

REPORT
on the Free Movement of Workers
in Ireland in 2010-2011

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Introduction

There have been a number of important developments in 2010-2011 with regard to the free movement of workers in Ireland.

As part of the legacy of the *Metock* judgment, ‘marriages of convenience’ continue to raise concerns in Ireland. This issue was highlighted by the Minister for Justice, Equality and Law Reform at the Justice and Home Affairs Council in June 2011. Statistics apparently continue to indicate unusual marriage patterns between EEA nationals from certain Member States and third-country nationals from certain third countries. The Minister proposes to amend the Immigration, Residence and Protection Bill 2010 in an attempt to tackle the issue.

As a response to the March 2011 Court of Justice judgment in *Zambrano*, the Department of Justice, Equality and Law Reform decided to examine cases before the courts, and current applications for residency, where the *Zambrano* judgment could have implications. The Department has issued 135 positive decisions in such cases so far, with a large number still pending a decision.

With regard to the Roma community in Ireland, the Department of Justice, Equality and Law Reform is in the process of producing an integration strategy as part of the Europe 2020 strategy. There are very few Roma workers in Ireland (many of them are Romanian nationals who need a work permit to work). Much of the debate in Ireland concerns the engagement of Roma with the criminal justice system, especially since the tightening-up of laws on begging.

In order to be eligible for student grants in Ireland, students have been required, since 2010, to be ordinarily resident in the State for three of the previous five years. This requirement has now been given a legislative basis as part of the new Student Support Act 2011 which is expected to be in force before the next academic year in September 2011.

With regard to equal treatment, there continues to be many cases taken by non-nationals, in particular those from 2004 Accession Member States, alleging discrimination in relation to matters such as the provision of contracts, training in health and safety, rates of pay, and dismissal. There appears to be a relaxation in the attitude of the Equality Tribunal with regard to the provision of contracts to employees in a language that they do not understand. The equality legislation is nonetheless an important tool in securing equality in the workplace.

In relation to young workers, most measures available to facilitate entry into the labour market are open to everyone irrespective of nationality. It may be more difficult, however, to access programmes that are only available to those in receipt of social assistance, as in such cases, the habitual residence condition must be satisfied. More generally, job-seekers are unable to obtain job seeker’s allowance unless they can satisfy the habitual residence condition.

Chapter I: The worker: Entry, residence, departure and remedies

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

Article 7(1)(a) of the Residence Directive provides that all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they are workers or self-employed persons in the host Member State.

Regulation 6(2) of the European Communities (Free Movement of Persons (No .3) Regulations 2006 (the ‘2006 Regulations’) provides that, subject to Regulation 20 (on removal from the State), a Union citizen may reside in the State for a period longer than 3 months if, amongst other matters, he or she is in employment or is self-employed in the State.

Article 7(3) sets out four sets of circumstances in which, for the purposes of Article 7(1) (a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person.

These are addressed in Regulation 6(2)(c)(i)-(iv) of the 2006 Regulations. These provisions, somewhat curiously, do not expressly maintain the status of worker or self-employed person, but rather the right to remain. Subject to this, the first two sets of circumstances (relating to temporary inability to find work resulting from illness or accident and involuntary unemployment after being employed for more than one year) are correctly transposed.

The third set covers involuntary unemployment after completing a fixed-term employment contract of less than a year or being involuntarily employed during the first twelve months. The Directive provides that, in this case, the status of worker shall be retained for no less than six months; Regulation 6(2)(d) provides, rather differently, that ‘the right to remain shall expire 6 months after the cessation of the activity concerned unless the person concerned enters into employment within that period’.

The fourth set of circumstances covers persons embarking on vocational training where, save in the case of involuntary unemployment, the retention of the status of worker requires the training to be related to the previous employment. This is transposed by the provision ‘except where he or she is involuntarily unemployed, he or so she takes up vocational training related to the previous employment’. Although a little ambiguous, it seems to be intended that persons who are involuntarily unemployed have the right to remain whether or not the training is related to their previous employment.

Article 8(3)(a) provides, amongst other matters, that, for a registration certificate to be issued to Union citizens who are workers or self-employed persons in the host Member State, Member States may only require the presentation of a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons.

The 2006 Regulations do not provide for the issuing of a registration certificate. Ireland does not require Union citizens to register and there is therefore no need for a registration certificate.

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Article 14(4) provides that, by way of derogation from Article 14(1) and (2) and without prejudice to the provisions of Chapter VI (restrictions on grounds of public policy, public security and public health), expulsion measures may not be adopted against Union citizens or their family members if the Union citizens are workers or self-employed persons, or the Union citizens entered the territory of the host Member State in order to seek employment (for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being employed).

Article 14(4) has not been explicitly transposed in the 2006 Regulations.

A possible difficulty arises in relation to residence of up to three months, which in Regulation 6(1) of the 2006 Regulations is made conditional on the person concerned not becoming an unreasonable burden on the social welfare system of the State. There is no specific derogation for workers or self-employed persons, or job seekers.

This difficulty does not arise in respect of workers or self-employed persons enjoying a right of residence for more than three months, since there is no condition that the person concerned does not become an unreasonable burden on the social welfare system. Provided the status is retained, there are no grounds for expulsion under the Regulations other than those provided for in Chapter VI of the Directive. The position of job seekers is discussed in 2., below.

Article 17 provides for exemptions in relation to the conditions for permanent residence for persons no longer working in the host Member State and their family members.

Article 17 is transposed by Regulation 13 of the 2006 Regulations, which deals with ‘entitlement to permanent residence in the State of Union citizen no longer working in the State and his or her family members’.

The wording used in Regulation 13 is sometimes rather different from that used in Article 17. In most cases, it seems that there has been correct transposition. However, there are two cases where the position is not clear:

First, in relation to the transposition of Article 17(1)(c) of the Directive (frontier workers), Regulation 13(4) provides for return to the State ‘at least once a week’, whereas Article 17(1)(c) provides for return ‘as a rule, each day or at least once a week’. The Irish transposition seems to ignore the need for a measure of flexibility.

Second, in relation to the transposition of Article 17(3) of the Directive (right of permanent residence of family workers), Regulation 13(6) refers to family members of Union citizens who have been in employment or have pursued self-employed activity in the State, whereas Article 17(3) refers to family members of a worker or self-employed person. The Regulation does not appear – at least on its natural interpretation – to cover the position of Union citizens actually in employment or engaged in self-employed activity.

Article 24(2) provides that, by way of derogation from the enjoyment of equal treatment under paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans. This derogation does not apply to persons who are workers, self-employed persons, persons who retain such status and members of their families.

Ireland avails fully of the derogation under Article 24(2) of the Directive.

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Regulation 18(2)(a) of the 2006 Regulations provides that persons covered by the Regulations - other than workers, self-employed persons, or a person who retains such status and members of his or her family, shall not be entitled to receive assistance under the Social Welfare Acts: (i) for three months following his or her entry into the State; or (ii) where the person entered the State as a job-seekers, 'for such period exceeding 3 months, during which he is continuing to seek employment and has a genuine chance of being engaged'. The term 'assistance under the Social Welfare Acts' means assistance under the Social Welfare Consolidation Act 2005 to 2009 and includes payments or services under the Health Acts 1947 to 2010 and the Housing Acts 1996 to 2009.

Regulation 18(2)(b) provides that, prior to the acquisition of permanent residence in the State, a person covered by Regulation 18(2)(a) shall not be entitled to receive maintenance grants for students (including those undertaking vocational training). Notwithstanding this, permanent residence does not appear in fact to be required in order to receive a maintenance grant (see Chapter VI, 5, below): the purpose of Regulation 18(2)(b) appears to be to ensure that the right to receive a grant remains a national one, rather than a right under EU law.

2. SITUATION OF JOBSEEKERS

The position of job seekers who enter the State in this capacity is very unclear in Ireland. There is little on official web sites. There is no legislative provision expressly applying to job-seekers, save for Regulation 18(2)(a)(ii) of the 2006 Regulations that denies assistance to them under the Social Welfare Act (see above).

There is no legal obstacle to 'genuine' job seekers entering and residing in Ireland. There is no requirement to register.

He or she can transfer unemployment benefit from the Member State of origin for up to 3 months (and up to six months in some cases). After that period, the job seeker may qualify for Jobseeker's Allowance if conditions, including the habitual residence condition, are satisfied (see Chapter IV, 2.1, below, for a discussion on the application of this condition).

Operational guidelines issued by the Department of Social and Family Affairs¹ state that, apart from the production of identification (a passport or national identity card) to confirm EU/EEA Member State nationality, the Deciding Officer will need evidence of a permanent address showing that the person is resident and available for employment in Ireland, that the person has a good command of English and that the reason for coming and the actual place of residence is consistent with a genuine search for work. It is specifically stated that 'special care should be taken to ensure that all EU Nationals have genuinely come to Ireland with the intention of seeking employment'.

3. OTHER ISSUES OF CONCERN

None to report.

¹ http://www.welfare.ie/EN/OperationalGuidelines/Pages/swa_habres.aspx.

4. FREE MOVEMENT OF ROMA WORKERS

There are no official statistics relating to the number of Roma *workers* in Ireland.

The Roma Support Group in Ireland estimates that there are between 2,500 and 3,000 Roma currently in Ireland.² The majority are from Romania with smaller numbers coming from Slovakia and the Czech Republic.

It is not clear how many are workers under EU rules. Access to the labour market for many of the Roma community is restricted by the requirement that Romanian nationals must have a permit to work in Ireland under the EU-2 transitional regime, although Romanian (and Bulgarian) nationals receive preferential treatment over non-EEA nationals with regard to work permits..

Pavee Point Travellers' Centre is a non-governmental support agency for travellers' in Ireland which, in association with the Roma Support Group in Ireland, provides support to the Roma community in Ireland. In particular, Pavee Point Travellers' Centre, in conjunction with FÁS, the National Training and Employment Agency, organises a Local Training Initiative programme for the Roma community which provides pre-development training to aid Roma entry into either mainstream training services or the jobs market.

At a seminar on the Free Movement of Workers in Ireland held in Dublin in November 2010, the experience of members of Roma community in the area of criminal law was discussed.³ In particular, it was noted that Roma are often charged with theft, begging and casual trading offences. Aside from criminal offences, it was noted that Roma are often charged with not producing a valid passport or registration certificate on demand (as required under Section 12 of the Immigration Act 2004).

