

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

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October 2011

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Introduction

In 2010, there were important developments affecting the free movement of Community workers and their families. Among these we can highlight the following:

1. In the first place, an increase of judicial control of the administrative action of the Spanish authorities annulling the Decisions to expel Community citizens, especially those from eastern countries, through an interpretation of Royal Decree 240/2007 in the light of Directive 2004/38 through reference to Decisions of the EUCJ.
2. In the second place, an important Decision of the Spanish Supreme Court of June 1, 2010 meant the annulment of some subsections of several provisions of Royal Decree 240/2007 which positively affects the treatment of members of the families of Spanish citizens and the members of the families of Community citizens. In this Decision express mention is made of the Decision of the EUCJ of February 13, 1985 *Diatta Vs. Land Berlin* and of the Communication of the Commission of December 11, 2002 concerning the free movement of workers – the full implementation of advantages and possibilities, COM (2002) 694 final.
3. In the third place, following the agreements reached in the European Union, on April 9, 2010, the Spanish Council of Ministers approved a plan of action for the development of the gypsy population 2010-2012, which would benefit approximately 700,000 gypsies resident in Spain and which includes measures to combat employment discrimination.
4. In the fourth place, as regards access to and internal promotion to Spanish public employment, there are still some doubts regarding some requisites such as seniority and training, stipulated in the job offers and announcements of public employment and the fact that the Spanish legislation which regulates the post of Captain and First Officer in the Merchant Navy continues to refer to Spanish nationality.
5. Finally in some sports directly or indirectly quotas of national players continue to be required.

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

The Spanish legal framework is Royal Decree 240/2007, of February 16, on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other states parties to the agreement of the European Economic Area, in force, since April 2, 2007 (Hereinafter, Royal Decree 240/2007).

In 2010, the legal situation in relation with the transposition of provisions is the same as previous years. The novelty in 2010 are the judgements issued by Spanish Courts against Decisions of expulsion taken by Spanish authorities against EU workers analysed in point 3 of Chapter I.

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

Article 7(1a); Right of residence for more than three months

The Spanish legislator has not transposed the EU citizens' condition *to be workers or self-employed* established in article 7 (1.a) of Directive 2004/38 in any provision of Royal Decree 240/2007.

Thus, Spanish *Royal Decree 240/2007*, under the provision on Right of residence for more than three months explains that 'citizens of the EU or of the EEA have the right of residence in Spain for a period of longer than three months' without any mention of their condition as workers, self-employed or any other working condition

Moreover, Article 3, 2 *Royal Decree 240/2007* explains that all persons to whom the Royal Decree is applicable have the right to access any work activity and studies, in the same conditions as Spaniards.

Article 7 (3 a-d); Retention of the status of worker

Considering that the condition of worker or self-employed person (established in article 7. (1a) of Directive 2004/38) *has not been transposed* in Spain, neither does the Spanish legislator mention the retention of the status of worker of article 7 (3) of Directive 2004/38.

Article 8 (3a); Registration certificate (...)

Royal Decree 240/2007, in coherence with what we have just explained, does not mention any administrative formality in order to obtain the Registration Certificate except that citizens of the EU or the EEA are obliged to apply for the registration certificate¹ before the end of the three month period from the time of their arrival. Once the citizen has made the application and paid the relevant fee, s/he will be given a registration certificate displaying his/her name, nationality, address, date of registration and Alien Identity Number (NIE).

¹ Application for Registration Certificate or Residence permit as a Family Member (which can be downloaded from www.extranjeros.mtas.es, www.mtas.es or www.mir.es).

Article 14 (4 a-b), Retention of the right of residence

In Royal Decree 240/2007 there is no mention at all of any of the reasons stated in article 14.(4 a-b) as limiting circumstances regarding the adoption by Spanish authorities of an order of expulsion against EU citizens and their family members

Article 17, Cases in which the right of permanent residence in the host MS shall be enjoyed before completion of a continuous period of five years of residence

The cases involving the acquisition of the right to permanent residence before having complied with the five years of continuous residence stipulated in articles 17.1 and 2 of Directive 2004/28 were transposed in sections 2, 3 and 4 of article 10 of Royal Decree 240/2007. However, the Spanish legislator has omitted the transposition of the second part stipulated in article 17.1. a) which states that 'If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60'. Finally, Sections 3 and 4 of article 17 of Directive 2004/38 are transposed in Spain in sections 3 and 5 of article 10 of Royal Decree 240/2007.

