Casework Instructions). Again, the distinction is drawn between whether an applicant has resided in a member state beforehand as the dependant of the EEA national. If a non-EEA extended family member can show that they have lived under the same roof as the European Economic Area sponsor in another EEA state (for at least six months) before coming to the United Kingdom, dependency does not need to be shown.

If this is not the case, they will need to meet the requirements of the Immigration Rules. Again, Immigration Rule 317 would be most applicable. The European Casework Instructions state that "...the caseworker may issue a residence card if in all the circumstances it appears *appropriate* to do so". It goes on to state:

> "When deciding whether it is *appropriate* to issue a residence card, caseworkers will need to assess whether refusing the family member would *deter* the EEA national from exercising his/her Treaty Rights or would create an effective obstacle to exercise of Treaty Rights. Each case must be decided on an individual basis but an example where it might be appropriate to issue a residence card would be if the family member were very elderly or incapacitated. In assessing such cases, it would be important to consider whether there were any relatives to care for him/her in his/her home country."

It should be noted that throughout, the extended family member regime is considered by the Home Office to be discretionary.

In relation to durable relationships, the United Kingdom has interpreted this to mean that a couple need to have been cohabiting for two years or more before they will be considered to have a durable relationship (Casework Instructions chapter 5 – 4.2). This clearly goes against the wording of the directive which states that cases must be looked at on a case-by-case basis. It remains to be seen whether the United Kingdom, despite the wording in the regulation, will in fact apply this more broadly.

### *Marriage/civil partnership*

*Marriages of convenience*

Immigration (European Economic Area) Regulations 2006 specifically exclude from the meaning of spouse/civil partner anybody who has entered into a marriage of convenience or a civil partnership of convenience. However, as seen below, perceived abuse of marrying European Union nationals has largely been curtailed by legislation brought in by the Government.

*Certificates of approval*

Since 1 February 2005, people subject to immigration control who want to get married or enter civil partnership in the United Kingdom need to do so at a specially designated register office of which there are 76 throughout England and Wales and includes all the register offices in Scotland and Northern Ireland. Those subject to immigration control are unable 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. Though 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.

EEA nationals and Swiss nationals are exempt from having to obtain a certificate of approval as they are not subject to immigration control. However, a third country national wanting to marry an EEA national would have to seek approval. If the third country national does not have leave in the United Kingdom or the total leave granted to the individual was under six months or he/she has less than three months remaining of their current leave, he/she would not be able to marry the EEA national in the United Kingdom.

*Civil Partnership Act*

The Civil Partnership Act came into force in December 2005 and couples have, since then, been able to register their relationship with similar obligations and rights to those of marriage. Immigration law has taken this into account and EEA nationals are able to bring their partners to the United Kingdom to undergo a civil partnership ceremony or, if the partner is already in the United Kingdom, apply for a certificate as above.

### *Retained right of residence*

The case of *Baumbast* has been transposed into the 2006 Regulations, so that a non-EEA national parent of a child whose EEA national spouse has ceased to be a qualified person can qualify to remain in the United Kingdom, if the child is in education. However, in practice, there have been difficulties on the divorce of parents where the EEA national has remained resident in the United Kingdom and the non-EEA national has not had the means of remain-

ing. The Uk authorities prohibit the on- EEA national from working where the only ground of residence is the right of an EEA national child to reside. The other difficult situation arises where the EEA national is out of touch with the non-EEA national family member. Although the strict reading of *Baumbast* has been transposed, in similar situations where principles are arguably parallel, the Home Office is apparently taking a strict line and not allowing non EEA national parents to stay.

### *Administrative Practice*

*Family permit*

The situation in relation to EEA family permits issued at embassies and consulates appears to have improved. It seems that in most cases, these applications are being given priority and dealt with swiftly. It also appears that there is an understanding that no fee should be charged. Family permits are granted for six months giving the applicant this window of space to travel to the United Kingdom. Swiss nationals benefit from the same rules as other EEA nationals. If an EEA national travels to the United Kingdom without an EEA family permit, the immigration officer must give the non-EEA national reasonable opportunity to provide via other means proof that he/she is a family member of an EEA national with the right to accompany that national or join him/her in the United Kingdom. This has been transposed into paragraph 11 of the 2006 Regulations.

*Residence cards*

By contrast, the Home Office has been taking a significant amount of time to deal with residence cards. It is true to say that certificates of application are sent out quickly from the Home Office stating that the person who has made an application can work. The fact that Community law requires the Home Office to decide applications for residence cards within six months of the date of receipt of the application is again mentioned in their guidance at two points. Chapter 5 – 1.9 of the European Casework Instructions, it states that: "Every effort should be made to do so, particularly were an applicant draws our attention to an alleged breach of this requirement." In chapter 2 – 3.1 of the same document however the guidance has been improved and states that applications must be dealt with within six months. It goes on to say: "It is vital that this requirement is adhered to".

### *Access to work*

For the EEA family members of migrant citizens of the Union there are no obstacles to the right to work except for the family members of 2007 Member States where the family members of the self employed are now subject to a restriction on employment while they were under no restriction to take employment before 1 January 2007 (see enlargement). For the third country national family members of migrant citizens of the Union two issues arise:

1) the right to work immediately before the issue of a residence card – while in 2005 there were substantial administrative problems relating to the delay in issuing residence documents and the lack of clear guidance to employers that the family members are entitled to commence work, these problems have now been resolved and the letter confirming receipt of the demand for a residence card indicates that the individual is entitled to take employment;
2) the third country national parents of Union citizen children where the parents' residence depends on the child's exercise of his or her citizenship rights are prohibited from taking employment. This is causing substantial problems and hardship.

### *Access to education*

The UK is the state against which the decision in *Bidar* was decided. On higher education fees, there are differential fees applicable to all students depending on whether they have lived in the EEA during the pervious three years or not. If they have not they pay overseas student fees, if they have they pay the much lower home student fees. For Bulgarian and Romanian nationals who begin a course of study on or after 1 January 2007, and have lived in the European Economic Area (including Bulgaria and Romania) or Switzerland for three years before the first day of the first academic year of the course and meet any other requirements of the fees regulations, they will be treated as a 'home' fee payers. From September 2007 the children of Turkish workers will (finally) also be included as home students regarding fees. Also included for the lowers fees are an EU national who has been ordinarily resident in the EEA, Switzerland and/or the overseas territories for three years before your course begins. The overseas territories are: Anguilla; Aruba; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Faroe Islands; French Polynesia; French Southern and Antarctic Territories; Mayotte; Greenland; Montserrat; Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius and Sint Maarten); Pitcairn, Henderson, Ducie and Oeno Islands; South Georgia and the South Sandwich Islands; St Helena and Dependencies (Ascension Island and Tristan de Cunha); St Pierre et Miquelon; the Territory of New Caledonia and Dependencies; Turks and Caicos Islands and Wallis and Futuna.

Student Support is provided by the Department for Education and Skills in England. Student Support is only available for'designated course', namely:

- undergraduate degree
- Higher National Diploma (HND)
- Higher National Certificate (HNC)
- Diploma of Higher Education
- teacher training course.

Student Support is composed of:

- a loan for tuition fees
- a loan for living costs
- certain supplementary grants for specific categories, for example disabled students
- a non-repayable maintenance grant of up to £2700 per year for new full-time students from households with a low income (figures are for the 2006-07 academic year).

The student must be both settled in national law and ordinarily resident in national law for the preceding three years at the beginning of the course and the main purpose for residence in the UK and Islands must not have been to receive full time education during any part of the three-year period. If during any part of the three year period, the main purpose for residence was to receive full time education the student must have been 'ordinarily resident' in the UK or elsewhere in the EEA and/or Switzerland immediately prior to the 3-year period of 'ordinary residence' in the UK and Islands. It does not matter if the student was in the EEA and/or Switzerland mainly in order to receive full-time education during this earlier period.

A student will also be entitled to Student Support if he or she has the right to permanent residence in the UK, was ordinarily resident in England at the start of the course and had been 'ordinarily resident' in the UK for three years before the 'first day of the first academic year' of the course. Further, if the three-year residence in the UK and Islands was at any time mainly for the purpose of receiving full time education the student must have been 'ordinarily resident' in the UK or elsewhere in the EEA and/or Switzerland immediately prior to the three-year period of 'ordinary residence' in the UK and Islands.[23]

23 Many thanks to UKOCSA for its excellent briefing on the new student support rules in the UK which cane be found at http://www.ukcosa.org.uk/pages/sseng.htm#intro.

## CHAPTER VI. RELEVANCE/INFLUENCE/FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGMENTS - HELEN TONER

### *Follow-up on benefits cases, Collins, Trojani, Ioannidis*

The Court of Appeal considered the *Collins* case further in the Court of Appeal, in April 2006. There have also been a number of cases considering the implications of the addition of the requirement of 'lawful residence' in 2004, and the definition of 'lawful residence' has also been amended in the light of the implementation of Directive 2004/38 through the Immigration (European Economic Area) Regulations 2006. We consider each of these points in turn.

### *Collins and habitual residence: Judgment in the Court of Appeal*

This was an appeal against the decision of the Social Security Commissioner in the *Collins* case. The Commissioner's decision of March 2005[24] was appealed and the appeal heard in the Court of Appeal, which considered further the significance of the Judgment of the ECJ. The Court of Appeal held[25] – (1) that the requirement for a genuine link to the employment market of the Member State concerned was additional to and separate from the requirement that the applicant be genuinely seeking work in the Member State, and (2) that in fact the requirement of 'habitual residence' in s 85(4) of the Jobseekers Allowance Regulations was both legitimate and justified in itself and compliant with Community law, and that (contrary to the 2005 decision of the Commissioner), no additional requirement whereby an applicant could seek to satisfy the test of a genuine link with the employment market of the UK by some other means was necessary.

Other cases have arisen applying this test – for example see [2007] NISSCSC C3_05_06 involving the claim of a UK national who had returned from a number of years living in Germany, and although not in the context of European Community law, *Bhakta* [2006] EWCA Civ 65.

*Advance applications for 'habitual residence'*

*Bhakta* also clarified the practice of making 'advance' determinations. This works by a judge giving a ruling not that certain circumstances will prevail at some future date, but that on the basis of present circumstances and intentions, and these if circumstances continue and no unexpected eventuality intervenes, the habitual residence test will be satisfied at a future date. In other words, even if the judge is not satisfied that the claimant is habitually resident at the date of application, she may make an order to the effect that given the continuation of present circumstances, the claimant will be habitually resident at a later date. This is intended to remove the necessity for repeat applications and uncertainty about when habitual residence might be established if a first application fails simply because it is premature and the only outstanding issue is the period of time necessary for the applicant to demonstrate habitual residence. The procedure is provided for in Section 13 of the Claims and Payments Regulations. Proposals have been put forward to bar persons newly arrived in the UK from abroad from making such advance claims following the *Bahkta* case,[26] and the statutory Social Security Advisory Committee has been asked to report on these plans, but we understand that no final decision has yet been made as to whether or not to bring these draft Regulations into force and if so in what form, whether unaltered or amended in some way.

24 [2005] UKSSCSC CJSA_4065_1999.

25 *Collins v Secretary of State for Work and Pensions* [2006] EWCA Civ 376 [2006] 1 W.L.R. 2391 [2006] Eu. L.R. 981 [2006] I.C.R. 1033.

26 Social Security Advisory Committee Consultation on the Draft of the Social Security, Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) (No. xx) Regulations 2006.