Indeed, a member of the Roma community was the first person successfully prosecuted under a new anti-begging law.⁴ She was convicted of obstructing people while begging and a fine of €100 was imposed.⁵

Deportation figures are not made available to the public. At the above seminar, it was observed that the deportation of Roma from Ireland has been successfully challenged on a number of occasions on three main grounds, namely: procedural grounds; insufficient evidence of a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' as required under Article 27 (2) of Directive 2004/38; and on humanitarian grounds.

Voluntary repatriation is a different matter. In 2010, 302 Romanian nationals were voluntarily repatriated to Romania by the Reception and Integration Agency (the body responsible for voluntary repatriations).⁶ In January and February 2011 alone, 73 Romanian nationals were voluntarily repatriated. Statistics for repatriations are based on nationalities only and they do not take into account ethnic groups. However, anecdotal evidence suggests that the majority of Romanians repatriated by the Agency are members of the Roma community.

2 <http://www.romasupport.ie>

3 Key Issues in Free Movement in Ireland, Seminar, Law Society of Ireland, 5 November 2010, Ms. Leandra Frawley, 'The Roma and their Experience of the Criminal Law in Ireland'. (www.ru.nl/.../report_specialised_seminar_5_november_2010_dublin.pdf)

4 Criminal Justice (Public Order) Act 2011

5 <http://www.independent.ie/national-news/courts/roma-gypsy-first-to-be-convicted-for-begging2660589.html>

6 Reception and Integration Agency, Annual Report 2010, <http://www.ria.gov.ie/en/RIA/RIA%20Annual%20Report%202010.pdf/Files/RIA%20Annual%20Report%202010.pdf>

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Statistics on voluntary repatriations by EU nationals are discussed further in Chapter VII, 8.3, below.

The Department of Justice, Equality and Law Reform is at the early stages of producing an integration strategy for the Roma community in Ireland, as requested by the European Commission under the Europe 2020 Strategy. The deadline for completion of the integration strategy for Roma in Ireland is December 2011.

Chapter II: Members of the family

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

The term ‘family members’ is interpreted, by Regulation 2 of the European Communities (Free Movement of Workers) (No. 2) Regulations 2006, as including ‘qualifying family members’ and ‘permitted family members’. Each of these two terms is defined in terms of the family member’s relation to a Union citizen.

A ‘qualifying family member’ means the Union citizen’s spouse, a direct descendant of the Union citizen/spouse who is under the age of 21 or dependant on the Union citizen/spouse, and dependant direct relative of the Union citizen/spouse in the direct ascending line. The term ‘spouse’ does not include a party to a ‘marriage of convenience’. This latter term is not defined.

A ‘permitted family member’ means any family member, irrespective of nationality, who is not a qualifying family member and who is, in his or her country of origin, habitual residence or previous residence: (a) a dependant of the Union citizen; (b) a member of the household of the Union citizen; (c) a person who, on the basis of serious health grounds, strictly requires the personal care of the Union citizen; or (d) is the partner with whom the Union citizen has a durable relationship, duly attested.

A Union citizen is defined as any person having the nationality of a Member State: ‘Member State’ is in turn defined as a Member State of the EU *other than the State*. Family members who are related to a Union citizen who is only a national of Ireland are therefore not covered by the Regulations (though this does not mean that they are not otherwise in a situation governed by Union law).

There have been a number of cases involving third-country national family members of *Irish* citizens which shows that the ‘principle’ of ‘reverse discrimination’ continues to apply. In November 2009, the High Court refused an Irish family leave to challenge the Government’s decision to deny a Chinese relative permission to live with them in Ireland, in circumstances where a Union citizen having the nationality of another Member State would have been entitled to reunion. In March 2010, the Irish wife of a deported Nigerian asylum seeker argued that this situation was unfair where, had she possessed the nationality of another Member State, she would have been entitled to avail of the ruling in the *Metock* case (see below). There is no publicly available information on the status or outcome of this claim.

The judgment of the ECJ in the *Zambrano* and *McCarthy* cases has reopened the ‘reverse discrimination’ debate. Although the parents of minor Union citizen children may be entitled to the novel rights of residence and work under *Zambrano*, it seems that ‘reverse discrimination’ will continue to exist in relation to other family relationships, including between a third-country national spouse and a non free-moving national of the host Member State (see, for more detail on the impact of these cases, Chapter IX).

2. ENTRY AND RESIDENCE RIGHTS

In June 2010, the Irish Naturalisation and Immigration Service decided to restrict the right of third-country national family members of EU citizens to work pending the outcome of an application for the recognition of their EU Treaty rights. A case was subsequently brought to the High Court on the issue of when a spouse of an EU citizen who is not a national of a Member State may take up employment.⁷ The Court decided that a third-country national family member of an EU citizen has the right to work in Ireland from the date of receipt of acknowledgment from the Department of Justice, Equality and Law Reform of a valid application for a residence card based on EU Treaty rights. This right to work is subject to revocation with retroactive effect should the Department of Justice, Equality and Law Reform lawfully decide to refuse to issue a residence card within a six month period.

The Immigration Act 2004 (Visas) (No. 2) Order 2009 declared that non-nationals who were holders of a valid permanent residence card issued under Regulation 16, or of a valid residence card issued under Regulation 7, of the EC (Free Movement of Persons) (No.2) Regulations 2006 were not required to be in possession of a valid Irish visa when landing in the State. This has been replaced, from 25 April 2011, by the Immigration Act 2004 (Visas) Order 2011. The principal change made by the new Order is that non-nationals who are family members of the EU citizen and holders of a document called ‘Residence card of a family member of a Union citizen’ as referred to in Article 10 of the 2004 Residence Directive are not subject to an Irish visa requirement. Regulation 7 of the 2006 Regulations does not refer in terms to the ‘Residence card of a family member of a Union citizen’: since possession of this named document exempts the family member concerned from the entry visa requirement, such clarity is welcome.

3. IMPLICATIONS OF THE *METOCK* JUDGMENT

The Irish Government adopted Regulations amending the offending part of the European Communities (Free Movement of Persons) Regulations 2006 (‘2006 Regulations’) only four working days after the Court delivered its Judgment in *Metock*.⁸ In respect of family members who are not Union citizens, the requirement of prior lawful residence has now been removed and it is now stated that the Regulations apply to qualifying family members⁹ of Union citizens, who are not themselves Union citizens who seek either: (i) to enter the State in the company of the Union citizen family member/s; or (ii) to join those Union citizens, in respect of whom they are family members, who are lawfully in the State.¹⁰ The same approach is now taken to ‘permitted’ family members,¹¹ including those who are not Union citizens.¹²

The Department of Justice, Equality and Law Reform stated that all applicants who had applied since 28 April 2006 for a residence card and had been refused because they did not

7 *Decsi and Zhao v Minister for Justice, Equality and Law Reform*, (2010) JR 858.

8 European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (S.I. No. 310 of 2008).

9 Those covered by Article 2(2) of the Directive.

10 Regulation 3(2)(b) of the 2006 Regulations, as amended.

11 Those other family members covered by Article 3(2) of the Directive.

12 Regulation 3(2)(c) of the 2006 Regulations, as amended.

have prior lawful residence would have their applications reviewed. There is no publicly available information on the number of cases reviewed following the *Metock* ruling, or on the outcome of such reviews. However, only one case was brought by an applicant affected by this review in 2010. The case concerned a judicial review application requesting an order mandating the Minister for Justice, Equality and Law Reform to reach a lawful decision on the issue of residency and to grant temporary residence to the applicant.¹³ The Court declared that the Minister for Justice, Equality and Law Reform had failed to render a decision on the issue of residency within a reasonable time. No other reliefs were granted as the Department of Justice, Equality and Law Reform had issued a decision regarding the complainant during the course of the trial.

Although the Irish Government sought to address the *Metock* ruling in an impressively short timeframe, it also started to campaign together with Denmark for an amendment to the Directive. The Commission has not supported such amendment, but has instead sought to resolve legitimate Member State concerns by way of 2009 guidelines.

4. ABUSE OF RIGHTS, I.E. MARRIAGES OF CONVENIENCES AND FRAUD

Concerns about abuse of rights and fraud have been addressed by a provision in the 2006 Regulations that the term ‘spouse’ does not include a party to a marriage of convenience and, more generally, by a provision that a person found to have acquired rights or entitlements by fraudulent means – including marriages of convenience – would immediately cease to enjoy them. Under the 2006 Regulations, the Department of Justice, Equality and Law Reform also has the power to carry out an administrative review of any decision taken regarding entry or residence and this may be used to review a decision where there is an alleged marriage of convenience.¹⁴

It is, however, difficult to establish marriages of convenience. Indeed, the prior lawful residence test – outlawed by *Metock* - was seen as a useful means of avoiding the issue.

Since 2008, Irish Ministers for Justice have raised the issue of abuse of Directive 2004/38 and marriages of convenience on a number of occasions to their European counterparts, noting that statistics illustrate unusual marriage patterns in Ireland.

In 2009, a document entitled ‘The Irish experience – statistics and issues’ was prepared for the Justice and Home Affairs Council (JHA). This paper provided statistical analysis of applications for residency cards since Directive 2004/38 came into force. The statistics illustrated unusual marriage patterns and strongly suggested that the Directive was being exploited by persons who were illegally in the State or whose presence in the State was ‘precarious’. The report also stated that marriages of convenience were ‘part of the problem but proving them is very resource-intensive and can be intrusive’. A distinction was also drawn between ‘opportunistic’ rather than ‘convenience’ marriages: ‘one party to the marriage sees a change for regularisation while the other is duped’. There was often co-habitation and ‘perhaps even a child’.

In January 2010, the Irish Minister for Justice again raised the issue of ‘suspect’ marriages in the Council of Ministers. He produced a table showing the nationalities of third-country

¹³ *Tagni v Minister for Justice, Equality and Law Reform*, (2009) JR 598.

¹⁴ Section 21 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006.

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nationals who had applied for residency in Ireland under the 2004 Directive on the basis of marriage to an EU national. This showed, for example, that, out of a total of 384 Pakistani applicants, 116 were married to Latvians, 50 were married to Poles and 47 were married to Estonians.

