

**REPORT**  
**on the Free Movement of Workers**  
**in Ireland in 2009-2010**

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## 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 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 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.

*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

(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.

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 Con-

olidation Act 2005 and includes payments or services under the Health Acts 1947 to 2004 and the Housing Acts 1996 to 2004.

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 III, 4.5, 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 an obligation under the Directive.

## **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).

In practice, there is no obstacle to ‘genuine’ job seekers entering Ireland in their own right (the position of third-country national family members is not so clear – see Chapter VI). Since there is no requirement to register, and no entitlement to social assistance, the individual concerned does not have to prove his or her status with the immigration authorities. It seems that a job seeker will not be initially entitled to social assistance. 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. It is clear from operational guidelines issued by the Department of Social and Family Affairs<sup>1</sup> 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’.

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<sup>1</sup> [http://www.welfare.ie/EN/OperationalGuidelines/Pages/ja\\_jobseekall.aspx](http://www.welfare.ie/EN/OperationalGuidelines/Pages/ja_jobseekall.aspx).

## Chapter II

### Members of the Worker's 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'.

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 (in contrast to a Union citizen with dual nationality) are therefore not covered by the Regulations.

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 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).

#### 2. ENTRY AND RESIDENCE RIGHTS

Two issues are discussed below. First the application of the *Metock* judgment. Second, the question of abuse of rights.

### 3. APPLICATION OF *METOCK* JUDGMENT

The Irish Government adopted Regulations amending the offending part of the 2006 Regulations only four working days after the Court delivered its Judgment.<sup>2</sup> 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 members’<sup>3</sup> 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’.<sup>4</sup> The same approach is now taken to ‘permitted’ family members,<sup>5</sup> including those who are not Union citizens.<sup>6</sup>

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 have prior lawful residence would have their applications reviewed. It was envisaged that this process would take three or four months to complete.<sup>7</sup>

Although the Irish Government therefore sought to address the *Metock* ruling in an impressively short timeframe, it has also continued to campaign together with Denmark for an amendment to amend the Directive.

### 4. ABUSE OF RIGHTS

Concerns about abuse of rights 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.

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

A short document entitled ‘The Irish experience – statistics and issues’ was prepared for the JHA Council meeting in September 2008. Part of this paper sets out the results of a statistical analysis of the 4,600 applications for the first residence card received since the Directive came into effect. 2,000 of these did not satisfy the ‘prior legal residence’ requirements. In relation to immigration status, 15% of the 4,600 applicants had entered the State as asylum seekers (and tended to marry at ‘points of jeopardy’ in the asylum/deportation process) and 15% were students (with a ‘precarious status’), or former students who were now ‘illegal’. In relation to nationality, over 600 were Nigerians (seen as ‘statistically disproportionate’), mainly failed asylum-seekers. Nearly 600 applications were from Pakistani nationals (‘again statistically very unlikely’), who were students, or former students who were now ‘illegal’. The analysis then looked at ‘unusual marriage patterns’: of the 4,600 applicants,

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

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

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

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

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

7 See the August 2008 notice ‘European Court Judgment on Free Movement of Persons (the ‘Metock’ case) (<http://www.inis.gov.ie/en/INIS/print/PR08000027>).

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10% of all the EU spouses were Latvian, 33% of the Latvians were married to Pakistanis and 50% of the Latvians were married to Pakistanis, Bangladeshis or Indians. In contrast, 39% of the Latvians married non-EU nationals who were ‘closer to home’ (comprising ‘Latvian Aliens’, Ukrainians, Belarusians and Russians). The figures had been subjected to statistical analysis – including comparison with registration figures and data on EU nationals residing in Ireland. The authors commented: ‘the high incidence of applications from certain nationalities and the marriages involving Latvians/Pakistanis etc are so statistically abnormal that they cannot have occurred by chance’. The data strongly suggested that the free movement directive had been exploited by persons who were illegally in the State or whose presence there was ‘precarious’. The pattern of applications received strongly suggested that, even before *Metock*, the Directive was seen as a route to regularisation and was being systematically abused. After *Metock*, the State’s capacity to deal effectively with such applications was limited. Ireland shared Danish concerns about the implications of *Metock* for the capacity of Member States to combat illegal immigration and its encouragement of marriages of convenience.

Turning specifically to marriages of convenience, it was stated that they were ‘part of the problem, but proving them is very resource-intensive and can be intrusive’. It was extremely difficult to prove marriages of convenience. A distinction was drawn between ‘opportunistic’ rather than ‘convenience’ marriages: ‘one party to the marriage sees a chance 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 nationals who had applied for residency in Ireland under the 2004 Directive on the basis on 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. The Minister remarked that ‘the love affair between Pakistan and the Baltic States shows no sign of abating’. There have been reports of police investigations into an alleged racket involving the trafficking of Union citizen women from Eastern Europe to marry third-country national men in order to secure residency in Ireland. At least one marriage has not gone ahead following police objections that it constituted a marriage of convenience in order to obtain residency.