The SSAC report will not be made public until a decision is made regarding the laying of Regulations before Parliament.

*The 'lawful residence' requirement*

A series of judgments of Social Security Commissioners were delivered on 12th May 2006, concerning the test (new since 2004) that, in order to qualify for certain non-contributory benefits including JSA (jobseekers allowance) an individual must have a 'right to reside' in the UK as well as being habitually resident in fact.[27] Again, we have reported on the introduction of this test in the last two reports. In particular, this means that those EU Citizens who are neither workers nor in possession or receipt of funds from other sources to qualify as self-sufficient will be excluded from receipt of these benefits. This was intended to ensure that UK benefits were not granted to newly arrived EU Citizens in circumstances where this was not required by Community law simply due to the absence of proper provision in UK law to enforce the proper and lawful limits of entitlements under Community law. Some confusion arises out of the difficulty of removal of such individuals against their will as, being EU Citizens, there is an immediate right of re-entry (absent public policy reasons) which means their presence must be tolerated and enforcing removal may be problematic. One of these judgments makes it clear that this does not however amount to 'lawful residence' for the purposes of these benefits and thus refusal of the specified benefit is perfectly appropriate in such circumstances. Another argument that was raised and rejected was that because of the wording of the Regulations, the 'right to reside' test was only applicable to those who were deemed to be habitually resident not those who had been found to be habitually resident in fact. All of them indicate therefore that an EU Citizen without means or work will not be treated under UK law as eligible for these benefits. Another pair of case from September 2006 raises similar issues and both rely on one of these earlier determinations in May to come to a similar conclusion.[28] It is clear from these cases that the policy behind the habitual residence and right to reside tests is accepted to be legitimate and proportionate response to potential claims on the social assistance resources of the UK, particularly in the situation of those newly arrived in the UK. There appears[29] to be a concession that there might be exceptional circumstances where the proportionality of the exclusion *might* be challenged successfully on the basis that the burden was not unreasonable. The Commissioner in that case suggests that if this were the case the appropriate course of action would not be to question the existence of the habitual residence/right to reside tests, nor perhaps even to dis-apply them, but to find that the individual did in fact have a right to reside. The extent to which this kind of argument might exceptionally succeed, and how it might be affected by the implementation of the 2004 Directive in the 2006 Regulations remains unclear. Your rapporteurs are not at the present time aware that any of these decisions has been appealed further.

*Amendment of the 'right to reside' test in the light of the implementation of Directive 2004/38*

The Social Security (Persons from Abroad) Amendment Regulations 2006 (see also the explanation in Circular HB/CTB A9/2006 from the Department for Work and Pensions) sets out the response to the implementation of the new Directive and the Immigration (European Economic Area) Regulations 2006. These attach no conditions or formalities to the right to reside during the first three months, although the 2006 Regulations explicitly state that the right during the first three months may be terminated if the individual becomes an

27 [2006] UKSSCSC CIS_3573_2005, [2006] UKSSCSC CH_2482_2005, [2006] UKSSCSC CPC_2920_2005, [2006] UKSSCSC CIS_2559_2005. All concerned individuals of Somali origin but EU or EEA Citizenship – one had Norwegian citizenship.

28 [2006] UKSSCSC CIS_3182_2005, dealing with a Dutch national who had worked for a short period of time but had ceased to do so when she gave birth prematurely, and [2006] UKSSCSC CIS_3875_2005 concerning a French national suffering from mental illness and staying in a hostel, in which it was concluded that he was not entitled to reside as self-sufficient nor was he a recipient of services.

29 [2006] UKSSCSC CIS_3182_2005, paragraphs 15-16, 23-24.

unreasonable burden on the social assistance system, Regulation 13(3)b, and the Directive specifically states that Member States need not grant equal access to benefits for those in the first three months of residence or those staying longer in search of work. The concern is that this might undermine the policy by allowing applicants to claim that, during this first three months where the right to reside is more or less unconditional, they had a relevant 'right to reside' in the UK. The intention therefore is to enforce the proviso in the Directive that benefits need not be granted on equal terms during the first three months of residence. The 'right to reside' test has therefore been adapted: workseekers and those non-workers relying on the right to three months of residence without conditions are, although fully entitled to reside lawfully under EC law and the UK implementing Regulations during this time, deemed not to satisfy the Habitual Residence test because their 'Right to Reside' does not qualify. (Those who are workers or self employed under Community law continue to be exempt from this requirement and are deemed not to be 'persons from abroad' having to satisfy this test).

An example of how this is achieved may be illustrated by Regulation 2 which amends eligibility for Council Tax benefit (similar provisions are included in relation to other benefits in other regulations). The key provisions are Regulation 2(3) and 2(4) which provide that:

> (3) No person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless he has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (4).
> (4) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following—
> (a) regulation 13 of the Immigration (European Economic Area) Regulations 2006;
> (b) regulation 14 of those Regulations, but only in a case where the right exists under that regulation because the person is
> (i) a jobseeker for the purpose of the definition of "qualified person" in regulation 6(1) of those Regulations, or
> (ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker;
> (c) Article 6 of Council Directive No. 2004/38/EC; or
> (d) Article 39 of the Treaty establishing the European Community (in a case where the person is seeking work in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland).

The Commission may wish to consider the extent to which this strict and complete exclusion complies with Community law in the light of *Collins* decision and the transposition of Directive 2004/38 now having taken place.

*Concerns about 'Right to reside'*

Your rapporteurs are aware of two particular concerns about these Regulations and their implementation, which seem equally applicable both before and after the 2006 Amendments.[30] Firstly, there is some concern as to when the 'right to reside' element was added to the habitual residence test in 2004, is the quality of decision-making. Concerns were raised at the time in 2004 that expecting social security decision-makers to make good quality, reliable decisions on the residence/immigration status of applicants would be a challenge. Decision-making has to some extent been centralised to enable expertise to be collected in a limited number of centres, but these concerns have not lessened in the months that these Regulations have been in operation. Your rapporteurs are aware of concerns that decisions sometimes are sometimes subject to considerable delay and are of poor quality when they are made, giving rise to sometimes severe hardship and the necessity for appeals as a result – we are aware of concerns that some who have been resident and working for quite lengthy periods of time, as well as family members, have experienced difficulty enforcing their rights properly and promptly. Secondly, some situations have arisen which have given rise to seri-

30 We are grateful to colleagues at the Child Poverty Action group for sharing some of their experiences with us.

ous concern – particularly women ceasing work temporarily because of pregnancy, or women caring for a sick child or other relative. (Consider for example the facts of case [2006] UKSSCSC CIS_3182_2005 in which a Dutch national came to the UK, worked as a cleaner for two or three months between July and September 2004 and then gave birth prematurely and was unable to return to work in November/December 2004 when it was held that she had no right to reside in the UK, which disqualified her from receiving any Income Support because she could not be habitually resident and was a 'person from abroad' whose entitlement was nil). Whether or not the exclusion of such individuals from the right to reside and thus the right to benefits is technically compatible with the Directive which does not mention these particular situations, or compatible with general principles of community law (on the grounds for example of sex discrimination), your rapporteurs are aware of concerns that both the Directive and the way it has been implemented contain inadequate protection for these groups. Concerns have been raised about the breadth of the 'right to reside' test in these situations and whether it is really necessary to have a test that excludes such individuals in the interests of combating benefit tourism. We are also aware of concerns that women who leave their partners because they have been subject to domestic violence remain in a vulnerable position.

### *Chen and self-sufficiency*

Your rapporteurs particularly wish to draw the Commission's attention to the implementation of the *Chen* judgment in the UK through the Immigration Rules. The case continues to be somewhat controversial in 2006, specifically in relation to the question of the extent to which the *Chen* judgment is capable of conferring on the parent/carer the right to work in order to provide the funds necessary for the infant EU Citizen to qualify as self-sufficient. A number of cases have raised this point during 2006.[31] It has been argued that the fact that *Chen* does not place any restrictions of the source of the funds might call into question measures prohibiting the parent from working to provide the funds. The approach taken in the Immigration Rules is that the adult accompanying parent must be self-sufficient without relying on the status as the child's *Chen*-recognised carer to provide a right to work in the Host State and the status as *Chen*-recognised parent/carer is granted subject to a prohibition on work. In the *Chen* case itself the means for the child and parent came from the family business run from China, but it is clear that the approach taken by the UK authorities, and endorsed by the domestic courts, is that parents without such a source of funds, and without an independent right to work in the UK through some other means, cannot take advantage of the *Chen* case. It has also been made clear that the means must be sufficient for the parent as well as the child, and that the requirement of medical insurance would also be required for parent and child, although one judge questions whether this always necessarily has to be private insurance. It seems also to have been decided[32] that the parent with a right to remain and work lawfully but which is limited for a particular purpose or is temporary, cannot provide the funds either. This latter point in particular seems questionable, not perhaps in so far as it might prevent the child remaining permanently and extending the parent's right to work through it's own Community law rights (which was in fact exactly what the parents were trying to do in that case), but certainly in so far as it might be argued to go beyond this and prevent the child from benefiting from a temporary period of residence with the parent while the parent is in fact lawfully present and working on a temporary basis. We suggest that there is nothing in *Chen* that would seem to require or authorise this restriction. However, as we have noted the case actually concerned the situation of parents trying to extend

31 A number of cases make these points: in the Court of Appeal, *W (China) v Secretary of State for the Home Department* [2006] EWCA Civ 1494 [2007] 1 C.M.L.R. 17, *Ali v Secretary of State for the Home Department* [2006] EWCA Civ 484 [2006] 3 C.M.L.R. 10 [2006] EU. L.R. 1045 [2006] Imm. A.R. 532 [2006] E.L.R. 423 (2006), and in the Asylum and Immigration Tribunal, *GM & AM v Secretary of State for the Home* Department [2006] UKAIT 00059 (currently on appeal to be heard in the Court of Appeal in March), *ER & others v Secretary of State for the Home Department*, [2006] UKAIT 00069, and *MA & others v Secretary of State for the Home Department* [2006] UKAIT 00090.

32 *MA & others*, above.

their leave to remain and to work, and whether the point would arise and be applied in the same way in a case where they were not trying to do so but merely to gain recognition of the rights of the child (or perhaps the second parent?) under *Chen* during the period when one parent was actually lawfully present and working albeit on a temporary basis remains to be seen.

The Immigration Rules refer to the situation of the individual spouse or primary carer, (and sibling, including step and half brothers and sisters), and do not provide any explicit guidance on whether *both* parents may enter and remain in the UK under these provisions, or whether a child may only act as the 'sponsor' and legal basis for the residence status of one parent/carer: neither do the European Casework Instructions which provide further guidance on some issues but not this one. Some cases have arisen in which both parents have sought entry, and these have been rejected on other grounds, no point apparently being taken that *Chen* and the UK implementation of it in the Immigration Rules might only be a source of rights for one parent. Your rapporteurs conclude that the practice in the UK is not systematically to exclude the second parent. Your rapporteurs are not aware that any of the cases have been referred to the ECJ, requests to do so were made in more than one case but were rejected.

### *Vehicle Registration*

Follow-up of cases C-464/02 *Van Lent* and C-232/01 *Commission v Denmark* – Cases concerning use in the UK of vehicles registered abroad.

Registration rules distinguish between permanent and temporary import of a vehicle. Permanent importation requires registration in the UK. The general rule for temporary use is that use for six months in any twelve month period is normally permissible and if stopped, the owner of an EU-registered vehicle should prove the length of stay in the UK.