In June 2011, at the Justice and Home Affairs (JHA) Council meeting, the Irish Minister for Justice again raised his concerns about unusual marriage patterns in Ireland. The Minister noted that large numbers of EU nationals and third-country nationals are marrying, with the third-country national subsequently applying for residency rights in Ireland on the basis of the spouse's residency rights under EU law.¹⁵ The Minister observed that in 2010, almost 400 residency applications were lodged in Ireland by non-EEA nationals (mainly Pakistani nationals and to a smaller extent, Ukrainian and Indian nationals) following their marriage to Latvian nationals.¹⁶ The Minister also informed the JHA meeting that the Department of Justice, Equality and Law Reform now interviews applicants and their spouses who apply for residency rights based on EU law where there is suspicion that it is a marriage of convenience.

In January 2011, the Minister for Justice, Equality and Law Reform announced that Department officials will 'examine as a matter of urgency the possibility of deploying biometric technology in the context of visa applications from Pakistan. This technology has proven to be very effective to date, particularly in the area of tackling abuses in the asylum, immigration and visa areas of activity'.¹⁷

The Gardaí Síochána (the national police force), as part of Operation Charity (aimed at tackling marriages of convenience), has lodged objections to alleged 'sham marriages' with marriage registrars.¹⁸ It is estimated that the Gardaí have objected to 150 alleged marriages of convenience. It is reported that only three of these were upheld by marriage registrars on the basis that there were concerns over identity-fraud resulting from false documentation. It is also reported that the objections were not upheld on the basis that they were suspected marriages of convenience.

A recent case was taken by a couple whose marriage was stopped because the Gardaí objected on the grounds that it was a marriage of convenience.¹⁹ The Gardaí lodged an objection under Section 58 of Civil Registration Act 2004 (which allows for an objection to a marriage before the solemnisation takes place on the grounds of marital status, age, capacity, incest and gender) and arrested the groom for attempting to avoid deportation. The Court subsequently held that, according to Irish law, an objection to a marriage can only be made on the basis of capacity, age, marital status, incest or gender of the couple and an alleged marriage of convenience does not fall within any of those grounds.²⁰ The Court also stated that the State has not provided a legal basis to allow the authorities to prevent an alleged marriage of convenience from taking place. The law as it stands provides that an alleged

15 <http://justice.ie/en/JELR/Pages/PR11000079>

16 2010 statistics on the number of applications for residency in Ireland based on marriages to EU spouses indicate that the highest number of applications were made by Pakistani and Nigerian nationals respectively. It is estimated that two thirds of applications by Pakistani nationals involved an EU partner from one of the Baltic States.

17 <http://www.justice.ie/en/JELR/Pages/2010-asylum-stats>

18 *Irish Times*, James Smyth, Just three of 150 objections to marriages upheld, March 21 2011

19 *Izmailovic and Elmorsy v Commissioner of an Garda Síochána, Minister for Justice, Equality and Law Reform*, (2011) IEHC 32

20 Section 58 of the Civil Registration Act 2004

marriage of convenience can only be reviewed by the Department of Justice, Equality and Law Reform following the solemnisation of the marriage.²¹

The Immigration, Residence and Protection Bill 2010, which addresses asylum and residency issues, including marriages of convenience, was restored by the incoming government on 23 March 2011. This Bill is currently at the committee stage and it will be presented to the Dáil at a later stage. It remains unclear when this legislation (originally proposed in 2007) will be passed.

Under Section 138 of the Bill, the Minister for Justice, Equality and Law Reform may disregard a particular marriage when determining an immigration matter if the marriage is deemed to be a marriage of convenience. In this regard, the Minister can request the parties to provide information that proves that the marriage is not a ‘sham marriage’. Section 138 (5) of the Bill lists a number of factors that will be used to determine whether there is a marriage of convenience. Factors such as the nature of the relationship prior to the marriage, whether there was any fiscal inducement, and the parties’ familiarity with each others personal details will be considered. Section 138 of the Bill does not provide for a right of appeal. The only remedy available would be the possibility of judicial review in the High Court.

The Minister for Justice, Equality and Law Reform recently stated that the provisions of the Bill relating to marriages of convenience may be amended before the Bill is enacted.

5. ACCESS TO WORK

Regulation 18(1)(b) of the European Communities (Free Movement of Workers) (No. 2) Regulations provides that ‘subject to the other provisions of these Regulations, a person to whom these Regulations apply shall be entitled ... without prejudice to any restriction on that entitlement contained in the Employment Permits Acts 2003 and 2006, to seek and enter employment in the State in the like manner and to the like extent in all respects as Irish citizens’.

Regulation 18(1)(c) provides that a person to whom the Regulations apply shall, subject to the other provisions of these Regulations, be entitled ‘to carry on any business, trade or profession ... in the like manner and to the like extent in all respects as Irish citizens’.

In relation to employment, non-EEA nationals are, as a rule, required to seek employment permits. The position of third-country national ‘family members’ within the meaning of Article 2(2) of the 2004 Directive remains rather unsatisfactory.

As far as a non-EEA national married to an EU national is concerned, the Department of Jobs, Enterprise and Innovation has expressly stated that a work permit will not be required once he/she has received a residence card. Other non-EEA national family members do not need a permit once they have received a residence card under the 2006 Regulations, though there has been no express official recognition of this.

Prior to April 2010, non-EEA national spouses of EU citizens were required to apply for a Stamp 4 endorsement (which provides that the person concerned is permitted to remain in Ireland until a specified date) and a work permit prior to the granting of a residence card. In April 2010, the Irish Naturalisation and Immigration Service announced that, *with effect*

21 Section 21 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006.

from 1 June 2010, third-country national family members of Union citizens would be granted a Stamp 3, rather than a Stamp 4 endorsement during the period of the application process. Stamp 3 permits the person concerned to remain in Ireland for a specified period but employment is prohibited (i.e., the applicant would not be entitled to a work permit) The stamp was to be provided only for a maximum of 6 months, (the period of the application process only), after which period a residence card would be issued and the individual concerned would have the right to work without a permit.

However, this change in policy by the Irish Naturalisation and Immigration Service was successfully challenged in a High Court case in 2010.²² In this case, the Department of Justice, Equality and Law Reform informed the applicants that they could only avail of a Stamp 3 endorsement pending the outcome of their EU Treaty rights applications (meaning they were not entitled to work). In its judgment, the Court looked to the wording of Directive 2004/38 and the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (the implementing regulations) and reasoned that Article 23 of the Directive provides that, once a family member has a right to reside, that family member is also entitled to work and, therefore, the entitlement to work operates in conjunction with the right to residence and is not dependent on a residence card being issued. As a result, a third-country national family member of an EU citizen has the right to work from the date of receipt of a letter of acknowledgment of a valid residency application from the Department of Justice, Equality and Law Reform. However, this is subject to revocation with retroactive effect should the Department of Justice, Equality and Law Reform lawfully refuse to issue a residence card within six months.

As the wording of the judgment in *Decsi* refers to family members and not just spouses, it also applies to dependents of an EU citizen. Therefore, other family members will be entitled to work from the date of receipt of a letter of acknowledgement of a valid residence application from the Department of Justice, Equality and Law Reform.

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

There is an almost total lack of transparency on the situation of family members of jobseekers regarding access to employment. It has not been possible to obtain a clear indication on the question of access to work by third-country national family members of job seekers.

22 *Decsi and Zhao v Minister for Justice, Equality and Law Reform*, (2010) JR 858

Chapter III: Access to employment

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

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

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Nationals of other Member States enjoy equal treatment in relation to access to employment as a matter of law. This has now been made clear in Regulation 18(1)(a) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006,²³ which provides that nationals of other Member States and qualifying family members ‘shall be entitled ... to seek and enter employment in the State in the like manner and to the like extent in all respects as Irish citizens’.

This includes full access to the services provided by FÁS as the National Training and Employment Authority.²⁴ Through a regional network of 66 offices and 20 training centres, FÁS operates training and employment programmes, provides a recruitment service to jobseekers and employers, provides an advisory service for industry, and supports community-based enterprises.

The reporter is not aware of any issues in relation to equal treatment in relation to access for employment as regards FÁS.

1.2 Language requirements

As far as the private sector is concerned, there is no general legal requirement that English and/or Irish be spoken. However, in practice, employers in Ireland will require employees to speak the language that is needed to do the job.

The question of linguistic proficiency of workers coming from other Member States has arisen in relation to a number of professions, including nurses, doctors, pharmacists, teachers and lawyers (where there was a major legislative change in 2008).

In relation to *nurses*, a 2007 Circular issued by the Irish Nursing Board stated that the Board itself was precluded from assessing the English language competence of nurses coming from other EU Member States. However, it recognised that employers had the responsibility to patients and their families of ensuring that employees had the necessary language skills.

In relation to *doctors*, the difficulty in assessing the linguistic competence of EU citizens coming to Ireland to practice as doctors was highlighted recently by the Medical Council of Ireland at the seminar on the Free Movement of Workers in Dublin in November 2010.²⁵ The

²³ See n. 2, above.

²⁴ See, generally, www.fas.ie.

²⁵ Key Issues in Free Movement in Ireland, Seminar, Law Society of Ireland, 5 November 2010, Una O'Rourke, Head of Registration, Medical Council. Regulation of doctors in Ireland. www.ru.nl/.../report_specialised_seminar_5_november_2010_dublin.pdf

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Medical Council is attempting to address this problem with a number of measures including seeking a declaration on the registration application affirming language skills and utilising the Guide to Professional Conduct and Ethics which provides that if a doctor does not have the professional or language skills necessary, he/she must refer the patient to a colleague who can meet those requirements.

In relation to *pharmacists*, Section 14 of the Pharmacy Act 2007 provides that the Council of the Pharmaceutical Council of Ireland is to register a person who is a national of Ireland or another Member State if he or she lacks the linguistic competence necessary to be a registered pharmacist in the State provided he or she undertakes to acquire it.