## 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.

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As far as a non-EEA national married to an EU national is concerned, the Department of Enterprise, Trade and Employment 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.

Until April 2010, there was a requirement that spouses obtain a work permit in respect of any period before receiving the residence card. Obtaining such a permit could take some time, though the fee for such permit was waived.

Other dependants were also required to apply for a dependant work permit, if they sought to work before issue of the residence card. According to information given by officials in the Department, a dependant child would only be recognised as such if he/she enters the State before his/her 18<sup>th</sup> birthday. If entry is after that age, the child will not be regarded as 'dependant' and would thus have to apply for an independent work permit.

In April 2010, the Irish Naturalisation and Immigration Service announced that, *with effect from 1 June 2010*, the permission to remain which might be given to applicants in the State on the basis of a pending application for EU Treaty rights (in effect, third-country national family members of Union citizens) would be Stamp 3, instead of Stamp 4. Stamp 4 simply provides that the person concerned is permitted to remain in Ireland until a specified date. Stamp 3 permits the person concerned to remain in Ireland for a specified period on condition that the he/she does not enter employment and does not engage in any business or profession – that is, *employment is prohibited*. The stamp will be provided only for a maximum of 6 months, the period of the application process only, after which period a residence card should be issued and the individual concerned have the right to work without a permit.

### **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, both as regards the right to reside and access to employment.

In practice, it seems that family members of job-seekers are in principle able to enter and avail of residence rights corresponding to those of the job-seeker. It should be noted that there is no right to social assistance during the period where the job-seeker is seeking employment and has a genuine chance of being engaged (see Chapter 1).

This is at least the position for family members who are themselves Union citizens and they are, of course, entitled to exercise any rights of free movement they themselves possess apart from enjoying their derivative status. The position of third-country national family members is less clear. Since there is a requirement to apply for a residence card, the question of status may arise at the time such application is made. However, I am not aware of any individual cases where a residence card has been refused, at least to a family member of a bona fide job seeker.

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.

## Chapter III

### Access to Employment: a) Private sector and b) Public sector

#### A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

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

Nationals of other Member States enjoy equal treatment in relation to access to employment as a matter of law. This has now been made clear in Regulation 18(1)(a) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006,<sup>8</sup> 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.<sup>9</sup> 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 rapporteur is not aware of any issues in relation to equal treatment in relation to access for employment as regards FÁS.

##### *a.2 Language requirements*

As far as concerns the private sector, 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, 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 *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.

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<sup>8</sup> See n. 2, above.

<sup>9</sup> See, generally, [www.fas.ie](http://www.fas.ie).

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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.

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.

### **B) 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 2009/2010. Only a summary of the current position is provided here.

#### ***b.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.

### ***b.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.

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 an adaptation period of five years (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 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.

***b.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 continued to apply in 2008 and 2009.

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).

## 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 origins (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*.<sup>10</sup>

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, as well as to strengthen inspection and enforcement powers. (As at June 2010, this Bill has not been passed by the legislature.)

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<sup>10</sup> Towards 2016: Ten Year Framework Social Partnership Agreement 2006-2015  
[http://www.taoiseach.gov.ie/attached\\_files/Pdf%20files/Towards2016PartnershipAgreement.pdf](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 and 2010, 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 a number of cases, 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.<sup>11</sup> There will be no discrimination where no contract is issued and this failure cannot be ascribed to the complainant's nationality.<sup>12</sup>

A similar approach has been taken where an employer has failed to provide non-Irish employees with health and safety statements in a language they can understand.<sup>13</sup>

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 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.<sup>14</sup>

Discrimination on grounds of the same treatment of different situations will not, of course, arise where the non-national worker in fact understand the local language and mores.<sup>15</sup>

More generally, discrimination will arise where non-national workers are subject to more stringent disciplinary measures than Irish workers,<sup>16</sup> or where the employer has failed to prevent harassment where this is directed at non-nationals.<sup>17</sup>

There have also been a number of cases where non-Irish workers have been discriminated against in terms of dismissal.<sup>18</sup>

It has been held that these non-discrimination provisions do not apply where an employer decides to employ only non-Irish nationals.<sup>19</sup>

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11 *Vaiculis* (DEC-E2010-014, 15 February 2010), referring to 58 *Named Complainants v Goode Concrete* (DEC-E2008-020, 30 April 2008).