### *Professional football*

We note that:

- In our report for 2005, we noted that in February 2005, UEFA announced proposals to set a quota of 'home-grown' players in European club competitions.[33] The proposals were adopted on 21 April 2005 and mean that from 2006/07, of a squad of 25 players, at least two have to be club trained (registered for a minimum of three years between the ages of 15 and 21) and at least two more have to be association trained. These figures rise to three and three in 2007/08, and four and four in 2008/09.
- These proposals have generated significant differences of opinion within the key organisations concerned with football in England. The Professional Footballers' Association and the Football League (which is made of clubs outside the first tier) appear to support the proposals. By contrast, it is reported that only 2 of the 20 clubs in the Premier League support the proposals, and that the Football Association (the sport's governing body) has also declined to support the proposals.[34] This included the vice president of Arsenal football club a fact noted by the newspapers as curious at a time when for the first time in its history that club had no home born players on its team.[35] The football associations of other parts of the United Kingdom – i.e. Scotland, Wales and Northern Ireland - supported the proposals. It has also been reported that the Scottish Football Association favours the introduction of a similar system in domestic club competitions as well.[36] The Football Governance research Centre based at Birkbeck College, University of London held a number of seminars on the question of football regulation in 2005, some of which specifically raised the issue of the new rules.[37]
- As we noted last year, regarding the changes, differences of opinion within British football correspond to the distribution of winners and losers in the period since the establishment of the Champions League and English Premiership in 1992. Since that time, television revenues have fuelled a marked increase in the gap between the richest clubs in England (Arsenal, Chelsea, Liverpool, Manchester United and

33 'Local Training Debate Moves Online', UEFA press release 6 February 2005.
34 'FA Chairman under fire for opposing quota' *Guardian*, 16 February 2005.
35 http://football.guardian.co.uk/print/0,,5130931-3057,00.html.
36 'Eight Player Rule a Boost', *Sunday Mail* , 13 March 2005
37 http://www.football-research.org/seminars.htm.

Newcastle) and Scotland (Celtic and Rangers), and their competitors. These clubs have come to dominate domestic league and cup competitions, and with them qualification for European club competitions. It is widely thought that the *Bosman* ruling in 1995 contributed to this situation of competitive imbalance, since only the top clubs have the financial weight to import significant numbers of better players from other parts of the EEA. It is also widely thought to have weakened the domestic game in England and (in particular) Scotland, because of the associated decline in the number of national players with top clubs, and so playing in European club competition.
- Experience shows that the Court of Justice in *Bosman* underestimated the benefits of certain restrictions on the freedom of contract within professional football. For that reason, we would argue that some version of the UEFA proposals is probably justifiable under Article 39, in providing incentives for clubs to train players, while reducing sporting inequalities.

Your rapporteurs have little to add to this in the current year from the UK except to note that the differences of opinion continue to be expressed about this as the rules have come into effect in the 2006/07 season. A survey of professional players revealed that 83% were in favour of the UEFA scheme,[38] whereas Arsenal manager Arsene Wenger has spoken out against similar proposals from FIFA.[39]

38 Players back quotas to encourage home talent: *Independent* 14th April 2006.
39 FIFA quota proposal angers Wenger, BBC News Online, 4th November 2006. See also 'Dein and Kenyon united over quotas', BBC Sport, 28 November 2006.

## CHAPTER VII. POLICIES, TEXTS AND/OR PRACTICES OF A GENERAL NATURE WITH REPERCUSSIONS ON FREE MOVEMENT OF WORKERS – BERNARD RYAN

### *Selective admission policies*

Government policy on admission for employment was the subject of an extensive consultation process during 2005. In February 2005 the outgoing Labour Government published a 'five year strategy' for immigration, *Controlling our Borders: Making Migration Work for Britain*. After the Labour Government's re-election, two further documents made more specific proposals concerning admission for employment and related matters: *Selective Admission: Making Migration Work for Britain* (July 2005) and *A Points-Based System: Making Migration Work for Britain* (March 2006). The Government's purpose is to rationalise the framework governing admission for employment into a number of 'tiers' which broadly reflect pre-existing policy in the area. The main employment categories are Tiers 1 to 3, which are discussed below. Tier 4 concerns the admission of students, and Tier 5 covers miscellaneous employment categories which are temporary or cultural in nature. Tiers 4 and 5 are not discussed here.

*Tier 1: The new Highly Skilled Migrant Programme*

Within the intended scheme, Tier 1 is a points-based system for 'highly skilled' workers. Changes to Tier 1 were put in place through a reform of the Highly Skilled Migrant Programme (HSMP), announced on 8 November 2006 and implemented from 5 December 2006.[40] The HSMP originally began in January 2002, as a means for highly-qualified persons to come to Britain for employment and self-employment without first obtaining a work permit or providing a detailed business plan. Under the modified system the main route to admission is to achieve 75 points across four areas:

- *Education*: 50 points for a PhD, 35 points for a masters degree and 30 points for a bachelors degree
- *Earnings*: Up to 45 points for earnings in the previous year (meaning 12 out of 15 months), with different income assessments depending on the standard of living in the country of prior residence. For the most developed countries, £40,000 is the threshold for 45 points.
- *United Kingdom link*: five points are allocated for previous employment or study in the United Kingdom
- *Age*: 20 points if aged 27 or younger, 10 points if aged 28 or 29, five points if aged 30 or 31, and no points if aged 32 or over

Alternatively, an individual who has an MBA from one of 53 designated institutions automatically meets the points requirement. Among these institutions, there are 27 in the US, ten in the UK, three in the Netherlands, two each in Australia, Canada and Spain, and one each in China, France, Germany, Ireland, Italy, Singapore, and Switzerland.[41]

The main changes made to the points rules by the 2006 reform were as follows:

Points are no longer allocated for experience or achievement in the given field, where previously up to 25 (of the 65 required) were available.

- Points are no longer allocated for a partner's education and experience, where previously up to 10 points were available.

40 The details of the new system are to be found in Home Office, *Highly-Skilled Migrant Programme: Guidance for Applicants* (version of 26 January 2007).
This is available at http://uk.sitestat.com/homeoffice/ind/s?hsmpguide&ns_type=pdf (accessed 17 February 2007).

41 *Ibid*, Annex D.

- Greater weight is given to education (previously a maximum of 30 out of the 65 required, now up to 50 of 75) and age (a new criterion).

These changes were intended to remove evaluative elements from the system, and thereby to make it more objective and transparent.[42]

In addition, applicants must now demonstrate competence in the English language. This is to be done either by their having obtained a bachelors degree taught in English, or by scoring Band 6 or higher in an International English Language Testing Scheme (IELTS) test.[43]

A final change made in 2006 concerned the rules regarding extensions of stay under the HSMP. The general position remains that persons accepted under the HSMP are admitted initially for two years, and then must apply for a further period (currently three years) to take them to eligibility for indefinite leave to remain ('ILR', long-term residence status). At the extension stage, it had previously been necessary to show that the individual had taken "reasonable steps to become engaged in economic activity in the United Kingdom." From December 2006, however, a more restrictive approach was introduced, under which it is necessary to again comply with the core HMSP requirements.[44] In the short-run, the main burden of this new rule has fallen upon those admitted under the old rules for the HSMP, as they may not be able to meet the requirements of the new points system.[45] Thereafter, the main effect of the change will probably be to permit the refusal of an extension to those whose earnings are low in an initial period of stay under the HSMP.

*Tiers 2 and 3: skilled and lower-skilled employment*

Tier 2 is for 'skilled' workers with a job offer, and will re-fashion the current work permit system. There were no significant developments in policy on work permits in 2006.

Tier 3 covers lower skilled schemes. As was noted in the previous year's report, the Government's general view is that lower skilled labour migration schemes have been rendered unnecessary by labour supply from the states which have recently joined the EU. The seasonal agricultural workers' scheme (SAWS) has remained in place, with a quota of 16,250. Where previously SAWS places were available only to non-EU states, the policy for 2007 is that at least 40% of places will be for Bulgarian and Romanian ('A2') nationals, and that from 1 January 2008 it will be reserved exclusively for them.[46] The other low-skilled scheme is the sectors-based scheme (SBS). The last element of the old SBS was a quota of 3,500 in the food processing sector. That general quota came to an end on 31 December 2006, but was replaced from 1 January 2007 by a new quota of 3,500 for A2 nationals only. The current A2-only quota is made up of 600 for fish processing, 600 for meat processing and 2,100 for mushroom processing.[47]

Each of Tiers 2 and 3 is covered by the proposal for a Migration Advisory Committee (MAC) which was the subject of a consultation document published in November 2006.[48] The Government's intention is that the MAC should be fully operational from April 2008. The role of the MAC would be to replace the current *ad hoc* arrangements in advising the government on labour shortages which make labour migration desirable. This system would apply to the designation of shortage occupations which (as at present with work permits) would be favoured within the Tier 2 skilled migration category. The MAC would also advise

42 See *Explanatory Memorandum to the Statement of Changes in the Immigration Rules laid on 7 November 2006*, para 7.3.

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

44 Immigration Rules, para 135D and Appendix 4.

45 This aspect of the new arrangements has been politically controversial, and is the subject of legal challenge: see 'Skilled immigrants forced back out by changes to visa rules', *Times*, 3 January 2007.

46 Working in the UK, 'Information about the Seasonal Agricultural Workers' Scheme from 1 January 2007', www.workingintheuk.gov.uk (accessed 21 February 2007)

47 Working in the UK, untitled news release, 1 January 2007, www.workingintheuk.gov.uk (accessed 21 February 2007).

48 Home Office, *A Consultation on Establishing a Migration Advisory Committee* (November 2006).

on sectors in which lower skilled migration is needed, initially with respect to A2 nationals only. The Government had left open the possibility that MAC advice could concern a region and not just a sector. If pursued, that possibility would be of particular relevance to Scotland, but also potentially to Northern Ireland.

### *Acquiring indefinite leave*

Within the United Kingdom immigration system, acquisition of ILR is critical as regards entitlement to work. It is through ILR that workers in economic categories other than the HSMP obtain an unrestricted entitlement to engage in employment and self-employment.

There were two developments in this area in 2006. The first was that, from 3 April 2006, the required period of residence for the acquisition of ILR by those in economic categories was increased from four to five years.[49] The explanation for this change was that "This brings us in line with the European norm ...and also helps to ensure that settlement is a final stage in an on-going process of building up an attachment to the UK."[50]

The second was that it was announced in November 2006 that, from 2 April 2007, all applicants for ILR would have to meet requirements as regards knowledge of the English language and of life in the United Kingdom.[51] In concrete terms, what is required is either to pass a test on 'Life in the UK' or to complete a designated language course with citizenship elements. A similar system has been in place for naturalisation applications since November 2005. In this case, the stated objective is the "Effective integration of those who wish to adopt the UK as their home."[52]

### *Irregular employment*

The previous year's report discussed the proposal to replace the existing criminal sanctions for employment of workers who lack immigration permission with administrative fines, together with a criminal offence of knowingly employing such persons. The legislative basis for this new scheme is now contained in the Immigration Asylum and Nationality Act 2006 (sections 15-26). The new system has not however been brought into effect at the time of writing (February 2007).