As regards *teachers*, there is no statutory Irish language requirement for access to teaching posts in Ireland. A good level of English will as a matter of fact be required. Naturally, some posts will require teaching through Irish. For primary school teachers who have qualified outside the State, there is a requirement to sit a Teachers' Qualifying Examination in Irish. This is not a pre-requisite for applying or accepting teaching posts in the State. However, the Department of Education requires that the Teachers' Qualifying Examination in Irish is completed within three years from the date of application to the Teaching Council.²⁶

In relation to *legal professionals (barristers and solicitors)*, the Legal Practitioners (Irish Language) Act 2008 has replaced a compulsory Irish language requirement for most barristers and solicitors with a voluntary system designed to ensure that there are sufficient numbers of lawyers qualified to provide services through Irish.

The Act requires the professional bodies concerned (the Honorable Society of King's Inn for barristers and the Law Society of Ireland for solicitors):

- To have regard to the status of the Irish language as the first official language and to seek to ensure that an adequate number of barristers/solicitors are competent in the Irish language so as to be able to practise law through the Irish language as well as through the English language.
- To provide a non-examinable course of instruction in Irish legal terminology and the understanding of legal texts in Irish in order to enable the identification through the medium of Irish of a legal service that is required and to facilitate referral to a practitioner who can conduct the case through Irish.
- To provide an advanced course for the practice of law through Irish as an optional course and to hold examinations of those who have undertaken the course.
- To establish and maintain a register of barristers/solicitors who have passed this examination.
- To report (in Irish and in English) on the operation of the system, including the numbers of people who have taken the advanced course and who have passed the advanced examination.

In Ireland, there is no requirement for nationals of EU Member States to satisfy an English language competency requirement in order to work as a legal professional.²⁷

²⁶ See www.education.ie for more information.

²⁷ Key Issues in Free Movement in Ireland, Seminar, Law Society of Ireland, 5 November 2010, Eva Massa, Law School, Law Society of Ireland, 'Access to Employment: the Question of Language'. www.ru.nl/.../report_specialised_seminar_5_november_2010_dublin.pdf.

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

A detailed survey of the position with regard to employment in the public sector was provided in the 2007 Report. There have been no material developments (at least in the public domain) in 2010/2011. Only a summary of the current position is provided here.

2.1 Nationality condition for access to positions in the public sector

In relation to access to positions for posts in the civil service, most posts are open to nationals of the other EU Member States. However, some posts are reserved to Irish nationals on national interest grounds: these include all posts in the Irish Diplomatic Service requiring the holding of a diplomatic passport and posts in the Department of An Taoiseach (Prime Minister), the Office of the Revenue Commissioners, the Department of Defence, the Department of Justice, Equality and Law Reform and the Department of Foreign Affairs. There is no available list of such posts – the nationality condition is set for individual competitions.

There are no nationality requirements for employment in the health, education and marine sectors.

In relation to the Defence Forces, Irish citizenship is normally required for recruitment to commissioned officer ranks. However, an exception is made for ‘specialists’ such as doctors. Other EEA nationals are eligible to join the Defence Forces below commissioned officer rank.

Nationals of other EU/EEA Member States are eligible to join An Garda Síochána, the national police service.

2.2 Language requirements

English language competence is required for virtually all posts in the public sector.

Save for the primary education sector, there is no formal Irish language requirement applying to all applicants. However, applicants for certain Irish-speaking posts may have to show that they have the necessary qualifications/competence. In addition, as part of the State’s policy to ensure that services are available in Irish, applicants may be assessed for Irish language ability and Irish-speakers may be favoured in the selection process.

A certain advantage is given to applicants for posts in the Civil Service who may take an optional Irish language test and are awarded extra marks which may give them a higher ranking in a competition. Some posts – for example, in the Department of Community, Rural and Gaeltacht Affairs – require a competency in Irish.

The Civil Service supports and encourages staff to study Irish, especially at *Gaeleagras*, a body established in 1971 to promote the Irish language throughout the Civil Service.

There is no general requirement for Irish language competency in the Health Service. However, in order to ensure that services can be provided in Irish, an assessment of ability to speak in English and Irish may be carried out at interview, and this may result in preference given to Irish speakers.

Access to the Defence Forces is not dependent on Irish language qualifications. There is ‘on the job’ training in Irish.

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In the education sector, all teachers trained in Ireland will possess Irish language qualifications, as this is a compulsory part of the training curriculum. Teachers trained in other EU Member States will need to have Irish to teach in mainstream national schools (primary education), but they are given a period of three years from registration with the Teaching Council to sit and pass the Teachers' Qualifying Examination in Irish (save, of course, for posts that require the teaching of a subject through Irish). In secondary schools, there is no obligation to know Irish, except where Irish is the subject being taught or for posts in the *Gaeltacht* (Irish-speaking localities) and where Irish is the medium of instruction. Efforts have been made, under the auspices of the North/South Ministerial Council, to promote seminars for student teachers to provide information on the Irish language requirements for teaching in Southern schools. There is no requirement for Irish in third-level posts, save where it is needed as a medium of instruction.

There are no Irish language conditions for access to posts in the marine sector.

In relation to An Garda Síochána, the national police service, there are no Irish language requirements for access. However, all recruits are required to achieve an appropriate standard before becoming full members. Recruits without an Irish language qualification will undergo basic training in that language.

2.3 Recognition of professional experience for access to the public sector

The position in Ireland has been set out in the Irish section of the 2006 Commission Report on the cross-border mobility of public sector worker and this appears to set out the position as it continues to apply to date.

In relation to access to public sector employment, previous professional experience may be taken into account where such experience is specified as being relevant to a particular post. Credit will then be given for such experience. This will be the case for competitions for certain technical and professional posts.

It should be noted that incremental credit for previous experience in the public service does not play a part in establishing an order of merit in the selection process, but may be relevant for salary purposes (see Chapter 4, section 1, below).

3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

Nothing to report.

Chapter IV: Equality of treatment on the basis of nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

The Employment Equality Acts 1998-2008 cover employees in both the public and private sectors including people employed through employment agencies and applicants for employment and training. It outlaws discrimination in all areas relevant to employment, on a number of specified grounds including race, colour, nationality or ethnic or national origin (together described as the ‘race’ ground). It should be noted that there are exemptions from the application of the non-discrimination principle in relation to employment in the public service, linguistic requirements for teachers in primary and post-primary schools and requirements to hold particular educational, technical or professional qualifications.

A key provision on equality, introduced ‘for the avoidance of doubt’, is contained in Section 20 of the Protection of Employees (Part-Time Work) Act 2001 which provides that a series of enactments conferring rights on an employee applies, and shall be deemed always to have applied to, a posted worker (within the meaning of Directive 96/71) and ‘a person, irrespective of his nationality or his place of residence, who

- i. has entered into a contract of employment that provides for his or her being employed in the State;
 - ii. works in the State under a contract of employment; or
 - iii. where the contract has ceased, entered into the contract of employment or worked in the State under a contract of employment,
- in the same manner, and subject to the like exceptions not inconsistent with this subsection, as it applies and applied to any other type of employee (emphasis added).*

The full range of employee protection legislation thus formally applies to foreign workers, posted or otherwise, and irrespective of origin.

As reported in the earlier Reports, there have been concerns that, as a matter of practice, the equality principle was not being applied to third-country national workers and to workers from the Member States that acceded in 2004 (in particular, Poland and the Baltic States). There have been focused attempts by trade unions and others to improve awareness of employment rights among these more vulnerable categories of workers through the publication of handbooks in various languages and conferences. These initiatives were bolstered by the political commitments in the Social Partnership Agreement *Towards 2016*.²⁸

The National Employment Rights Authority (NERA) was set up on an interim basis in February 2007, in order to secure compliance with employment rights legislation, including the principle of non-discrimination, and to foster a culture of compliance in Ireland. In March 2008, the Employment Law Compliance Bill was introduced, to put NERA on a formal legislative footing, and to strengthen inspection and enforcement powers. This Bill did not advance under the previous government: as of June 2011, the new government had not restored this Bill and it has not, therefore, moved any further in the legislative process.

²⁸ Towards 2016: Ten Year Framework Social Partnership Agreement 2006-2015
http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf.

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The Equality Tribunal is an impartial and independent quasi-judicial body charged with hearing or mediating claims of alleged discrimination under the Employment Equality Acts and other legislation.

During 2009, 2010, and 2011, a number of decisions have been taken on complaints made by workers from other EU Member States (mainly from Latvia and Lithuania) on grounds of race.

In the past, the Equality Officer has found that, in circumstances where an employer provides employees with contracts of employment, there will be discrimination where the employer provides non-Irish employees with contracts in a language that they cannot understand.²⁹

However, more recent case-law has somewhat changed the position. It appears that there is currently no requirement for an employer to provide a non-native English speaker with a contract in a language likely to be understood by such a person.³⁰ However, discrimination may arise where there is a failure to take action to ensure an employee understands a contract that is in a language that he cannot understand.³¹ Each case must be considered in light of a number of factors, such as an employee's knowledge of the language and the work environment, the employer's knowledge of the employee's language skills and the availability of translation services to the employee, before deciding on whether there has been discrimination against.³² As a minimum, employers should provide and follow appropriate procedures to ensure that non-native English speakers have been made fully aware of the terms and conditions of their contract and their rights as provided within the contract.³³ In a case where the employer could show that reasonable efforts had been made to establish whether the complainant had understood the employment contract and the training provided, the Equality Officer found that there was no discrimination.³⁴

Likewise, in the past, where an employer failed to provide non-Irish employees with health and safety statements in a language they could understand, there would be a finding of discrimination.³⁵ In more recent cases, this has been modified by a requirement to take meaningful action to ensure that the employee understands the health and safety training, in order to avoid a finding of discrimination.³⁶

In relation to disciplinary measures, it is recognised that discrimination can arise where the same procedural standards are applied to linguistically- or culturally-disadvantaged non-Irish workers as to Irish workers. Identical treatment could mean that the non-national would not understand any allegation and would be unable to articulate a defence: to treat the two the same could amount to the application of the same rules to different situations and could in itself amount to discrimination.³⁷

29 *Vaiculis* (DEC-E2010-014, 15 February 2010), referring to *58 Named Complainants v Goode Concrete* (DEC-E2008-020, 30 April 2008). The Equality Officer also found that there will be no discrimination where no contract is issued and this failure cannot be ascribed to the complainant's nationality. *Zubrikas* (DEC-E2009-044, 9 June 2009), *Silgalis* (DEC-E2009-068, 24 August 2009)

30 *Diadijajev* (DEC-E2011-039, 7 March 2011)

31 *Bernotas* (DEC-E2011-011, 25 January 2011)

32 *Tamilis, Belajevs & Jucevicius* (DEC-E2010-233, 23 November 2010)

33 *Cituys* (DEC-E2011 – 013, 27 January 2011)

34 *Sereniene* (DEC-E2011-029, 16 February 2011)

35 *Arinizis* (DEC-E2009-088, 9 October 2009), *Saluhanskas* (DEC-E2009-103, 10 November 2009), *Stukonis* (DEC-E2009-12, 31 December 2009).