12 *Zubrikas* (DEC-E2009-044, 9 June 2009), *Silgalis* (DEC-E2009-068, 24 August 2009).

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

14 *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*.

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

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

17 *Gedrinas* (DEC-E2009-014, 13 March 2009), *Gamusauknas* (DEC-E2009-063, 29 July 2009), .

18 *Jasaitis* (DEC-E2010-008, 2 February 2010).

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

***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 2009/2010.

## **2. SOCIAL AND TAX ADVANTAGES**

### ***2.1 General situation as laid down in Art. 7(2) Regulation 1612/68***

Operational Guidelines on the habitual residence condition,<sup>20</sup> updated in April 2010, make it clear that those entitled to social advantages under Article 7(2) of Regulation 1612/68 – which includes Social Welfare Allowance, but does not include certain other social welfare benefits<sup>21</sup> - 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).

***Specific issue: the situation of jobseekers***

The Habitual Residence Conditions Guidelines state that a jobseeker who moves from one EEA country to another in order to seek employment cannot claim advantages for migrant workers under EC law and is subject to the habitual residence condition.

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<sup>20</sup> [http://www.welfare.ie/EN/OperationalGuidelines/Pages/swa\\_habres.aspx](http://www.welfare.ie/EN/OperationalGuidelines/Pages/swa_habres.aspx).

<sup>21</sup> A number – such as Unemployment Assistance and Old Age Pension - are covered by Regulation 1408/71, which takes precedence over Regulation 1612/68.

**Chapter V**  
**Other Obstacles to Free Movement**

Nothing to report.

## Chapter VI

### Specific Issues

#### 1. FRONTIER WORKERS

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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> It also acts as an ‘advice centre’ for people with specific mobility-related issues.

In May 2004, a ‘habitual residence’ condition was introduced for obtaining certain social assistance payments. The regime has been amended a number of times since then. As it originally stood, there was a presumption that the applicant for social assistance would not be habitually resident where he not been present in the State or in any other part of the Common Travel Area for a continuous period of two years. This presumption was ‘softened’ in 2007 by a requirement that, notwithstanding this presumption, consideration was to be taken of all the circumstances. These were to include, in particular, the length and continuity of residence in the State or other country, the length and purpose of any absence from the State, the nature and pattern of the person’s employment, the person’s main centre of interest and the future intentions of the person concerned as they appear from all the circumstances. The conditions were further amended in 2009 to make it clear that a person who did not have a legal right to reside in the State could not be regarded as habitually resident there.

The general position for frontier workers is set out in guidelines and other documents issued by the Department of Social and Family Affairs.<sup>25</sup> 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 where 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

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

23 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.

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

25 See 2006 Guidelines for determining habitual residence for the purposes of Supplementary Welfare Allowance ([http://www.welfare.ie/foi/swa\\_habres.html](http://www.welfare.ie/foi/swa_habres.html)) and 2008 Guidelines for Deciding Officers on the determination of habitual residence (<http://www.welfare.ie/foi/habres.html>).

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 account of concerns expressed by the Social Welfare Appeals Office that the relevant EU provisions were not adequately covered.<sup>26</sup>

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 1612/68 in circumstances where the regime under Regulation 1408/71 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 1408/71, 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 1408/71 is able to claim the benefits of Article 7(2) of Regulation 1612/68 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 1612/68, 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

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<sup>26</sup> See Social Welfare Appeals Office, Annual Report 2007, <http://www.socialwelfareappeals.ie/pubs/report2007.html>.

(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 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.

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 has made it clear<sup>27</sup> 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.

There have been no material developments in this sector in 2009/2010.

### **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.

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<sup>27</sup> See Statement by Minister Martin to Dáil Eireann Re Irish Ferries, 20 November 2005, <http://www.en-temp.ie/press/2005/20051129a.htm>.

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.<sup>28</sup> 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.<sup>29</sup>

## 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 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 States, and in some cases are nationals of an EU Member State. As the 2007 Report made clear, the precise requirements seems 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 a 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 receive 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.

There are four student maintenance grant schemes funded by the Irish Government and administered by local authorities (for the University sector) and Vocational Education Com-

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<sup>28</sup> See <http://www.revenue.ie/en/tax/it/artists-exemption.html>.

<sup>29</sup> The recent autobiography of the former Taoiseach (Prime Minister) Mr. Ahern somewhat controversially benefits from the exemption.

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mittees (VECs).<sup>30</sup> 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.

Proposals to replace the four current schemes with a single unified grant scheme, with a new residence requirement that the student be resident in the State for three of the previous five years, are currently before the legislature. As a response to the current financial crisis, student grants and scholarships have been reduced by 5% from previous levels.