In addition, 2006 saw the introduction of a separate scheme relating to the employment of A2 nationals. Regulation 12 of the Accession (Immigration and Worker Authorisation) Regulations 2006 makes it a criminal offence to employ an A2 national who lacks permission to work.[53] To this, there is a defence that the employer was shown and copied a document which appeared to provide evidence of entitlement to work. Regulation 13 meanwhile makes it a criminal offence for an A2 national to work without authorisation. This employee offence is a novelty, as British law has never before set out a criminal offence of illegal working. In other cases, an equivalent result has been achieved through the combined effect of offences of illegal entry, overstaying and breach of conditions of leave (section 24, Immigration Act 1971). The explanation for his novelty lies in the peculiar legal position of A2 nationals, that they alone are free to enter the UK without being generally free to take up employment.

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49 Statement of Changes in Immigration Rules (2005-06), *House of Commons Papers* 974.

50 Explanatory Memorandum to the Statement of Changes in Immigration Rules laid on 13 March 2006, para 7.1

51 'Introduction of new rules for people applying for settlement', Immigration and Nationality Directorate press release, 4 December 2006.

52 Immigration and Nationality Directorate, *Knowledge of Life in the UK Settlement Q & A* (2006), p. 1.

53 SI 2006 No 3317.

## CHAPTER VIII. EU ENLARGEMENT - VALSAMIS MITSILEGAS

### *A8 Nationals - Legislation and implementation*

The legal position of A8 nationals has essentially not changed since the 2005 Report. The UK imposed no restrictions to the movement of workers from the A8 Member States. However, the Accession (Immigration and Worker Registration) Regulations 2004 impose an obligation to A8 workers within one month from starting a job to apply to register under the 'Workers Registration Scheme' (WRS) – which consists one of the main sources of information regarding flows of A8 nationals to the UK (see the statistics chapter). Registration under the WRS relates not to a specific worker, but to a specific employment (therefore A8 nationals changing jobs would have to register anew). It is a criminal offence to employ an A8 national who is obliged to register but has not done so. There are no restrictions to A8 nationals coming in the UK to look for work, but the 2004 Regulations specifically state that job seekers are not entitled to a right of residence (and the social assistance provisions emanating from such right).

A number of reports have now been published on the economic benefits of flows of A8 nationals in the UK, but also on the situation on the ground. A recent Report by David Blanchflower, a member of the Monetary Policy Committee of the Bank of England ('the Blanchflower Report') states that the propensity to migrate to the UK is higher the lower is GDP per capita in each of the A8 countries, and the decision is strongly correlated with life satisfaction scores and unemployment rates (but uncorrelated with employment rates or rates of inflation).[54] The Report also states that there is little or no evidence that A8 nationals have had a major impact on wages or unemployment in the UK, and notes that A8 migration has tended to reduce inflationary pressures.

As far as the operation of the WRS and working conditions are concerned, a number of Reports have been critical on the situation on the ground. It has been demonstrated that in practice employers may perceive little risk of employing unregistered A8 workers, with a number of employers or employees claiming to have 'never heard' of the WRS and others criticising the efficiency and the cost of the scheme- leading to the Report talking about a 'mismatch' between the government's intentions regarding the WRS and the experience of workers and employers.[55] This view is confirmed by other Reports highlighting that employers were prepared to 'bend the rules' and considered that the WRS was bureaucratic, unnecessary, and a means for the Government to raise money.[56] While A8 nationals are valued by employers because of their work ethic, there is evidence suggesting that, along with the willingness on the part of A8 nationals to work long hours, they may have less leverage to negotiate their hours with employers due to their status and situation.[57] Recent press articles highlight concerns by trade unions- but also the Church- on the abuse of A8 workers by employers, in particular in the field of health and safety and wages.[58]

*Case-law*

A number of cases involving A8 nationals covered horizontal issues of EU free movement law (not specifically related to the A8 Regulations) and are covered elsewhere in this Report (cross-reference). A recent case which is directly linked to the A8 Regulations has been a Decision of the Social Security Commissioner for Northern Ireland, which involved a claim by a Polish national for income support (Decision C6/05-06 (IS), [2006] NISSCSC C6-05-

54 *The Impact of the Recent Migration from Eastern Europe on the UK Economy,* January 2007.

55 COMPAS, University of Oxford, *Fair Enough? Central and East European Migrants in low wage employment in the UK,* 1 May 2006.

56 The Joseph Rowntree Foundation, *Central and East European Migrants in low wage employment in the UK,* April 2006.

57 At least those working in rural areas: Commission for Rural Communities, *A8 Migrant Workers in Rural Areas,* January 2007.

58 *Financial Times,* Church joins union fight to help migrants, 17-18 February 2007.

06 (IS)). The claimant was a Polish national with one daughter who came to Northern Ireland after the accession date (on 1 July 2004). She worked initially picking mushrooms from 9 July 2004 to 7 January 2005 – during that period she was registered with the Worker Registration Scheme and received a registration certificate on 5 November 2004. She subsequently changed employment to an employment agency- through them she worked for a firm packing vodka cases for three weeks in January 2005, and then for another firm making and packing bread from the end of January 2005 to 10 July 2005. But she did not notify the Home Office Worker Registration Scheme to amend her certificate.

On 21 July 2005 the claimant moved to the Women's Aid Hostel in Portadown and the next day she made an application for income support on behalf of herself and her daughter. The initial decision (dated 29 July 2005) was negative, on the basis of the fact that the claimant was not registered under the WRS for a whole year, no registration had been provided for her last employer, she had no right to reside and could not be treated as habitually resident in Northern Ireland. The case went then to the Tribunal which overturned the initial decision concluding that the amended habitual residence test incorporating the right to reside requirement in the definition of a person from abroad in regulation 21(3) of the Income Support (General) Regulations was incompatible with EC law- namely Article 39 TEC and article 7(2) of Regulation 1612/68 – and was outside of the scope of the derogation permitted by the Accession Treaty. According to the Tribunal, there was no derogation permitted from the said article 7. The claimant remained a worker for the purposes of that article – the ECJ has taken a broad approach to the definition of a 'worker' under the Treaty, and the claimant was still in the labour market. The Tribunal concluded that the claimant, being a worker for the purposes of Regulation 1612/68, was exempt from the requirement to be habitually resident in Regulation 21 and had consequently a right to reside and was habitually resident in the UK.

The case then moved on to the Social Security Commissioner, who focused on whether the provisions of the Accession Regulations in this context fell within the permitted derogation from article 39 TEC and if not whether article 7 of Regulation 1612/68 can assist the claimant. The Department of Work and Pensions, dismissing the claimant's claim, argued that:

- the effect of the 2004 Regulations was to create a different species of worker- this was permissible under the Accession Treaty and it had the effect of excluding A8 nationals from being workers under Regulation 1612/68
- to be a worker for the purpose of Regulation 1612/68, the relevant person must have exercised his right to freedom of movement under that Regulation. The claimant had not. She gained access to the UK labour market under the 2004 domestic Regulations, not under EC Regulation 1612/68
- according to earlier case-law (*D v The Secretary of State for Work and Pensions* (C4/2004/1117), drawing upon *Collins*, the 2004 Regulations are a permissible derogation from articles 1-6 of Regulation 1612/68
- Article 7(2) could not be relied by the claimant even though the permitted derogations went no further than articles 1-6- article 7(2) extended to a worker who commenced lawful employment after the date of accession. Lawful employment referred to the worker's immigration status and by implication those who breached their immigration status were not entitled to the protection of Article 7(2)
- Even if accepted that the claimant was a work seeker she would still fall within the permitted derogation. Right of residence under EU law is subject to limitations and conditions laid down in the Treaty and measures adopted to give it effect- those limitations included that economically inactive persons, such as the claimant, could not claim EU rights unless they were self-sufficient.

In reply, the claimant's solicitor argued as follows:

- the UK chose to open its labour market to A8 nationals

- the claimant was not in breach of immigration rules – she was lawfully present in the UK but there was a question as to whether she was lawfully resident there (this was a different question)
- Article 7(2) of Regulation 1612/68 applied to those who had once been admitted to the employment market (*Lopes da Veiga v Staatsecretaris van Justitie*, case C-9/88). A derogation was permitted by the Act of Accession from articles 1-6 of Reg. 1612/68, which indicated that the derogation did not apply to the other provisions (including article 7)
- the loss of the right to reside under the 2004 Regulations could not produce a loss in terms of Treaty rights. Once a person arrived and took up employment, in European terms, that person had a right to reside
- the requirement of the Regulations that out of work benefits were tied to both registration and uninterrupted employment for 12 months was disproportionate

The Social Security Commissioner overturned the tribunal's decision and ruled that the claimant was not entitled to income support. The arguments were as follows:

- the WRS rules are for purposes of the right to reside. This right derives from article 18 TEC but is not unconditional. Limitations and conditions are included in article 39 TEC, and Directives 68/360/EEC and 90/365/EEC.
- under general Community law Member States may restrict rights of residence to workers within Regulation 1612/68 and to those otherwise self-sufficient and may remove those rights where the conditions upon which they are granted are no longer fulfilled
- it transpires from the Accession Treaty derogations that the right of access to a labour market of a Member State and the right to reside in that State are considered as linked. They may both be limited during the transition period.
- the UK A8 scheme was not incompatible with EC law. The permitted derogation from the right to reside is clearly within the permitted derogation. The 12 month period and the registration scheme are not excessive or disproportionate. The derogation by its very nature permits discrimination between Accession States nationals and other EC nationals.
- as the Tribunal has noted, no derogation to article 7 was permitted by the Act of Accession- but the claimant was not covered by article 7(2) once she ceased her registered employment. The claimant came to the UK and was permitted access to the labour market under the terms of the particular scheme rather than in exercise of an Article 39 right
- ECJ cases such as *Baumbast, Grzelczyk* and *Trojani* involved legally resident EU nationals and are thus not applicable in the present case

This is a very interesting case. It involves an A8 national who obtained access to the UK labour market as a worker lawfully, by registering under the WRS. She also completed 12 months working in the UK – but she was not registered for all of this period. Was she a worker by virtue of her de facto working in the UK? Was she entitled to work seekers' rights by virtue of the fact that she had been accepted and worked lawfully in a Member State? These questions became complicated for the UK, as it did not close completely its market to A8 nationals. The market was open, but on condition of registration. A further question thus arises on the role of the registration requirement itself in determining rights in a case where an EU national has exercised lawfully free movement of worker rights in another Member State.

In order to address these questions, the courts focused on the domestic legislation on A8 workers and its relationship with EC law. It is noteworthy that in both the Government's submission and the Commissioner's ruling, there has been an attempt to disassociate Community law from domestic law. They both stress that the rights to work and reside in the UK are linked to domestic law and not EC law. This is striking, as domestic law in this case emanates from Community law. Moreover, in the present case, once lawfully resident/working in a Member State, EC law does apply to determine the situation of EU nationals. There is also a tendency to completely identify the right to residence with the right to be employed

(the Commissioner notes that UK law permits A8 nationals to have access in the UK labour market and a concomitant right to reside subject to the Registration Scheme but provide that once registered employment ceases the concomitant right to reside also ceases unless there has been 12 months continuous working under the Scheme- para. 49). However, this may disregard the fact that, for persons out of work but once lawfully employed in the UK as an EU citizen, citizenship/residence rights may still apply under certain conditions on the basis of EC law.