Article. 24, 2 Equal treatment.

Article 24 (2) of Directive 2004/38 has not been transposed into Spanish legislation. Regarding equal treatment in general, article 3 (4) of Royal Decree 240/2007 establishes that

'All the Union citizens residing on the basis of this Royal Decree in Spain shall enjoy equal treatment with the Spanish people within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State, or other States parties to the agreement of the European Economic Area, and who have the right of residence or permanent residence'.

2. SITUATION OF JOBSEEKERS:

Royal Decree 240/2007 does not regulate the situation of jobseekers as a consequence of the lack of transposition of the working conditions stipulated in article 7.1 of Directive 2004/38. In practice, this lack of transposition implies that the jobseekers have the right to stay and look for work as Spaniards, with no specific limitations for them. Moreover, as stated above, *article 3, 2 of Royal Decree 240/2007* explains that all persons to whom the Royal Decree is applicable have the right to access any work activity or studies, in the same conditions as Spaniards.

- a) *Is it in line with case law – Do they have to register?* They have to register just like other EU or EEA citizens (this means before the end of the three month period after entry).
- b) *How long can they stay without formalities?* If the EU or EEA citizen spends less than three months in Spain, s/he only needs his/her passport, or a valid identity card which shows his/her nationality. Family members who are not members of an EU or EEA State need to enter with a valid passport and in many cases (Regulation EC 539/2001) with a visa or to show the family residence of a citizen of the EU issued by another Member State. After three months they need to apply for a residence permit. *Royal Decree 240/2007 is in accordance with the stipulations set out in article 6 and recital 9 but not with article 14.4 of Directive 2004/38 which, as we have mentioned above has not been transposed.*

3. OTHER ISSUES OF CONCERN.

The expulsion measures adopted by the Spanish authorities against nationals of the EU and their compatibility with EU Law have given rise to different case law which requires analysis under three distinct categories. In the first place, the expulsion Decisions confirmed by the Spanish judicial authorities and infringing EU Law. In the second place, the expulsion Decisions annulled by the Spanish Courts in accordance with EU Law or the case law of the EUCJ. Finally, the modifications made by the Decision of the Spanish Supreme Court of June 1, 2010 concerning the resolution or Decision to expel EU citizens and their families adopted by the Spanish Authorities in accordance with the stipulations in article 18.2 of Royal Decree 240/2007.

- 1) As regards the first group of Decisions, it is necessary to stress two Decisions issued by the Spanish Courts confirming the expulsion Decisions and the entry prohibition for two Community citizens which could be contrary to the principle of proportionality and infringe the stipulations in articles 28.1 and 32 of Directive 2004/38.

The first is the Decision 44/2010 of the National Court, of June 21, 2010, concerning a British citizen charged with an offence of drug trafficking and the Judge confirmed an expulsion measure and the prohibition to enter Spanish territory for 10 years. The problem of this Decision is due to the reasoning given by the Spanish Judge for his Decision as he did not assess the stipulations in article 28.1 of Directive 2004/38, adapted in article 15.1 of Royal Decree 240/2007, and he should have invoked the stipulations in article 33 of Directive 2004/38 and, especially, the entry prohibition for 10 years is disproportionate. Specifically, the Spanish Judge provided the following reasoning,

‘As regards the British citizen, the special point is that he is a Community citizen, and this could mean that the stipulation in the aforementioned article do not apply to him. nothing could be farther from reality, *Community citizens are foreigners and as such are also subject to residing legally or illegally in Spain*, although this fact in the administrative area does not have the same consequences as for extra-Community aliens as the reasons for administrative expulsion are much more restricted and exceptional, as results from article 15 of Royal Decree 240/2007, of February 16, on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and of other states parties to the European Economic Area. That is to say, *if a Community citizen resides illegally in Spain or is not registered as a resident, the stipulations of the Criminal code can be applied to him*, and the contrary entails an interpretation to his detriment; *it is not possible to leave Community citizens in a worse condition than extra-Community aliens even though these are delinquents*. Thus, it is also right to decree his expulsion on condition that the requisites established in the Criminal Code are complied with.’