36 *Bernotas* (DEC-E2011-011, 25 January 2011).

37 *Daugintiene* (DEC-E2009-012, 5 March 2009), *Stukonis* (DEC-E2009-12, 31 December 2009), each referring to the Labour Court in *Campbell Catering v Rasdaq*.

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Discrimination on grounds of the same treatment of different situations will not, of course, arise where the non-national worker in fact understands the local language and is knowledgeable regarding employment rights and procedures.³⁸

More generally, discrimination will arise where non-national workers are subject to more stringent disciplinary measures than Irish workers,³⁹ or where the employer has failed to prevent harassment where this is directed at non-nationals.⁴⁰ In one recent case, the Equality Officer took into account the fact that the respondent provided the Equality Tribunal with false and misleading information and attempted to deny that the complainant was employed by the respondent, when deciding that the respondent had discriminated against the complainant on grounds of gender and race.⁴¹

There have also been a number of cases (involving a variety of circumstances) where non-Irish workers have been discriminated against in terms of dismissal.⁴² In one case, the fact that the employer dismissed all non-Irish employees and retained all the Irish workers was deemed sufficient to raise the presumption that the employees were discriminated against in terms of dismissal.⁴³ In another case, the Equality Officer found that the employees had been discriminatorily dismissed because the employer had cut the pay of non-Irish workers resulting in these employees having no other choice but to leave in circumstances where the pay cut did not also apply to the Irish workers.⁴⁴

It has been held that the non-discrimination provisions do not apply where an employer decides to employ only non-Irish nationals.⁴⁵

Specific issue: Working conditions in the public sector

The question of incremental credit for previous public sector service has been addressed in agreements between the Minister for Finance and trade unions. Examples of such agreements include an April 2006 agreement providing for incremental credit for previous service for entry levels at Tax Officer and Higher Tax Officer grades and a December 2007 agreement covering entry levels at Clerical Officer and Executive Officer grades.

These agreements apply only to adjust pay and do not affect seniority. They apply to persons who have been previously employed within the public service in Ireland or equivalent bodies in the EU Member States. Employment in the public service in EFTA countries and the European Commission will be considered relevant.

In general, recognition is not given for experience in the private sector.

There appear to have been no developments in this regard in 2010/2011.

38 *Shaskova* (DEC-E2009-0011, 27 February 2009).

39 *Silgalis* (DEC-E2009-068, 24 August 2009), *Bozs* (DEC-E2009-074, 3 September 2009), *Saluhanskas* (DEC-E2009-103, 10 November 2009).

40 *Gedrinas* (DEC-E2009-014, 13 March 2009), *Ganusauknas* (DEC-E2009-063, 29 July 2009), *Mannering* (DEC-E2010-116, 2 July 2010).

41 *Luzak* (DEC-E2011-010, 24 January 2011).

42 *Jasaitis* (DEC-E2010-008, 2 February 2010), *Guze* (DEC-E2010-152, 9 August 2010), *Skeiverys* (DEC-E2010-197, 13 October 2010).

43 *Vaicikauskas* (DEC-E2010-156, 27 August 2010).

44 *Aukscionis* (DEC-E2010-227, 16 November 2010).

45 *Braslis* (DEC-E2009-098, 28 October 2009).

2. SOCIAL AND TAX ADVANTAGES

2.1 *General situation as laid down in Art. 7 (2) of Regulation 492/2011 (ex. 1612/68)*

In general terms workers having the nationality of a Member State enjoy the same social and tax advantages as national workers.

A ‘habitual residence’ condition for obtaining certain social assistance/welfare payments was introduced in 2004. Early concerns that workers from other Member States might be subject to the condition have been addressed in administrative guidelines. The condition does not apply where this would conflict with EU free movement rules. Operational Guidelines on the habitual residence condition,⁴⁶ updated in July 2010, make it clear that those entitled to social advantages under Article 7(2) of Regulation 492/2011 – which includes Supplementary Welfare Allowance - cannot be subject to the condition. However, the authorities will need to be satisfied that the person concerned qualifies as a ‘worker’ in EU law (applying the tests laid down by the European Court of Justice). It is therefore considered that ‘an EEA national who is engaged in genuine and effective employment in Ireland is regarded as a migrant worker under EC law and does not need to satisfy HRC for the purpose of any claim to Supplementary Welfare Allowance’.

2.2 *Specific issue: the situation of jobseekers*

Jobseekers continue to have to satisfy the Habitual Residence Condition in order to be eligible for social welfare payments including the Job Seeker’s Allowance.

Recently revised Operational Guidelines on the Habitual Residence Condition issued by the Department of Social Protection (updated in June 2011) state that Job Seeker’s Allowance is subject to the condition and, in contrast to specified payments such as Supplementary Welfare Allowance and Child Benefit, the requirement is not stated to be overridden by EU law.

The implications of the *Vatsouras* Judgment (Joined Cases C-22/08 and C-23/08) are not explicitly taken on board. It seems undeniable that the Job Seeker’s Allowance falls within the ambit of ‘benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market’. The position of the Department seems to be that this allowance falls within the scope of Regulation 883/04 which specifically allows for the application of a habitual residence condition in relation to such payments.

46 http://www.welfare.ie/EN/OperationalGuidelines/Pages/swa_habres.aspx.

Chapter V: Other obstacles to free movement of workers

The Habitual Residence Condition for access to certain social welfare payments has become an issue for returning emigrants to Ireland who are often refused social welfare assistance on the basis that they have ‘lost’ their habitual residence in the State. This could be perceived as impeding the right to move freely within the EU.

During a recent discussion in the Dáil, the Minister for Social Protection advised that the Operational Guidelines on the Habitual Residence Condition contain adequate protection for returning workers, as it provides that persons who have left the country to work elsewhere and subsequently return to Ireland may be considered habitually resident on their return, by taking into account a number of factors, such as: the reason for returning to Ireland; the length and continuity of previous residence in the State; the record of employment or self-employment in another State; links with the State of previous residency; and whether there is an intention to stay in Ireland temporarily or habitually.⁴⁷ However, the Operational Guidelines do not guarantee that returning immigrants will be considered habitually resident for social welfare purposes.

⁴⁷ <http://debates.oireachtas.ie/dail/2011/03/30/00012.asp>

Chapter VI: Specific Issues

1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES),

The relevant frontier here is that between Ireland and Northern Ireland. A study on obstacles to mobility, under the aegis of the North/South Ministerial Council, was published in November 2001.⁴⁸ The study identified obstacles in relation to taxation, social security, pensions, healthcare, childcare, housing, recognition of qualifications and employment. This study did not specifically focus on obstacles to the free movement of workers under Community law and, so far as the reporter is aware, a comprehensive study in this regard has not been undertaken.⁴⁹

Those moving between North and South have clearly encountered difficulties in relation to matters such as employment, enjoyment of social insurance right, access to social welfare, and healthcare. The Cross Border Mobility Project has been launched by the North/South Ministerial Council and its website is designed to act as a ‘one-stop’ shop for all who move across the border (including frontier workers) in detailing their position in the two Member States.⁵⁰ It also acts as an ‘advice centre’ for people with specific mobility-related issues.

A number of emerging issues regarding mobility were identified by the representatives of the North/South Ministerial Council at the Seminar on the Free Movement of Workers in Dublin on 11 November 2010.⁵¹ These issues include differences in the UK and Irish taxation system and a lack of available information and advice with regard to access to training, the recognition of qualifications and banking charges.

The general position for frontier workers is set out in guidelines and other documents issued by the Department of Social Protection.⁵² As far as persons resident in Ireland are concerned, it is made clear that frontier workers are generally regarded as habitually resident in Ireland even when working abroad provided that they return at regular intervals to Ireland and maintain their habitual residence there.

As regards frontier workers who live in Northern Ireland but work in the South, it is clear that, *subject to any exceptions arising by virtue of EU migrant worker status*, a frontier worker will generally not be regarded as habitually resident in Ireland. However, it is clear that EC law takes precedence over national law and that frontier workers living elsewhere in the EEA and working in Ireland are entitled to family benefits without needing to satisfy the habitual residence condition. The guidelines in this regard were updated in June 2008 to take

48 North/South Ministerial Council *Study of Obstacles to Mobility* (November 2001) (PriceWaterhouseCoopers & Indecon Economic Consultants).

49 In the light of remarks in the 2006 Report for the UK indicating that many of the obstacles identified in 2001 had not been addressed, there may be scope for an up to date study to revisit the issue.

50 <http://www.borderpeople.info>.

51 Key Issues in Free Movement in Ireland, Seminar, Law Society of Ireland, 5 November 2010, North South Ministerial Council (NSMC): Cross- Border Mobility Issues, Ms. Anne Barrington (Joint Secretary of the NSMC). Please click here for the seminar report: www.ru.nl/.../report_specialised_seminar_5_november_2010_dublin.pdf

52 2011 Guidelines for Deciding Officers on the determination of habitual residence (<http://www.welfare.ie/EN/OperationalGuidelines/pages/habres.aspx>)

account of concerns expressed by the Social Welfare Appeals Office that the relevant EU provisions were not adequately covered.⁵³

The *Hartmann* and *Geven* cases are each generally concerned with the entitlement of frontier workers to receive child-raising allowance in the State of employment, rather than that of residence as a social advantage under Article 7(2) of Regulation 492/2011 (previously Regulation 1612/68) in circumstances where the regime under Regulation 883/2004 does not apply (in the first case because the claimant did not work and her husband – a civil servant – fell outside the scope of Regulation 883/2004, in the second case, because the claimant was in only minor employment).

There has been no explicit recognition in Irish practice that a frontier worker who does not fall within the regime of Regulation 883/2004 is able to claim the benefits of Article 7(2) of Regulation 492/2011 in the circumstances that obtained in the *Hartmann* case.