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30 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.

## 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 <sup>31</sup>
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 (Jan-Mar)	Bulgaria	22	0	22	5	1
	Romania	178	0	178	54	4

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). It is nevertheless striking at first glance that, particularly in respect of Romanians, there has been a higher percentage rate of refusals than that for non-nationals as a whole subject to the permit regime (which may seem strange given their privileged status).

The National Employment Rights Authority (NERA) was in 2009 given the task of enforcing the legislation on employment permits (the Employment Permits Act 2003 and 2006). It was reported in June 2009 that the Minister for Enterprise, Trade and Employment has ordered a crackdown on the (alleged) 5,000 Romanians and Bulgarians suspected of working illegally in Ireland.

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<sup>31</sup> Data on withdrawals is not available for 2007 and 2008.

## Chapter VIII

### Miscellaneous

#### 1. RELATIONSHIP BETWEEN REGULATION 1408/71 (LATTERLY, REGULATION 883/04) AND ART 45 TFEU /REGULATION 1612/68

In the 2007 Report, it was stated that it had not been possible to identify any concrete cases where the relationship between Regulation 1408/71 and the equality rules in Regulation 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 (see below). 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 1408/71 regime, which (with certain exceptions) are payable by the Member State of employment and social welfare payments which are caught by Regulation 1612/68, 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. However, the Department of Social and Family Affairs has published detailed Guidelines on EU Social Security Regulations,<sup>32</sup> a section of which addresses the scope of Regulation 1408/71 and the position of persons outside the scope of that Regulation. (This has recently been updated to reflect the new Regulation 883/04 regime, and it should be noted that this section has been dropped from the current published version.)

It is recognised that certain persons will fall outside the scope of Regulation 1612/68. 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 are made in relation to the regime under the Article 39 EC (new Article 45 TFEU)/Regulation 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 is pointed out that a worker as thus defined is not necessarily the same as a person within the scope of Regulation 1408/71.

Third, the worker must have employment in Ireland, which excludes job seekers. It is recognised that there are a number of Community law exceptions to the requirement to be employed.

Fourth, family members will receive benefits under Article 7(2) only where this involves 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 1408/71, the employed person must actually support the family members in question. Family members will not benefit from the derived right where the worker is an Irish national or a non-EEA national.

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<sup>32</sup> <http://www.welfare.ie/EN/Policy/EU/Euguide>.

Finally, the benefit must be a social advantage as defined by the Court of Justice.

## **2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS**

The relationship between the rules of Directive 2004/39 and 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 IV.1).

## **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***

Nothing to report.

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

The Immigration, Residence and Protection Bill, introduced in January 2008, was withdrawn in May 2010. It is intended to present a new Bill later in 2010. This makes it unlikely that legislation seen as necessary to modernise Ireland’s immigration and protection regime will be introduced until 2011 at the earliest.

A ‘saver’ provision in the Bill makes it clear that the provisions of the Bill – in particular those relating to entry, residence and expulsion – will not apply to persons covered by the EU free movement rules. This is likely to continue under the new Bill.

### ***3.3 Return of nationals to new EU Member States***

The Reception and Integration Agency, under the aegis of the Department of Justice, supports the repatriation on an ongoing basis for the Department of Social and Family Affairs of 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 scheme is not advertised publically, with returnees referred by State agencies, usually Community Welfare Officers. 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. Figures for the first two months of 2010 are rather higher than the corresponding period in 2009.

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. Since 2007, relatively large numbers of Romanians have returned: 150 in 2007 (27.8% of the total), 462 in 2008 (61%) and 395 in 2009 (59.5%). It has been suggested that some of these returnees return to Ireland again and benefit from the scheme more than once.

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

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 Euro-jus consultant lawyer under the auspices of the European Commission Representation in Ireland and to the work done by the Immigrant Council of Ireland,<sup>33</sup> which provides guidance and advice on free movement issues.

#### **5. SEMINARS, REPORTS AND ARTICLES**

Handoll, John 'Metock: family reunion and Union citizenship', *Law Society Gazette*, Jan-Feb. 2009, p. 61-64. An outline of the judgment of the European Court of Justice in the *Metock* case and some comments on the issues arising.

Quinn, Emma, *The Organisation of Asylum and Migration Policies in Ireland*, ESRI 2009. A reference document providing a 'map' of immigration and asylum-related policy in Ireland, with a focus on non-EU immigration.

Quinn, Emma, *Programmes and Strategies in Ireland Fostering Assisted Return to and Re-integration 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.

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33 [www.immigrantcouncil.ie](http://www.immigrantcouncil.ie).