### *A2 nationals*

See:
- The Accession (Immigration and Worker Authorisation) Regulations 2006, SI 2006, no 3317
- The Social Security (Bulgaria and Romania) Amendment Regulations 2006, SI 2006, no 3341

*Statement of Changes in Immigration Rules, 11 December 2006, HC 130*

The prospective accession of Bulgaria and Romania in the European Union has provoked a heated debate in the United Kingdom on whether free movement of workers from these countries should be liberalised on terms equivalent to the situation of A8 nationals or whether further restrictions should be imposed. A8 movement- in particular the volume of the flows of people in the UK- has been a central issue in the domestic political debate, with talks about the 'invasion' of A8 (in particular Polish) nationals to Britain appearing not infrequently in the press.[59] This view of the movement of Eastern European EU citizens to the UK as a destabilising threat was backed up by accusations that the UK Government was not in control of its borders and had seriously miscalculated the volume of the flows of A8 nationals in the country (with the data provided by the WRS actually undermining in the political debate the Government's case for liberalised access).[60] In the case of Bulgaria and Romania, concerns were exacerbated in the light of the view that the majority of workers from these countries would be low-skilled (and thus threatening the jobs of similarly skilled UK nationals), while the image of 'undesirable' migrants from Bulgaria and Romania coming to the UK to claim benefits – and thus provoking a 'public backlash' was also heavily projected in the press.[61]

In the light of the increasingly negative portrayal of the movement of EU nationals from Eastern Europe to the UK post-accession, the UK Government decided to backtrack from its relatively liberal approach regarding A8 nationals and impose restrictions to the movement of workers from Bulgaria and Romania. In a statement on 24 October 2006, the Home Secretary John Reid confirmed that, although migration from A8 countries had been a success, with A8 nationals contributing to economic growth, restrictions would be placed on the movement of A2 nationals for a transitional period – with the opening of the UK labour market taking into account of the needs of the market, the impact of the A10 expansion, and the positions adopted by other Member States. Mr Reid indicated that the priority for accepting A2 workers in the UK would be in the highly skilled sector, and in the sectors of food processing and agriculture as regards low-skilled workers.

The main instrument regulating access by A2 workers to the UK labour market is the Accession (Immigration and Worker Authorisation) Regulations 2006. The Regulations apply primarily to A2 nationals to be employed after 1 January 2007. According to Regulation 2, the Regulations do not apply to A2 nationals who:

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59 See very recently the *Times* headline on 'Britain's Polish invasion' (February 10 2007, international edition).

60 The numbers of the original Government estimates vary, ranging in the press between 18,000 and 26,000 A8 nationals (as will be seen in the statistics chapter, the numbers of WRS registrations have exceeded 500,000) see *The Guardian*, Reid faces criticism for ban on Bulgarian and Romanian workers, October 25, 2006; *The Independent*, 23 August 2006.

61 For a good example see *The Times*, Migrant fear over 45,000 'undesirables', 23 July 2006.

- have leave to enter or remain in the UK and are not subject to any condition restricting employment;
- have been legally working in the UK on 31 December 2006 and had been legally working in the UK without interruption throughout the period of 12 months ending on that date ( those who have been working in the UK on 31.12.06 but for less than 12 months will cease to be subject to the Regulations when the 12 month period ends);
- are also nationals of the UK or an EEA state other than Bulgaria and Romania;
- are spouses or civil partners of a UK national or a person settled in the UK;
- are family members of EEA nationals (unless, in the latter case, the EEA national is an accession state national subject to worker authorisation or an accession state (Bulgarian or Romanian) student);
- are highly skilled persons having unconditional access to the UK labour market (as evidenced by a certificate);
- are students, working no longer than 20 hours a week (as evidenced by a certificate);
- are posted workers.

Persons who do not fall within these categories will be legally employed in the UK only if they hold an accession worker authorisation document and are working in accordance with the conditions described therein (Regulation 2(12)(b)). A2 nationals subject to worker authorisation have the right to reside in the UK under the conditions of the Immigration (EEA) Regulations 2006, which implement Directive 2004/38. However, these Regulations will not apply to jobseekers and to A2 nationals who cease to work (Regulation 6). Residence documents will not be issued automatically to A2 workers: the latter will have to apply to the Home Secretary for such documents. The Home Secretary will issue a registration certificate if satisfied that the applicant is seeking employment in the UK and is a highly skilled person- the certificate will then state that the holder has unconditional access to the UK labour market (Regulation 7).

The Regulations contain a separate part (part 3 – Regs 9-14) on the employment rights of the A2 nationals subject to worker authorisation. A2 nationals are legally employed if they hold an accession worker authorisation document and are working in accordance with the conditions described in the document. These documents are: a passport or other travel document endorsed before 1 January 2007 to show that the holder has leave to enter or remain in the UK; a seasonal agriculture work card; or an accession worker card (Regulation 9(2)). The Regulations describe the process and admissible documents for the application for the accession worker card. In cases which would, prior to accession, fall to be dealt with under the work permit arrangements, a letter from the Home Office confirming that the arrangements have been met prior to the employee's application is made.[62] The accession worker card will be issued under the conditions of employment to the employer specified in the application and the specified type/category of employment – the card will expire if the holder of the card ceases working for the employer specified in the application (Regulation 11). Schedule 1 to the Regulations contain authorised categories for employment. These include employment under the sectors based scheme, work permit employment or training schemes; they also include a number of specific categories of employment such as au pairs, domestic workers, postgraduate doctors, dentists and trainee GPs, teachers and qualified nurses.

Similarly to the A8 Regulations, the A2 Regulations introduce criminal offences for employment without authorisation (Regs 12-14). Employers will be liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £ 5,000) if they employ an employee who does not hold an accession worker authorisation document or the document is subject to conditions that preclude the worker from taking up the specific employment. However, the criminal law framework also extends to employees. An employee will be guilty of an offence if (s)he does not hold an accession worker authorisation document or is working in breach of the conditions set out in this document. The penalties are harsher here: the offence is punishable by a fine (as described above), but also (alternatively or cumula-

62 Regulation 10(5) and EM to the Regulations, para. 7(5).

tively) by imprisonment for not more than 3 months. A2 nationals for whom there are reasons to believe that they have committed such offence may be given the opportunity of discharging any liability to conviction by paying the Home Secretary the sum of £1,000. Criminal fines and/or imprisonment along the lines mentioned above also apply to A2 nationals for deception- in cases where an employee has obtained or sought to obtain, by means which include deception, an accession worker card.

The Regulations constitute a remarkable shift in UK law and policy towards the movement of citizens from Eastern European EU Member States. While the data from the movement of people following the A8 accession overwhelmingly demonstrates that movement has been beneficial to the UK economy, the climate of fear created post-accession has led to the imposition of restrictions to workers from Bulgaria and Romania.[63] The A8 Regulations served as a model to some extent (worker authorisation), only now authorisation is a prerequisite for employment. Moreover, penalties are harsher in particular regarding the employees- one can discern a criminalisation of EU citizens. Moreover, the following matters are worth probing further:

- *the time required for A2 nationals to obtain permanent residence in the UK* in accordance with Directive 2004/38 and implementing legislation: according to the Immigration Rules and the Accession Regulations, to acquire permanent residence Bulgarian and Romanian nationals will need to reside in the UK for five years *after* accession. Those nationals who have already established themselves in the UK before accession will be able to acquire an equivalent status to permanent residence (Indefinite Leave to Remain) under the rules based in whole or in part on time already spent in the UK.[64] However, time spent in the UK before accession will not count towards permanent residence- although such residence is the outcome of rights under Community law (the Association Agreements). The legality of the combination of two different legal regimes to A2 nationals resident in the UK before accession is questionable and needs to be further explored.
- *The position of students*: those enrolled after 1 January 2007 are in a worse position to those in the UK prior to that date. Prior to January 2007, Bulgarian and Romanian students could work part-time during term time and full time at holiday time- those who have leave to remain on these terms can continue doing so. However, the Regulations state that those coming to the UK after 1 January 2007 have the right to work up to 20 hours per week. They are thus seemingly placed in a worse position than those in the country before 1 January 2007. The Regulations were changed in March 2007 to permit A2 students to work full time during their holidays
- *The position of au pairs*: A2 nationals who have worked with leave to enter/remain as au pair continuously for 12 months or more (ending on or after 01/01/07) are considered to have worked legally and exempt from registration under Regulation 2(3) and/or 2(4) of the Accession (Immigration and Worker Authorisation) Regulations 2006. Also, au pairs who apply for an accession worker card as an au pair are not limited to working for two years. If they have already worked as an au pair for two years, they will still be able to apply as age is the only restriction on them. They may join the scheme for 12 months and then be exempt under the Accession Regulations. Thus previous work by au pairs is calculated towards the 12 month period after which an A2 national is no longer subject to the transitional arrangements.
- *Residence of A2 workers:* The Regulations state that the Home Secretary will issue a registration certificate if satisfied that the applicant is seeking employment in the UK and is a highly skilled person. The situation regarding low skilled persons is unclear, in

63 See also the recent poll by the *Financial Times*, according to which 47% of Britons believe immigration was having a negative impact on the economy. This is the most negative view of migration compared to the other countries surveyed (Spain, Italy, Germany and France). 66% of Britons said, according to the same poll, that there were 'too many foreigners' in the country, *Financial Times*, 19 February 2007 (European edition).

64 Statement of Changes in Immigration Rules, para. 7.5.

particular whether they are covered by a combination of other provisions (on sectoral schemes).

- *A2 spouses*: A2 spouses of A2 self employed persons are required to obtain registration certificates which are only issued where a job offer is available. This places them in a worse position that the third country national spouses of third country nationals with work permits who obtain a visa to enter the UK with their work permit spouses which visa has the effect of giving them access to the labour market without restriction. A2 spouses of third country national work permit holders do not enjoy the same access to the UK labour market as third country national spouses of work permit holders. Instead they are not eligible for a visa abroad (as citizens of the Union this is excluded) but when they arrive in the UK they must apply for a registration certificate which will only be issued if they have a job offer.

## CHAPTER IX. STATISTICS - VALSAMIS MITSILEGAS

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- Office of National Statistics, Labour Force Survey, June 2006
- Home Office and Office of National Statistics, Control of Immigration: Statistics United Kingdom 2005
- Office of National Statistics, International Passenger Survey 2005, November 2006
- D. Blanchflower et al., *The Impact of the Recent Migration from Eastern Europe on the UK Economy*, January 2007

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 510,000 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 30 September 2006 – 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 short periods. The total applications for July to September 2006 were slightly lower than the same months in 2005 (and applicant numbers were lower in the second and third quarter of 2006 compared to the second and third quarter of 2005). As far as the *nationality* of the applicants is concerned, the vast majority of applicants come from Poland, with the percentage of Polish nationals as to the total of A8 nationals increasing steadily and reaching 72% in the third quarter of 2006. Their number between May 2004 and September 2006 exceeded 300,000. They are followed by Lithuanian and Slovakian nationals (numbers of applicants from each of these countries exceeded 50,000 over that period).

According to the Accession Monitoring Report, applicants continue to be of young *age*: Of those who applied between May 2004 and September 2006, 82% of registered workers were aged between 18-34; this percentage increased to 84% in the third quarter (the summer months) of both 2005 and 2006, with over 50% in the younger 18-24 age bracket. As far as *occupation* groups are concerned, administration, business and management have overtaken hospitality and catering as the group that employs the most A8 workers since May 2004. The proportion of workers in the Administration group increased from 17% in the second quarter of 2004 to 42% in the latest quarter. On the other hand, the proportion in Hospitality and Catering fell from 31% to 18% in the same period. Agriculture presents considerable fluctuations, with numbers peaking in the summer months and falling considerably in the winter months (suggesting that agriculture is a primarily seasonal occupation). On the basis of the applicants' responses to the WRS application form, it transpires that 97% of registered workers were working full time and 78% of workers were earning £4.50-£5.99 per hour. 59% of respondents answered the question regarding their *intended length of stay*: of these, 41% did not answer or said they did not know, and 45% ticked 'less than three months'. Only 4% said they intended to stay for more than 1 year and 6% more than 2 years (however, the reality may prove to be different).