There is a general recognition, in relation to Supplementary Welfare Allowance, which is affected by Article 7(2) of Regulation 492/2011, that workers within the meaning of Article 39 EC do not have to establish habitual residence. This approach should extend to cover the *Hartmann* and *Geven* scenarios. However, in discussions with an official in the Department of Social and Family Affairs, it appears that the issues in *Hartmann* and *Geven* have not arisen in the Irish context, but that if they did, those cases would be applied in deciding whether to dispense with any residence condition.

2. SPORTSMEN/SPORTSWOMEN

As far as can be ascertained, there are no nationality restrictions as regards participation in sporting activities as far as competitions within Ireland are concerned. Although several sports have rules on transfers, these rules appear to be designed to ensure that players seeking to transfer have honoured their obligations, rather than to set any limits on the mobility of players from elsewhere.

It should be noted that the Football Association of Ireland (FAI) explicitly endorses an all-embracing anti-discrimination policy, specifically applying to selection for representative teams, including nationality and ethnic origin as prohibited grounds.

There are a number of rules and regulations – reflecting European and International rules – on representation on national teams in international competitions. The Irish Rugby Football Union (IRFU), for example, follows IRB rules which require that to play for a national representative team, a player must have been born in the country, or one parent or grandparent must have been born in the country, or the player must have completed 36 consecutive months of residence immediately preceding the time of playing.

The Football Association of Ireland (FAI) follows similar rules established by FIFA. It should be noted that the FAI's counterpart in Northern Ireland, the Irish Football Association (IFA), announced in February 2010 that it would seek a ruling from the Lausanne-based Court of Arbitration for Sport in respect of a decision by a player who had played for Northern Ireland to play for the Republic of Ireland instead. This reflects the fact that any player born on the island of Ireland is eligible to play for the Republic of Ireland team. The IFA has

⁵³ See Social Welfare Appeals Office, *Annual Report 2007* (<http://www.socialwelfareappeals.ie/pubs/report2007.html>).

lost a number of players in the recent past in this way and has expressed concern that it has lost the benefits of investment in young players. In July 2010, the Court of Arbitration dismissed the IFA appeal and reaffirmed that players born in Northern Ireland can play for either the Irish football team or for the Northern Irish football team.⁵⁴

It should perhaps be noted that, in the area of Gaelic sports, the question does not arise since these activities are reserved to amateurs. Although the emphasis is on the sports' 'Irishness', there is no nationality restriction with interested players drawn from the local level (or from an institutional base, such as a university).

Professional sportspersons benefit from tax relief, which is available to them on the basis of residence. The 2009 Commission on Taxation recommended that this relief be maintained, subject to some suggested changes.

3. THE MARITIME SECTOR

Seafarers on *Irish-flagged ships* are entitled to equal treatment in terms of pay and other terms and conditions of employment irrespective of nationality. This arises from the Employment Equality Acts 1998-2007 and the Protection of Employees (Part-Time Work) Act 2001.

As has been mentioned in earlier reports, concerns about the application of this basic principle surfaced in 2004/2005 in relation to Irish Ferries. At that stage, flagged in Ireland, Irish Ferries sought to reduce its operating costs by replacing its Irish crew by seafarers from the Baltic States. It also appears to have paid individual workers on board its vessels – such as hairdressers – very low hourly rates of pay. It unilaterally terminated its arrangements with the trade union, SIPTU and, after considerable industrial unrest, made its Irish workers redundant and outsourced its crewing requirements.

Subsequently, Irish Ferries decided to reflag its vessels. A number of vessels are currently flagged in Cyprus and its most recently acquired vessel is flagged in the Bahamas. The Irish Government made it clear⁵⁵ that 'it is as a matter of international law clear (as reflected in United Nations Convention on the Law of the Sea – UNCLOS) that the terms and conditions of the employed seafarers on such vessels is to be decided exclusively by the flag State'. It was also clear that Ireland could not prevent a re-flagging that occurred as an integral part of exercising a right of establishment in another Member State.

With regard to the Implementation of the ILO Maritime Labour Convention 2006, the Department of Transport launched a consultation with stakeholders on the implementation of the Convention into Irish Law on 19 January 2011.⁵⁶ The Maritime Labour Convention will cover the five general areas of minimum requirements for work, conditions of employment; accommodation and food provision, and health care. The consultation closed on 14 March 2011. Contributions made during the consultation process will be taken into account in the drafting of the implementing legislation. There will be a further consultation following the ratification of the Maritime Labour Convention.

54 <http://www.tas-cas.org/d2wfiles/document/4385/5048/0/Award%202071.pdf>

55 See Statement by Minister Martin to Dáil Eireann Re Irish Ferries, 20 November 2005. <http://www.entemp.ie/press/2005/20051129a.htm>.

56 http://www.transport.ie/upload/general/12931-MN04OF2011_B-0.DOC

4. RESEARCHERS/ARTISTS

It appears that nationals of other EU Member States working as researchers and artists are treated equally to their counterparts who have Irish nationality.

As noted in earlier reports, income earned by artists, writers, composers and sculptors from the sale of their works is in certain cases exempt from tax in Ireland.⁵⁷ There is no nationality requirement, but claimants for this exemption must be resident, or ordinarily resident and domiciled, in the State and not resident elsewhere. The 2009 Commission on Taxation recommended that this exemption should be discontinued since it was not compatible with the equity principle. This has not been acted upon, although the upper-limit cap has recently been reduced from €250,000 to €125,000, and there is continued criticism of the uneven way in which the exemption is applied.⁵⁸ In 2011, the cap on the artists' exemption was further reduced to €40,000.

5. ACCESS TO STUDY GRANTS

Regulation 18(1)(c) of the European Communities (Free Movement of Workers) No. 2) Regulations entitles persons covered by the Regulations to access to education and training in the State in the like manner and to the like extent as Irish citizens.

Educational Fees. In relation to the fees charged by third-level institutions, 'EU' fees, which are set at a substantially lower level than 'non-EU' fees, apply to all those who satisfy residence requirements in any EU Member State, and, in some cases, are nationals of an EU Member State. The precise requirements seem to differ as between institutions. The largest third-level institution in the State, University College Dublin, imposes no nationality condition and requires that the parent/s of the student (or, in the case of mature students, the student him/herself) has/have been ordinarily resident in an EU Member State for three of the five years prior to entry. EU fees are also payable by students born in Ireland who do not meet these residency requirements but have received all their education in Ireland.

Another institution, Dublin City University, provides that students will qualify for EU fees where they are: (a) nationals of an EU Member State and have been ordinarily resident in an EU Member State for three of the five years prior to commencement of the programme; (b) nationals of an EU Member State and have received all their post-primary education within an EU Member State; (c) where they are mature students (over the age of 23) and have been *in full time employment* in an EU Member State for three of the five years prior to commencement; or (d) where they are under 23 and have been ordinarily resident in a EU Member State for three of the five years prior to commencement and their parent/s has/have been in full-time employment in an EU Member State for three of the five years prior to commencement.

Financial Support. The Free Fees Scheme, under which the Exchequer meets the tuition fees of students attending approved third-level courses, applies to first-time undergraduates who hold the nationality of an EU Member States and have been ordinarily resident for at least three of the five years preceding entry to the course.

⁵⁷ See <http://www.revenue.ie/en/tax/it/artists-exemption.html>.

⁵⁸ The recent autobiography of the former Taoiseach (Prime Minister) Mr. Ahern somewhat controversially benefits from the exemption.

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There are four student maintenance grant schemes funded by the Irish Government and administered by local authorities (for the University sector) and Vocational Education Committees (VECs).⁵⁹ Applicants for such schemes must themselves satisfy one of a number of 'nationality' conditions, including: (a) the holding of EU nationality; (b) not holding EU nationality, have permission to remain as a spouse or child of a resident Irish national; and (c) not holding such nationality, having permission to remain as a spouse or child of a national of another EU Member State who is residing in the State and who is/or has been employed or self-employed. In addition, the parents or guardians of the applicant (or the applicant in the case of an 'independent mature candidate') must be ordinarily resident in the administrative area of the local authority/VEC concerned from 1 October in the preceding year, although this requirement may be waived in exceptional cases. For the academic year 2010/2011, students were also required to be ordinarily resident in the State for three of the previous five years.⁶⁰

As a response to the current financial crisis, the 2010 budget reduced student grants and scholarships by 5%. The 2011 Budget reduced student grants by a further 4 %.

The new Student Support Act 2011 is intended to reform the third level grant scheme. As of June 2011, the provisions of this Act have not been commenced by the Minister for Education. However, it is intended that the new grant scheme will be in operation from September 2011.

The four current grant schemes will be replaced with a single unified grant scheme. There will be only one authority awarding student grants and an independent appeals board. The Act provides a legislative basis for the current practice of requiring certain residency criteria to be fulfilled in order to be eligible for the grant. In this respect, the Act provides that students must be ordinarily resident in the State in order to be eligible for a grant. Section 14(4) of the Act defines a student as ordinarily resident if they have been resident in the State for at least three out of the last five years. If a student is temporarily resident outside the State because they are pursuing a course of study or post-graduate research in one of the other Member States and they were resident in the State for at least three out of the last five years, they will also satisfy this condition.

6. YOUNG WORKERS

Both young migrant workers and young Irish workers face many difficulties in entering the jobs market, with the economic crisis and consequent lack of jobs to blame for much of the difficulty. Government departments have initiated a number of programmes and measures to help workers access the labour market. These are briefly discussed below. It should be noted that only one of these – 'Youthreach' – is specifically and exclusively directed at the young, but all of these measures are important for young people seeking access to the employment market, especially in the current economic crisis.

59 These are: the Higher Education Grants Scheme (HEG); the Vocational Education Committees' Scholarship Scheme (VEC); the Third Level Maintenance Grants Scheme (TLT); and the Maintenance Grants Scheme for Students attending ESF-aided Post Leaving Certificate Courses.

60 Higher Education Grant Scheme 2010. http://www.education.ie/servlet/blobServlet/he_heg_scheme.pdf?language=EN.

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In December 2010, the Higher Education Springboard Programme was launched by the government. This programme assists those who have a previous employment history in sectors which are unlikely to return to pre-recession levels (e.g., jobs in the construction and manufacturing sectors) by providing a range of education courses for unemployed people who fulfil the criteria below.

In order to qualify for a Springboard funded course, a person must be in receipt of either Jobseeker's Benefit, Jobseeker's Allowance or One-Parent Family Payment for six months prior to the course starting or be signing for social insurance credits for the six months prior to the course starting. All applicants must also have a history of employment and be actively seeking employment. There does not appear to be a residency requirement per se. However, all applicants for Jobseeker's Allowance, regardless of nationality, are required to be habitually resident in the State (i.e., have a proven link with the State) in order to qualify. In relation to Jobseeker's Benefit, eligibility depends on having made sufficient PRSI contributions; social insurance paid in another Member State may be credited the applicant's record in Ireland to help the applicant qualify for Jobseeker's Benefit. However, the applicant must have at least 1 reckonable contribution in Ireland. In order to qualify for the One-Parent Family Payment, applicants must satisfy the habitual residence condition. The requirement to have previously been in employment does not appear to require employment within the State. However, in order for applicants to be eligible for Jobseeker's Benefit, Jobseeker's Allowance or One-Parent Family Payment, they would have to be either habitually resident in the State or have worked in the State previously. Therefore, young job seekers from other Member States, who have not worked previously in the State, may find it difficult to access the Springboard Programme.

In March 2010, the establishment of a €20 million Labour Market Activation Fund was announced by the Minister for Enterprise, Trade and Employment⁶¹. This aims to deliver training and education programmes targeting specific priority groups among the unemployed. The priority groups targeted include the low skilled, and those formerly employed in declining sectors – such as construction, retail and manufacturing sectors, with particular emphasis on the under 35s and the long-term unemployed. While there is no residence/nationality requirement for participation in Activation Fund programmes as such, we understand that to be eligible to participate, the applicant must be in receipt of an unemployment payment. The eligibility criteria for Jobseeker's Allowance and Jobseeker's Benefit have already been discussed in detail in the above paragraph. Once again, it may be more difficult for persons from other EU Member States to satisfy the criteria (and hence persons from other EU Member States may be less likely to have access to the Activation Fund).

The Youthreach programme (which is co-funded by the Irish Government and the EU) is directed at unemployed young early school leavers aged 15-20 years. The programme provides early school leavers with opportunities to acquire certification and to progress to further training or employment.⁶² Nationals from other EU Member States have the same opportunity to access this programme as Irish nationals and so there does not appear to be any issue in relation to equal treatment.

⁶¹ Now called the Minister for Jobs, Enterprise and Innovation.

⁶² As part of the Youthreach programme, there is a strong emphasis on personal development, the core skills of literacy/numeracy, communications and IT. As part of the programme, there is also a choice of vocational options and a work experience programme.

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FÁS is the National Training and Employment Authority and is one of the main resources for the training and employment of all workers in the State, including young workers. Through a regional network of 66 offices and 20 training centres, FÁS operates training⁶³ and employment programmes, provides a recruitment service to job seekers and employers, provides an advisory service for industry and supports community-based enterprises. We are not aware of any issues in relation to equal treatment in relation to access for employment/training as regards FÁS.

The Work Placement Programme is a government supported programme that offers an alternative to persons who have been unable to find paid work. It allows persons to secure placements and to obtain experience in a real work environment. The Work Placement Programme consists of two streams. The first stream is made up of 1,000 places for graduates. The second stream is made up of 1,000 places for unemployed people (250 places are reserved for persons 34 years and under in this second stream).⁶⁴ Anyone who is unemployed is eligible to apply for the Work Placement Programme. The placement is unpaid and voluntary. However, if the applicant is already in receipt of certain social welfare payments, he/she may be allowed to retain the payment while on a placement.

It is interesting to note that in a recent Europe-wide survey on young migrants, 62.9% of participants in the study on young migrants in Ireland had taken part in training previously.⁶⁵ 63.6 of the participants intend to stay in Ireland and 79.5% of participants were, at the time of the survey, in employment. Statistics compiled as part of the Annual Monitoring Report on Integration indicate that workers from the older EU Member States are more likely to be provided with training or education by their employer than Irish national workers.⁶⁶

63 For example, FÁS provides training programmes aimed at the construction industry, film, the environment, construction and retail.

64 An unemployed graduate may apply under either stream for a placement.

65 'Young migrants experience similar barriers to employment across Europe' Immigrant Council of Ireland, 7 May 2010.

66 McGinnity, Frances, Quinn, Emma, O'Connell, Philip J., Donnelly, N., *Annual Monitoring Report on Integration*, ESRI 2010.

Chapter VII: Application of transitional measures

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS

Ireland has not imposed transitional measures in respect of workers from the EU-8 Member States.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

Ireland decided, prior to the accession of Bulgaria and Romania, to require Bulgarian and Romanian citizens to obtain work permits under the Employment Permits Acts 2003-2006. This requirement did not apply to workers who had already been resident in Ireland for 12 months prior to access, spouses of EU nationals who did not need an employment permit, self-employed persons resident in the State, resident students working less than 20 hours a week, or those explicitly permitted to reside and work in the State without a permit. Preference was to be given to Bulgarian and Romanian applicants over non-EEA nationals.

On 17 December 2008, the Government announced that it would, from 1 January 2009, continue to restrict access to the Irish labour market for nationals of Bulgaria and Romania. The existing exceptions to the requirement for a work permit would continue to apply and preference continues to be given to such nationals over nationals of non-EEA Member States. The decision to maintain the restrictions is being kept under continuous review and is to be assessed comprehensively before the end of 2011.

In justifying the decision, the Minister for Labour Affairs stated that it had been influenced by the challenges posed by the downturn in the global economic environment and the direct impact this had had on the labour market. It seems that this position is supported by the trade unions and the employers' body, IBEC.

In December 2009, employment permit information sheets were reissued for Bulgarian and Romanian nationals and, in summary, the current position is as follows:

- A permit is not needed by a Bulgarian or Romanian national who:
 - has been resident in the State as the holder of an employment permit, expiring on or after 31 December 2006, for an uninterrupted period of 12 months or longer;
 - is the spouse of an EU national, other than a Bulgarian or Romanian national;
 - from January 2010, is the spouse or dependant of a Romanian or Bulgarian worker (employed or self-employed);
 - is a student studying in Ireland (who, subject to certain conditions, is entitled to casual employment during the period of study);
 - is a graduate of an Irish third-level institution, with a qualification above a certain level, and who has worked on the basis of being a student for 12 months or more post 2007;
 - has obtained prior explicit permission from the Department of Justice to remain resident and employed in the State without an employment permit.

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- Bulgarian and Romanian nationals requiring a permit may apply for one of a variety of permits: work permit (new application for the first time); work permit (renewal or application for existing permit holder); spousal/dependant work permit; green card; or intra-company transfer. A fee is payable for all save spousal/dependant permits. The minimum wage must be payable for work permits (renewals or applications from existing permit holders) and spousal dependant permits: in other cases, high levels of minimum salary are prescribed. A labour market test is required for the first category of permit.
- Save for spousal/dependant work permits, applications may not be made for ineligible job categories (covering all clerical and administrative positions, all general operatives/labourers, all operator and production staff and various other posts in the sales, transport, childcare, hotel/tourism/catering and craft workers categories).

Some data on employment permits for Bulgarian and Romanian nationals is officially available, as follows:

Year	Nationality	New Permits	Renewals	Total Issued	Refused	Withdrawn ⁶⁷
2007	Bulgaria	33	5	38	15	-
	Romania	94	25	119	57	
2008	Bulgaria	22	0	22	23	-
	Romania	120	6	126	67	-
2009	Bulgaria	28	1	29	2	0
	Romania	195	1	196	38	8
2010	Bulgaria	69	1	70	8	2
	Romania	766	5	771	130	18
2011	Bulgaria	8	0	8	3	0
	Romania	121	2	123	22	10

It is difficult to draw any firm conclusions from the statistics, since there is no exact correlation between the data for applications, permits issued and that for permits refused (a permit may be issued or refused in respect of an application during the previous year for example). The National Employment Rights Authority (NERA) was in 2009 given the task of enforcing the legislation on employment permits (the Employment Permits Acts 2003 and 2006). It was reported in June 2009 that the Minister for Enterprise, Trade and Employment had ordered a crackdown on the (alleged) 5,000 Romanians and Bulgarians suspected of working illegally in Ireland. No information is available on how successful the crackdown was or whether Bulgarian and Romanian illegal workers are still being targeted by the Department of Jobs, Enterprise and Innovation.

There have been suggestions that EU-2 nationals have sought to avoid the requirement to obtain work permits by claiming to be self-employed. These suggestions are difficult to substantiate. However, as a recent case makes clear,⁶⁸ a self-employed EU-2 national will, on ceasing to be self-employed, have no right to remain in the State unless he/she is able to

⁶⁷ Data on withdrawals is not available for 2007 and 2008.

⁶⁸ *Petru and Aurica Solovastru v Minister for Social Protection and others* (2010/1331JR, High Court, 9 June 2011, not yet reported).

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obtain the right to stay on another ground (such as by obtaining a work permit). The status of 'involuntary unemployment' under Article 7 of the 2004 Residence Directive is applicable only to a person in paid employment (that is, a worker) and not to a self-employed person who ceases activity. In contrast to nationals of the other EU Member States, the formerly self-employed person cannot claim job-seeker status since he/she needs a work permit.

Chapter VIII: Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ART 45 TFEU AND REGULATION 1612/68 (NOW 492/2011)

In previous reports, it was stated that it had not been possible to identify any concrete cases where the relationship between Regulation 883/04 and the equality rules in Regulation 492/2011 (previously 1612/68) has been in issue. This question was raised in discussions with the Department of Social and Family Affairs in relation to the application of the *Hartmann* and other rulings. There had clearly been concerns about the application of the 'habitual residence' condition to social security and social assistance payments, which may now be of largely historical importance. The Department made a clear distinction between payments caught by the Regulation 883/2004 regime, which (with certain exceptions) are payable by the Member State of employment and social welfare payments which are caught by Regulation 492/2011, so that the habitual residence condition cannot apply to frontier workers and others benefiting from the free movement provisions.