Looking at the *geographical distribution* of WRS applicants, the greatest number of workers can be found in Anglia, followed by London and the Midlands. The lowest numbers can be found in Northern Ireland and Wales. The proportion applying in London fell from

25% in the second quarter of 2004 to 9% in the third quarter of 2006. 28% of those working in Hospitality and Catering were in London and 26% of those in agriculture were in Anglia – while the highest proportion of those working in Administration (20%) were in the Midlands. A greater proportion of workers from Lithuania and Latvia worked in Agriculture than any other nationality (21% and 25% respectively, compared to 12% of all workers). About 7,500 *applications for income support* have been made between 2004 and 2006, with less than 1,200 being successful. 56,681 applications for *child benefit* were made, 63% of which were approved. Only 128 *local authority lettings* were made to A8 nationals and a total of 524 *homelessness applications* were approved (out of 1,501 applications)- this represents 0.2% of the average number of acceptances over a typical 26 month period. All these data seem to confirm the point that the impact of A8 nationals on the UK social security system has been minimal.

The National Insurance Number (NINO) Allocation Report 2006 states that registration to Accession nationals increased from 111 to 271 thousand (144%) between 2004/05 and 2005/06 with Poland being the largest contributor (171,000 registrations in 2005/06, which is 63% of all Accession nationals). There have been 97,600 registrations of EU 'non-accession' nationals entering the UK in 2005-06, from 81,300 in 2004-05 (this was a noticeable increase, as the numbers of registrations from nationals of the 'old' EU presented little fluctuation between 2002/3 and 2004/05). Poland topped the list of countries whose nationals registered in 2005-06 (same as 2004-05). Lithuania and Slovakia were ranked 3rd and 4th in 2005-06, with France 8th, Latvia 9th and Germany 10th. This demonstrates a substantial increase in registrations of Lithuanian (30,900 from 15,800 in 04-05, when Lithuania was 6th on the list) and in particular Slovak citizens (27,400 from 11,400 in 04-05, when Slovakia was ranked 10th).[65] According to the Labour Force Survey, 247,000 out of 365,000 A8 nationals were in employment in the UK in June 2006 (with the vast majority again coming from Poland- 157,000), with the numbers for the 'old 15' EU member states being 616,000 (out of 1,198,000) (the majority from Ireland with 178,000 and Germany with 164,000, followed by some distance by France (63,000)). The proportion of those at work is thus much higher in the A8 countries. As far as residence documents are concerned, according to the 2005 Immigration Statistics decisions on applications from EEA nationals and family members rose to 24,815 for the 'old' Member States and the EEA countries, and to 11,550 for accession states (including Malta and Cyprus). The highest numbers came from Poland (6,495), followed by Portugal (5,025) and France (4,060). The increase in overall decisions from Europe (25%) was attributed primarily to accession.

As mentioned in the 2005 Report, different sources count different elements and dimensions of population flows. Due to the Worker Registration Scheme, and the sustained political attention to movement of persons from the A8 countries, it is much easier to obtain information on A8 nationals than on nationals of the 'old' 15 Member States. All reports seem to converge on the fact that there has been a constant flow of A8 nationals to the UK, primarily from Poland.[66] An attempt to synthesise the different data sources on A8 nationals has been made by the Blanchflower Report, which concluded that there has been consistent evidence that approximately 500,000 A8 nationals have come to work in the UK between May 2004 and late 2006- but, the Report notes, other sources suggest that a significant proportion of these workers have likely returned to their country of origin. According to the Report, the data suggests that as many as half of the A8 nationals who have come to the UK have not stayed permanently.[67]

65 NiNo statistics include data on age and geographical distribution of all applicants, but there is no nationality breakdown in this context.

66 This is also evidenced by the International Passenger Survey, which contains data on visits to the UK by overseas residents.

67 And there have been recent reports highlighting the fact that a number of A8 nationals are now returning to their countries of origin – see *The Sunday Times Magazine*, The End of the Rainbow, 25 February 2007.

## CHAPTER X. SOCIAL SECURITY - SIMON ROBERTS

### *Introduction*

This Chapter discusses free movement and
- the relationship between Regulations 1408/71 and 1612/68; and
- supplementary pension schemes.

### *The relationship between Regulations 1408/71 and 1612/68*

There are three broad categories of social security benefits in the UK- contributory, non-contributory categorical and non-contributory income related. The contributory benefits cover the contingencies of old age, sickness, invalidity, maternity and unemployment. Non-contributory categorical benefits are awarded to people whose circumstances mean that they have extra demands on their income. The relevant benefits in this group cover disability, care and mobility, industrial injuries and the upbringing of children. Income related benefits are non- contributory and means tested, designed to provide a minimum level of income for those out of work without means or as a top up to other benefits or low wages or for workers with disabilities. Some of the income related non- contributory in- work benefits are now administered as tax credits (Roberts, 2006).

In order to remove obstacles to free movement Regulation (EEC) 1408/71 co-ordinates Member States' social security schemes through four main principles: discrimination on grounds of nationality is prohibited; rules are laid down to determine which member country's legislation a person is subject to; periods of insurance spent in Member States are aggregated; and some benefits can be exported. Article 3(1) states: Subject to the special provisions of this Regulation, persons to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.

Social rights of migrants are also protected under Regulation (EEC) 1612/68. Article 7(2) provides that: (A worker who is a national of a Member State) shall enjoy the same social and tax advantages as national workers. The concept of social advantages within the meaning of Art. 7(2) of Reg. 1612/68 includes all those advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member State therefore seems likely to facilitate the mobility of such workers within the Community.

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).

Thus 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).

Although Regulation 1408/71 forbids the application of nationality conditions to member state nationals, it allows the retention of residence conditions (Roberts, 2006). The discriminatory effect of conditions of entitlement requiring past periods of residence is dealt with by aggregating periods of residence in one EU member state with periods spent in another. Thus their effect is the same for nationals moving from another EU member country as it is for host country nationals.

There are no nationality or residence conditions attached to UK contributory benefits. Entitlement is governed solely by contribution conditions. Similarly, none of the non-contributory benefits in the UK have nationality conditions attached to their receipt. However, over the past ten years an increasing number of residence conditions have been attached to UK non contributory benefits.

Changes in 1996 excluded people subject to immigration control from receiving Attendance Allowance, Child Benefit, Disability Living Allowance and Invalid Care Allowance (now Carer's Allowance) (Roberts, 2006).

As discrimination on grounds of nationality is prohibited by Regulation 1408/71, EU nationals and members of their family are treated as having satisfied the residence test (some other groups are exempted from the test or are also deemed to have passed it).

For those people who satisfy the above test, entitlement to non-contributory benefits is governed by further residence and presence conditions. For persons covered by Regulation 1408/71 periods of residence spent in another member country count towards satisfying the test.

More stringent residence tests are applied to non contributory means-tested benefits. The Habitual Residence Test was introduced in 1994 (Income-related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994 (SI 1994 No 1807) The Habitual Residence Test 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.

On May 1st 2004, in the context of enlargement, the Social Security (Habitual Residence) Amendment Regulations 2004 became effective. The amendment introduced a further test for receipt of the income-related benefits: Income Support, Pension Credit, Income Based Jobseeker's Allowance, Housing Benefit and Council Tax Benefit. Since this date, a claimant as well as being present and habitually resident, also has to have a right to reside in the UK under UK or EU law. The regulations came into effect on the same date of accession to the EU of the ten new member states. At the same time a Workers Registration Scheme was introduced to control access to the labour market for 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.

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.

An increasing number of cases concerning the Right to Reside are coming before UK Tribunal/Courts The right to reside provisions have been considered in a number of recent Commissioner's decisions that raise important issues concerning the compatibility of the test with EU law (CIS/3890/2005; CIS/3182/2005; CIS/3875/2005; CIS/3573/2005 (See Cousins' (2006) discussion of Case CIS/3573/2005)).

For example, a Polish national who worked in Northern Ireland and was for a period registered under the Worker Registration Scheme but failed to notify the Home Office when she changed jobs (C6/05-06(IS). She subsequently made an application for Income Support which was declined on the grounds that she did not have the right to reside and was therefore not habitually resident and so had no access to Income Support.

The argument before the Commissioners was whether the appellant had the right to reside and turned around whether the amended Habitual Residence Test incorporating the right to reside requirement contained in the definition of a person from abroad in Regula-

tion 21(3) of the Income Support (General) Regulations was incompatible with EC law. The Tribunal had concluded that the claimant's circumstances were covered by Article 39 of the Treaty and Article 7 of Regulation 1612/68. It concluded that Income Support was a social advantage and covered by Regulation 1408/71. It concluded that the effect of the 2004 Regulations was to discriminate directly against Accession State nationals on grounds of nationality and it found that Article 7 prohibited such an outcome. The Treaty did not permit derogation from Article 7. The Tribunal found that the claimant remained a worker both factually and for the purposes of Article 7(2) after her employment ceased and was therefore able to enjoy the same social and tax advantages as national workers. It found the claimant to be habitually resident in the United Kingdom, having a right to reside there with entitlement to Income Support.

At issue before the Commissioners was whether the provisions of regulation 5(2) of the 2004 Regulations are within the permitted derogation from Article 39 of the Treaty and if not whether Article 7 of the Regulation EEC 1612/68 (which implements Article 39) can assist the claimant.

The Department submitted that the definition of 'worker' in the 2004 Regulations was a narrower definition than that in Regulation 1612/68. The effect of the 2004 Regulations, it submitted, was to create a different species of worker. The Department submitted that this was permissible under the Treaty of Accession and it had the effect of excluding A8 nationals from being workers under Regulation 1612/68.

The Department submitted that to be a worker for the purpose of Regulation 1612/68, the relevant person must have exercised his right to freedom of movement under that Regulation. It submitted that the claimant had not. She gained access to the United Kingdom labour market under the 2004 domestic Regulations not under EEC Regulation 1612/68.

The Commissioners, after hearing arguments on the applicability of cases C/184/99 Grzelczyk; C314/99 Baumbast; 456 Trojani; 138/02 Collins; C-9/88 Lopes da Veiga; and C-305/87 Hellenic Republic, found that under general Community law the Member States may restrict rights of residence to workers within Regulation 1612/68 and to those otherwise self-sufficient and may remove those rights where the conditions upon which they are granted are no longer fulfilled. The Commissioners stated that it appears that Member States are entitled to take measures to prevent a person exercising a right of residence from becoming an unreasonable burden on the host Member State during an initial period of residence at least and concluded that the limitations on the right to reside are within the permitted derogations and are proportionate to attain the legitimate aim of regulating access to the labour market by Accession State nationals. The derogation by its very nature permits discrimination between Accession State nationals and other EC nationals in relation to access to labour markets and the right to reside as linked thereto. The United Kingdom legislation is within that permitted derogation.

The Commissioners then considered the effect on the appellant's entitlement to Income Support, reasoning that 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." The claimant did not have such right to reside. Regulation 21(3) is made subject to Regulation 21. This means that whether or not the claimant could otherwise be treated as habitually resident because she falls within sub-paragraphs 21(3)(a) to (d) she cannot be so treated if she does not have a right to reside in the United Kingdom. She therefore cannot satisfy the habitual residence test and must therefore be treated as a person from abroad with an applicable amount of nil for Income Support purposes.

The question of proportionality may be important. In concluding his discussion of Case CIS/3573/2005, Cousins draws attention to the Commissioner's suggestion in that case concerning the proportionality of the right to reside test suggesting that the test may be a proportional response under EU law in some situations but not in others.

### *Supplementary Pensions*

Occupational schemes, which date back to the nineteenth century, have covered about half of the UK working population at any one time since the mid 1960's. The government's stated strategy is to move from a situation at the beginning of the twentieth first century in which about 60 per cent of pensioners' income comes from the state and 40 per cent from private sources to one in which by 2050 those proportions are reversed. However, the percentage of firms that provide pensions for their employees has declined from 52 per cent in 2003 to 44 per cent in 2005 while membership amongst private sector employees has declined from 38 per cent in 2003 to 34 per cent in 2005. Since April 2001, a range of financial service companies and other organisations such as trade unions have been providing new low-cost, flexible, private second pension known as Stakeholder pensions, and the percentage of firms who were contributing to Stakeholder pensions rose from five per cent in 2003 to seven per cent in 2005 (McKay, 2006). This decline can be accounted for by changes in the treatment of pension funds, accounting rules for reporting firm's liabilities, changing economic conditions and changing attitudes by some companies to their responsibilities which have meant that many employers have either closed their final salary schemes to new recruits or even converted entire final salary schemes to defined contribution schemes. Between 2003 and 2005 there was a considerable reduction in the proportion of employees in open occupational schemes – from 16 to ten per cent in open defined benefit schemes, and from six to four per cent in open defined contribution schemes (McKay, 2006).

While Regulation 1408/71 coordinates statutory social security schemes it does not cover non-statutory occupational pension schemes and although Directive 98/49/EC addresses some specific issues it does not address the fundamental problems linked to the acquisition of rights and their transfer from one scheme to another. The EU Directive on Institutions for Occupational Retirement Provision 2003/41 (IORPS) is a first step toward creating a single market for occupational pensions in the EU. The Directive sets out

- rules to protect the beneficiaries and members of IORPs, who must be given sufficient information on the rules of the pension scheme, the institution's financial situation (where there is a guarantee) and their rights;
- investment rules adapted to the characteristics of IORPs to ensure diversification of assets by taking full advantage of the benefits offered by the single market and the Euro;
- rules permitting cross-border management of occupational pension schemes, supplemented by an appropriate degree of tax coordination
  (EUROPA http://europa.eu/scadplus/leg/en/lvb/l24038b.htm).

In response to the Directive the UK government introduced the Occupational Pension Schemes (Cross-border Activities) Regulations 2005 (SI 2005/3381) effective from 30th December 2005:

- To enable an occupational pension scheme established in the UK to accept contributions from employers located in other EU Member States, in accordance with the provisions of the Directive;
- To allow an employer located in the UK to sponsor an occupational pension scheme established in another EU Member State;
- To ensure that an occupational pension scheme, irrespective of whether it is located in the UK or elsewhere in the EU complies with relevant UK pensions legislation in respect of UK members.

The Pensions Regulator is responsible for supervising cross-border activity including authorisation of UK schemes to operate across borders, monitoring schemes' compliance with UK pensions legislation and taking action as necessary where a breach of law is detected.

The Occupational Pension Schemes (Cross-Border Activities) Regulations 2005 (SI 2005/3381) has subsequently been amended by the Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2007 which is due to come into force on 6th April 2007 to ensure that:

- the more stringent cross-border full-funding requirement only applies to those sections of a multi-employer scheme to which employers involved in cross-border activity contribute;
- the trustees must seek fresh cross border approval whenever their scheme starts to operate in a new Member State; the Regulator can instruct the trustees of the scheme to complete the necessary ring-fencing within a specified period of time;
- cross-border schemes are exempt from the requirement of section 66A (3) of the Pensions Act 1995 which requires that members of a scheme who work outside the UK should be treated the same as members of a scheme who work wholly in the UK. UK based cross-border pension schemes cannot comply with this requirement as the Cross-border Regulations (as expressed by Article 20 (5) of the EU Occupational Pensions Directive) require schemes to observe the social and labour law relevant to the Member State in which the member is based. Consequently members who work permanently outside the UK may be treated differently from those members who work wholly in the UK, on account of other EU States' differing social and labour law. The Cross-border Regulations do not, however, apply to members working on secondment (as defined in the Cross-border Regulations) in other EU States; and
- to add two further information requirements for schemes seeking approval to accept contributions in relation to a particular European employer to reflect changes to a protocol document covering schemes operating on a cross-border basis which was agreed by The Committee of European Insurance and Occupational Pension Supervisors (CEIOPS).

The Portability of Supplementary Pensions Directive 2005, which is subject to co-decision with the Council and European Parliament as co-legislators and in Council to voting by unanimity, proposes:

- minimum standards for the acquisition of supplementary pension rights
- preservation of dormant rights;
- transferability; and
- access to the information workers need to make informed choices.

The Directive would not require employers to provide supplementary pension schemes; but if they choose to do so, the schemes would have to be compatible with the requirements of the Directive.

The House of Commons European Scrutiny Committee, considered the EU Draft Directive on 30 November 2005 (European Scrutiny Committee, 12th Report, Session 2006-06) and on 12 January 2006 the Department for Work and Pensions issued a package of proposals, including a Regulatory Impact Assessment, for consultation.

Most respondents said that they had not experienced reduced mobility of workers caused by the rules of supplementary pension schemes. They observed that the UK already has preservation requirements for deferred pensioners, and the right to a fair transfer value, so there did not seem to be any improvements required.

However, some respondents believed there had been occasions when the rules of supplementary pension schemes had caused a reduction in mobility. They noted that the rules related to the Cross-border Regulations, implemented as a result of the IORP Directive. Others observed that restricted mobility was as a result of a general lack of mandatory or discretionary indexation on accrued benefits in the originator country. One respondent organisation noted that the restrictions resulted from problems in transferability between public and private sector schemes, arising from the rapid movement away from direct benefit in the private sector, which is not reflected in the public sector.

The Government subsequently set out its position in July 2006 (Government Response to the Consultation on a Draft European Directive - The Draft Portability of Supplementary Pensions Directive 2005, July 2006).

In the meantime the UK Minister Anne McGuire had outlined the essence of that position at the Employment, Social Policy, Health, and Consumer Affairs Council, under the Austrian Presidency, when she emphasised the need to maintain the viability of pension

provision while seeking to improve worker mobility. This basic position is repeated in the consultation document:

> "The Government supports the overarching principle behind the Directive (labour market flexibility), but has maintained the line that it is important to achieve a balance between improving rights for members of pension schemes, and any additional burden on schemes, remaining scheme members, and employers. The Government will continue to take a proactive approach in negotiations seeking a text that is clear and workable in the UK, and which minimises the cost on UK schemes (we believe the UK has already legislated to ensure pensions portability)" (Government Response to the Consultation on a Draft European Directive - The Draft Portability of Supplementary Pensions Directive 2005, July 2006).

Specifically the government has highlighted concerns around the scope of the Directive, including precision and clarity of definitions; costs, including administrative costs; vesting periods; preservation/up-rating; minimum age of entry; incoming transfers/transfer values; and provision of information.

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## CHAPTER XI. ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS - NICOLA ROGERS

### *Establishment*

The Immigration (European Economic Area) Regulations 2006 define as qualified persons, the self employed. This means they are entitled to free movement rights in the national legislation implementing Directive 2004/38. The definition of self employed is strictly by reference to the EC Treaty. No further guidance is provided in the Regulations regarding what document needs to be produced to substantiate status as self employed in the UK. The European Casework Instructions which set out the way in which officials are to carry out their job in applying the law, only states that a self employed EC national is "someone who has established her/himself in the UK in order to pursue activity as a self employed person." para 3.1. There is no further clarification in the ECIs as to what documents need to be submitted to show that the individual is self employed. This lack of guidance either in the Regulations or the ECIs as to what needs to be produced for the issue of a registration certificate is unhelpful, to say the least for the EU citizen exercising a self employed right in the UK. As this is the only economic free movement right available to the 2007 Member State nationals it is of some concern that there is not greater clarity.

In practice, lawyers indicate that there are few problems with the issue of registration certificates for the self employed from pre 2004 and 2004 Member States. The 2007 Member State nationals, however, are still subject to the higher level of scrutiny which applied when their right of self employment was regulated by the EEA Agreement – this means they are required to present business plans, evidence of potential and existing clients, and other documentation. At the moment, there appears to be substantial discrimination in practice in the treatment of requests for registration certificates from pre and 2004 Member State nationals which are dealt with very lightly and 2007 Member State nationals who are subject to a much more intensive investigation.

### *Provision of Services*

EEA nationals and their family members who come to the UK to provide services the situation are completely ignored by the Immigration (European Economic Area) Regulations 2006. Service and service provision is not mentioned in the Regulations at all. These EEA nationals are not defined as 'qualified persons' and so do not acquire rights under the Regulations.

There are continuing problems with the posting to the UK of third country national employees by EEA based businesses. While under the *Vander Elst* and subsequent judgments of the ECJ, such employees should be able to enter and under take service provision for their employer anywhere in the EU without undue administrative obstacles, in practice in the UK there are many obstacles. The first and most problematic is the prior visa requirement. The individual and business must obtain a prior visa for the third country national to come to the UK before he or she will be admitted. This causes delay and the loss of business opportunities. The jurisprudence of the ECJ in particular in *Commission v Germany* (C-244/04) has not been correctly applied (or indeed applied at all).

### *Students*

The main issue in the UK regarding students from other EU Member States has been the application of the ECJ's judgment in *Bidar* (see chapter V) regarding access to maintenance grants. There has not been any suggestion that EU national students be subject to quotas. As regards residence, EU national students only exceptionally apply for residence certificates. Thus they are rarely required to indicate whether they have sufficient funds to support themselves. They have access to the National Health Service. Normally, only students who

seek family reunification with third country national family members actually make applications. As far as your rapporteurs are aware no cases on this issue regarding students came before the UK courts in 2006.

### *The EC Turkey Agreement – application in the UK*

*Self-employed persons*

The application of the "standstill clause" relating to establishment and the provision of services contained in Article 14 of the Additional Protocol to the Ankara Agreement has remained extremely controversial in the UK in the past year.

It will be recalled that the ECJ has confirmed in two cases, *Savas* (Case C-37/98, 11 May 2000) and *Abatay* (Case C-317/01, 21 October 2003) the standstill clause gives no *right* of entry or residence to Turkish nationals wishing to set up business in the Member States. However, the Turkish nationals are entitled to set up their businesses in the Member States on conditions that are no more stringent than were in place at the time when the Additional Protocol came into force in the host Member State. "Conditions" will include conditions of entry, stay and establishment itself.

Those wishing to establish themselves in business in the UK will therefore need to rely on the immigration laws and practice that were in place on 1 January 1973. This was primarily the Immigration Act 1971 and the Immigration Rules HC509 (control on entry) and Immigration Rules HC510 (control after entry).

Compared with the current immigration rules applicable to business persons (HC395) the 1973 Immigration Rules HC509 and 510 were extremely flexible and generous. In brief the principle differences are:

- There was no minimum level of investment under HC 510 or 509;
- There was no requirement to offer employment to a minimum number of people under HC 510 or 509;
- There was no mandatory entry clearance requirement under HC 509 and passengers arriving without entry clearance would be given a period of leave to enter to have their application examined by the Home Office.