It has not been possible to identify any developments in individual cases. The Department of Social and Family Affairs had previously published detailed Guidelines on EU Social Security Regulations,⁶⁹ a section of which addressed the scope of Regulation 883/2004 and the position of persons outside the scope of that Regulation. The guidelines have since been updated and the current version does not address the position of those persons falling outside the ambit of the Regulation. However, the previous guidelines may still be of relevance.

The previous guidelines recognised that certain persons will fall outside the scope of Regulation 883/2004. First, those seeking social assistance. Second, family members and survivors, who cannot rely on the Regulation where the benefit applies *exclusively* to the employed person.

A number of points were also made in relation to the regime under the Article 45 of TFEU and Regulation 492/2011 (previously 1612/68) regime. First, Article 7(2) of Regulation 1612/68 does not benefit workers who are Irish nationals (see Joined Cases 35/82 & 36/82 *Morson and Jhanjan*). Second, the person concerned must be a worker according to the definitions set out in ECJ case law. It was pointed out that a worker as thus defined is not necessarily the same as a person within the scope of Regulation 883/2004. Third, the worker must have employment in Ireland, which excludes job seekers. It was recognised that there are a number of Community law exceptions to the requirement to be employed. Fourth, family members would receive benefits under Article 7(2) only where this involved a social advantage pertaining to the employed person. In contrast to the test to be applied when determining the rights of family members and survivors under Regulation 883/2004, the employed person must actually support the family members in question. Family members would not benefit from the derived right where the worker is an Irish national or a non-EEA national. Finally, the benefit must be a social advantage as defined by the Court of Justice.

It is clearly recognised that social welfare benefits such as Child Benefit and One Parent Family Benefit falling within the scope of family benefits under Regulation 883/2004 may

⁶⁹ <http://www.welfare.ie/EN/Policy/EU/Pages/SocialSecurityRightsIreland.aspx>.

not be subject to the Habitual Residence Condition. This exemption does not apply to other benefits within the scope of the Regulation which may be subject to such a condition: this is the case in relation to Job Seeker's Allowance.

In 2010, Ireland paid €15.4 million in child benefit to parents who were living in Ireland in relation to non-resident children.⁷⁰ There are currently 7,814 non-resident children whose parents are working in Ireland and in receipt of child benefit in relation to them. At a Council of Minister's meeting in June 2011, the Irish Minister for Social Protection asked the European Commission to carry out an impact assessment on the effect of EU Regulations⁷¹ on social welfare for EU workers on national welfare systems. These Regulations ensure that EU workers who are working in another Member State are covered by the social welfare system in that Member State. Parents who are working in one Member State, with children who are habitually resident in another Member State, may thus be entitled to child benefit, if they satisfy the eligibility criteria. According to newspaper reports, the Irish government wants the cost of living in a particular Member State of the children's residence to be reflected in the amount of child payment so that children residing in countries with a lower cost of living would receive a lesser amount of child benefit than a child who lives in a country with a higher cost of living.

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 (NOW 492/2011) FOR FRONTIER WORKERS

The relationship between the rules of Directive 2004/38 and Regulation 492/2011 (previously Regulation 1612/68) as regards frontier workers has not been addressed in case law or in official documentation.

Frontier workers moving in and out of the State on a daily basis would not seem to be regarded as 'resident' within the meaning of the 2004 Directive or the 2006 Regulations. As far as the application of the non-discrimination rule is concerned, the rights of a frontier worker derive from his or her status as a worker coming from another EU Member State and resident there, rather than as a resident of the Member State of employment.

As seen elsewhere in this report, the question of 'social advantages' has arisen in relation to frontier workers, in that it is recognised that workers living (mainly) in Northern Ireland and working in the Republic of Ireland cannot be subject to any 'habitual residence' condition as regards social advantages (see Chapter VI,1).

⁷⁰ <http://www.irishtimes.com/newspaper/ireland/2011/0617/1224299070759.html>.

⁷¹ Regulation (EEC) No 1408/71, Regulation (EEC) No 574/72 and Regulation (EEC) 859/2003 and Regulation (EC) 987/2009.

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS

3.1 Integration measures

There is no policy with regard to the integration of EU nationals as such. However, an emerging national integration policy covers the integration of immigrants generally.

The National Action Plan for Social Inclusion 2007-2016 envisages integration as one of the goals of the social inclusion framework. The successful integration of immigrants, both EU nationals and third country nationals, into education has also been discussed in the Intercultural Education Strategy 2010-2015 which was drafted with the Department of Education and Skills and the Office of the Minister for Integration. The National Intercultural Health Strategy 2007-2012 has made a number of recommendations aimed at providing a better health service to all nationalities and ethnic groups in Irish society including those from EU Member States.

The Department of Justice, Equality and Law Reform is at the early stages of producing an integration strategy for the Roma community in Ireland, as requested by the European Commission under the Europe 2020 Strategy. The deadline for completion of the integration strategy for Roma in Ireland is December 2011.

3.2 Immigration policies for third-country nationals and the Union preference principle

The Immigration, Residence and Protection Bill 2010 aims to provide a legislative framework for immigration law in Ireland by replacing all current legislation with one piece of legislation.

A 'saver' provision in the Bill makes it clear that the provisions of the Bill do not affect any obligations of the State under any European act. This saver has continued under the newly restored Bill.

3.3 Return of nationals to new EU Member States

The Reception and Integration Agency (RIA), under the aegis of the Department of Justice and Law Reform, supports the repatriation on an ongoing agency basis for the Department of Social Protection of *destitute* nationals of the EU-10 Member States, and latterly the EU-2 Member States, who do not satisfy the habitual residence condition for social assistance.

The RIA itself does not itself assess whether the individual concerned is destitute. Such assessment is made, and the individual referred to the RIA, by the Asylum Seeker and New Communities Unit (ASNCU) of the HSE (Community Welfare Service), and infrequently by local community welfare officers and employment exchanges. Individuals are themselves not eligible to apply, and referrals are not accepted from embassies, NGOs or third parties.

The RIA provides voluntary transport for the destitute nationals concerned, and will, where absolutely necessary, provide accommodation for one of two nights prior to departure.

There were suggestions that some of the returnees return to Ireland again and benefit from the scheme more than once. The rules are now quite strict. A person may be repatriated

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under the scheme only once. A person who has failed to take a flight will not be offered another one.

In 2010, a total of 548 persons were provided with return flights to EU-12 countries. This was less than the 664 persons assisted in 2009 and the 757 persons assisted in 2008. This may reflect generally lower numbers of EU-10 and EU-2 nationals now in the State.

In 2009, a total of 664 persons were provided with temporary subsistence and return flights. This was less than the 757 persons assisted in 2008. The general downward trend appears to be continuing for 2011.

Since the scheme was introduced in 2004, a large proportion of returnees have been Polish nationals (which reflects the fact that Poles constitute the largest group of EU-10 nationals in Ireland). However, since 2007, relatively large numbers of Romanians have returned: 150 in 2007 (27.8% of the total), 462 in 2008 (61%), 395 in 2009 (59.5%), 302 in 2009 (55%) and 302 in 2010 (54.9%). Czechs, Latvians, Lithuanians and Slovaks are also relatively heavily represented (together 27.8 % of the total in 2010). As of April 2011, Romanians have the largest number of voluntary repatriations so far with 270 returns with 54 Slovaks, 49 Poles, 38 Lithuanians and 33 Latvians also being voluntarily repatriated in the same period. These five nationalities account for the majority of voluntary repatriations.

4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED

Apart from SOLVIT, there is no fully-fledged complaints mechanism in Ireland which enables alleged violations of Community law to be properly addressed without the need to go to court or to EU institutions. However, reference should be made to the provision of a Eurojus consultant lawyer under the auspices of the European Commission Representation in Ireland and to the sterling work done by the Immigrant Council of Ireland⁷² and other law centres which provide guidance and advice on free movement issues

5. SEMINARS, REPORTS AND ARTICLES

Quinn, Emma, *Programmes and Strategies in Ireland Fostering Assisted Return to and Reintegration in Third Countries*, ESRI, 2010.

Report from the Irish NCP of the European Migration Network. Although this focuses on the question of assisted return measures for third-country nationals, the position of EU nationals is also considered.

Seminar on the 'Free Movement of Workers in Ireland', Law Society of Ireland, 5 November 2010.

The seminar covered a wide range of topics on the free movement of workers including recent EU case-law, the recognition of professional qualifications, language require-

⁷² www.immigrantcouncil.ie.

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ments for job seekers, reverse discrimination, cross-border issues for workers, social welfare issues for EU nationals and the Roma community in Ireland.⁷³

Handoll, John, Pandora's Box?, *Law Society Gazette*, May, 2011, pp. 30-33.

This article analyses the implications of the ECJ decision in the *Zambrano* case.

McGinnity, Frances, Quinn, Emma, O'Connell, Philip J. & Donnelly, N., *Annual Monitoring Report on Integration*, ESRI 2010

This report focuses on the issues of employment, education, social inclusion and active citizenship for immigrants in Ireland including EU nationals.

Becker, Hilka, A case note on *Zambrano*, *Law Society*, April 2011.

This article gives an overview of the *Zambrano* case and its potential effects for immigrants in Ireland.

Cosgrove, Catherine, *Living in Limbo: Migrants' Experiences of Applying for Naturalisation in Ireland*, Immigration Council of Ireland, 2011

This report focuses on the difficulties faced by immigrants when applying for residence and citizenship in Ireland and recommendations for reform.

European Network Against Racism, Catherine Lynch, *Racist Crime: ENAR Ireland Seminar Report*, 2010

This seminar report analyses the problem of racism in Ireland and makes a number of recommendations on how to effectively address the problem of racism in Ireland.

Siofra O'Leary, The Past, Present and Future of the Purely Internal Rule in EU Law, (2009) 44(1) *The Irish Jurist* 13.

This article analyses the purely internal rule in the context of the free movement rights with regard to Union citizenship. The article reflects on the scope of EU law in the future.

Gerard Hughes, *Free Movement in the EU, The Case of Ireland*, Friedrich Ebert Stiftung, May 2010.

This report describes the effect on the labour market in Ireland of EU10 migration following accession to the EU in 2004.

⁷³ See www.ru.nl/.../report_specialised_seminar_5_november_2010_dublin.pdf for more information.