After *Savas* the Home Office issued guidance in January 2003 suggesting that the standstill clause only applied to those who sought to lawfully switch in-country or overstayers but not to port applicant asylum seekers on temporary admission, illegal entrants or persons applying for entry clearance. Applicants on temporary admission, illegal entrants or those applying for entry clearance would have their applications considered under the *current* Immigration Rules HC 395 rather than the 1973 Rules. In other words the UK did not accept that the standstill provision affected anyone who had not at one stage been given leave to enter or remain by the Secretary of State. Since it is the case that very few Turkish nationals obtain visas or leave to enter in other capacities, the Government was really limiting the benefit of the standstill provisions.

Whether the standstill provision (and therefore the 1973 Rules) could apply to on-entry and temporary admission cases was challenged in an action for judicial review in two joined cases: *R (on the Application of Veli Tum) and R (on the application of Mehmet Dari v Secretary of State*, CO/2298/03). The cases were successful in the High Court. The Secretary of State appealed against the decision of the High Court to the Court of Appeal. By judgment dated 25 May 2004 the Court of Appeal dismissed the Secretary of State's appeal and upheld the decision of the court below. The Court of Appeal considered that all Turkish nationals could obtain the benefit of the standstill clause save where they had engaged in fraud. Therefore nearly all Turkish nationals whether in the UK or outside including asylum seekers on temporary admission should have their applications to enter or remain on the basis of their businesses considered under the 1973 Rules.

The Secretary of State petitioned the House of Lords. At a permission hearing before the Lords, their Lordships ordered at reference on the question to the ECJ (*C-16/05*). The ECJ heard the case on 18 May 2006.

Pending the outcome of *Tum* the Home Office issued further guidance on the application of the standstill clause to those are seeking entry to the UK to establish themselves in business. The guidance states that applications will be considered under the current Immigration Rules and the 1973 Rules simultaneously. If the person does not have entry clearance or does not otherwise satisfy the current Immigration Rules the Officer will then examine the case under the 1973 Rules. If the person seems likely to be able to satisfy the 1973 Rules then the person will be granted temporary admission with a prohibition on taking employment but permitted to start their self-employment. The cases will then have to be re-examined after the ECJ ruling in *Tum*. The Advocate General Geelhood gave his opinion on the case in September this year. It makes for depressing reading and appears to suggest that not only would persons on temporary admission not benefit from the standstill clause but neither would those admitted on short terms visas, calling into question the ECJ's decision in *Savas*. It remains to be seen if the ECJ is minded to revisit its decision in *Savas* as the Advocate General suggests.

The Home Office appears to apply this guidance in an extremely strict way and there are now a number of challenges underway where applications have been refused, without a right of appeal. No statistics for 2006 are currently available but anecdotal evidence suggests that the refusal rate is high.

The Home Office has produced guidance on in-country switching cases. The guidance correctly identifies that the ECJ decision in *Savas* makes clear that the standstill clause does apply to applicants who are already "in-country" having obtained leave to enter or remain, whether or not they have overstayed that leave. There is much emphasis however in the guidance on the use of *fraud* in in-country switching cases and obtaining leave to enter or remain in the first instance by use of fraud. In the Home Office view clandestine entry or a failed asylum application is to be deemed as fraudulent conduct which would cause the application to be refused under the current Immigration Rules rather than by reference to the 1973 Rules.

This is very arguably an incorrect approach to a standstill clause. Turkish business applicants should always have their cases considered by reference to immigration laws and procedures that were in place in 1973. If certain behaviour would have led to refusal in 1973 then such application should be refused for that reason. The Home Office cannot however impose current rules and procedures relating to immigration on Turkish business applicants. The Home Office position on "fraud" is subject of challenges in the Administrative Court now.

The Administrative Court has found favour in a number of cases now with an argument that untrue statements told in the context of an asylum application or asylum appeal constitutes fraud or that clandestine entry or breach of conditions of temporary admission might exclude an individual from the benefit of the standstill provision (see for instance *Arslan (R on the application of) v Secretary of State for the Home Department* [2006] EWHC 1877 (Admin); *Aksu (R on the application of) v Secretary of State for the Home Department (2006)* [2006] EWHC 1382 (Admin); *Temiz (R on the application of) v Secretary of State for the Home Department* (2006) (Case No: CO/8204/2005).

### *Workers*

Applications under Decision 1/80 for Turkish nationals to remain in the UK in employment are generally dealt with applying the case law of the ECJ in this area. However the Home Office is of the view that Decision 1/80 does not apply to persons admitted to the UK as trainees, au-pairs or students even where they have been given permission to work by the Home Office and they have taken up employment for at least one year.

The Court of Appeal has recently referred questions to the ECJ in three joined cases *The Queen on the application of Ezgi Payir, Burhan Akyuz, Birol Ozturk v Secretary of State for*

*the Home Department* (Case C-294/06). The questions relate to whether Turkish nationals who are admitted to the UK as students or au pairs can, after their first year's employment in the UK, continue to work (and therefore reside) in the UK pursuant to Article 6(1) of Decision 1/80. The Secretary of State considered they cannot benefit from the provision since they are admitted for other purposes, namely study or learning English. The Administrative Court in all three cases had found that if the Turkish nationals had been working lawfully for one year, they acquired a right under Article 6(1) to continue that employment regardless of the reason why they were admitted to the UK. The Secretary of State appealed to the Court of Appeal and the Court of Appeal referred questions to the ECJ.

The reference to the ECJ has left the situation of those admitted to the UK as students or au-pairs in limbo although the Court of Appeal did not allow the appeal of the Secretary of State. It appears at the present time the Home Office is not processing any applications from persons admitted as students and au-pairs (and even trainees) and this is subject of litigation now.

### *Entry Clearance*

The current Home Office guidance states that the British Embassy in Ankara will not consider applications under the 1973 Rules and they will only be considered under the current Immigration Rules. This is in direct conflict with the Court of Appeal decision in *Tum* and applicants may consider appealing to the Asylum and Immigration Tribunal. The benefits of having an application for entry clearance as a business person determined under the 1973 Immigration Rules as opposed to the current Immigration Rules are self evident particularly given the far less onerous financial requirements of the 1973 Immigration Rules. The Administrative Court in *Temiz* expressly stated that it is unlawful for entry clearance applications not to be considered under the 1973 Rules. However, the UK Government has not changed its position and continues to refuse to consider applications under the 1973 Rules.

### *Legal Services Commission*

Legal Services Commission which provides legal aid to litigants has decided on a narrow reading of the Access to Justice Act 1999 that litigation relating to the application of Article 41(1) (whether on a statutory appeal or a judicial review) should fall outside the scope of funding by virtue of the "business exclusion". Indeed in the *Tum* case referred to the ECJ the Legal Services Commission sought to revoke a public funding certificate once the case was referred to the ECJ by the House of Lords potentially exposing Mr Tum after months of litigation to having to pay his own costs and those of the Secretary of State if he is unsuccessful in the ECJ. Mr Tum applied for a review of the revocation by the Funding Review Committee. The Committee found that Mr Tum did not fall outside the scope of funding since he had not started his business and the litigation could not be said to be connected to the carrying on of a business. The LSC did then reinstate the certificate although only for the reason that the case was exceptional.

After other litigation the LSC has now decided that funding will be provided for judicial review cases but not for applications under legal help or statutory appeals under CLR although it has recently announced that it is seeking a change to the Funding Code to ensure that it does not need to provide funding in judicial review cases either.

## CHAPTER XII. MISCELLANEOUS - ELSPETH GUILD

The main website for information issued by the UK government for EU nationals working in the UK is:http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/your_status/european_citizens.html

The site helpfully begins by advising British citizens that they do not need to authorisation of the Immigration and Nationality Directorate to work in the UK. The IND is attempting to keep the site up to date in respect of enlargement though there are frequent complaints from practitioners that various aspects of the site are not up to date or incorrect.

The House of Lords EU Select Committee continued its valuable scrutiny of EU and UK legislation implementing EU legislation. A report on the Schengen Information System II took up much of Sub Committee F's time in 2006 (http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/1/101.htm). The 53rd report 2006 is entitled *The Further Enlargement of the EU: threat or opportunity?* – providing a very useful outline of the UK's position on enlargement. The 38th report on *The Services Directive Revisited* provides an excellent overview of the adoption of the new Services Directive and the consequences for the UK. The 40th report 2006 *Behind Closed Doors: the meeting of the G6 Interior Ministers at Heiligendamm* provides an insight into the closed meeting of the G6 Ministers which has important consequences for free movement of persons in Europe. The 32nd Report on *Illegal Migrants: proposals for a common EU returns policy* is more of interest to those following JLS issues but nonetheless might be considered of interest here.

The House of Commons Home Affairs Committee is taking an increasingly active interest in EU measures. There will be a session in February 2007 on EU JHA issues including borders (http://www.parliament.uk/parliamentary_committees/home_affairs_committee/hacpn070211n011.cfm). It published a report on immigration controls in 2006: (http://www.parliament.uk/parliamentary_committees/home_affairs_committee/hac2005_06ic.cfm).

An important new book, Peers and Rogers, *EU Immigration and Asylum Law,* Martinus Nijhoff, The Hague 2006, was published this year. It covers all aspects of migration which have been regulated at the EU level.

In training, the Immigration Law Practitioners Association has remained a key provider of training for lawyers and other legal practitioners on EU free movement of workers. In 2006 the following training course were held:

2 May 2006 – Free Movement of Persons in the UK – at which representatives of the IND, the Commission and the judiciary participated on a panel to consider the implementation of directive 2004/38.

15 June 2006 EU law and human rights in an immigration context which considered the intersection of EU and ECHR obligations in the field of immigration and their consequences in immigration and free movement of persons law.

10 July 2006 The Citizens Directive and its domestic implementation by the Immigration (European Economic Area) Regulations 2006.

20 October using the Refugee Qualification Directive in English courts: an essential guide for asylum lawyers.

23 November 2006 The Citizens Directive and its domestic implementation by the Immigration (European Economic Area) Regulations 2006 (a repeat of the earlier training course due to high demand).

Some training courses on EU free movement of persons law have also been provided by private companies, in particular CLT which provides training for lawyers in the UK. A number of barristers chambers have also instituted the practice of evening lecture series on EU law in the field of free movement of persons which has encouraged the exchange of information

and expertise in the area. Less evident have been the universities of which only few have courses on free movement of persons (the notable exception is Queen Mary University which has a very active programme in the field).

The ILPA European Sub Committee met every four weeks throughout the year to monitor the UK application of EU law in free movement of persons, immigration and asylum. The law Society's Immigration Sub Committee has also been active in exchanging information about free movement of persons in UK law and ensuring that solicitors who are practicing in the field are up to date. Similarly, a non governmental organisation – the Joint Council for the Welfare of Immigrants – has held some training course for non governmental organisations working at the grass roots level and for which problems of EU free movement of persons arise from time to time. The Child Poverty Action Group has been the main advocate in the UK regarding access to social benefits for 2004 and 2007 Member State nationals in the UK. It has careful scrutinised all of the implementing legislation and assisted individuals to bring challenged to restrictive interpretations. The UK Overseas Students Association has produced a number of information sheets and advice to students on EU law, in particular this year following up the ECJ's judgment in *Bidar* as regards the right to obtain study grants.