The second Decision is that of the High Court of Justice of Madrid 1317/2010, of December 1, 2010, in which the Resolution of the Government Delegation of Madrid of August 13, 2008 which agreed to the expulsion and a five year entry prohibition for an Italian citizen as he was irregularly on Spanish territory which means a clear infringement of Directive 2004/38 as no reasons concerning order, safety or public health were alleged against him and the only reason for his expulsion were not having registered or having lost the registration certificate in the terms of article 7 of Royal Decree 240/2007.

- 2) In 2010 the Decisions of the Spanish Courts annulling the expulsion Decisions adopted by the Spanish Authorities multiplied as they were considered to be contrary to EU Law or to the case law of the EUCJ. The Decision of the *High Court of Justice of Galicia 127/2011 of February 9, annulled the expulsion resolution of July 3, 2009, of the Gov-*

ernment Sub-Delegate of Lugo agreeing to the expulsion of a Rumanian citizen and a seven year entry prohibition for not being in possession of the required documentation alleging sections 7 and 8 of article 15 of Royal Decree 240/2007 which states the stipulations in articles 5.5 and 15.2 of Directive 2004/38, citing the Decisions of the EUCJ in the cases of *Donatella Calfa, Bouchereau, Orfanopoulos and Oliveri*. This same Court In two Decisions 535/2010 of March 8 and 1981/2010 of December 7, respectively annul the expulsion resolution against two Rumanian citizens for not having documentation. Unlike the first, the Decision was not grounded on Royal Decree 240/2007 but the stipulations in the Accession Treaty of Rumania to the EU were applied directly.

Likewise, although in this case a Bulgarian citizen was involved, the *Decision of the High Court of Justice of Granada 1995/2010, of December 7*, annulling the expulsion resolution due to the citizen lacking a residence and work permit.

Another important Decision is the one issued by the *High Court of Justice of Madrid 277/2010 of March 19, annulling the Decision to refuse a Community residence permit for a Polish citizen as he had a criminal record*. The Spanish Court reasoned its Decision by having recourse to the analysis of article 27.2 of Directive 2004/38 as regards its rule for Spanish transposition, article 15 of Royal Decree 240/2007, and refers extensively to the case law of the EUCJ in relation to the concept of real and present threat. In this regard, stress should be given to the argument put forward by the Spanish Court when it points out,

‘... thus, European case law has clarified that, in any case, apart from the disturbance of social order constituted by any infringement of the Law, the concept of public order requires that there be a real and present threat which is sufficiently serious and affects a fundamental interest of society (in particular, see, the aforementioned Decisions on *Rutili*, section 28, and *Bouchereau*, section 35, as well as the Decision of April 29, 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, Rec. p. I-5257, section 66).

The existence of one or more criminal convictions can only be appreciated to the extent that the circumstances which gave rise to these show the existence of personal conduct which constitutes a present threat for public order (in particular, see the Decisions of October 27, 1977, *Bouchereau*, 30/77, Rec. p. 1999, section 28; of January 19, 1999, *Calfa*, C-348/96, Rec. p. I-11, section 24, and of June 7, 2007, *Commission/Netherlands*, C-50/06, Rec. p. I-0000, section 41).

From this perspective, although the appellant has several criminal convictions dating from 2002, and it is not known to when the criminal acts can be taken back and as there is no negative data available on his current conduct which indicate that he constitutes a threat, together with the restrictive and exceptional interpretation of the clause on public order, leads to upholding the appeal as the Decision is only based on the existence of a criminal record, which is not in consonance with Directive 2004/38 /EC.’

- 3) Finally, mention must be made of the important contribution of the Decision of the *Spanish High Court of June 1, 2010*. This Decision annulled the possibility of the Spanish Authorities immediately expelling Community citizens and their families even though there are reasons of urgency as included in section 2 of of article 18 of Royal Decree 240/2007. *It is now obligatory to offer a period of voluntary departure for the persons to whom Directive 2004/38 is applied.*

4. FREE MOVEMENT OF ROMA WORKERS

In Spain there have been no limitations to movements or public actions against the gypsy population. There is no specific or ad hoc legislation which otherwise regulates freedom of movement and/or work of the gypsy population from other Member States. In fact, the most outstanding initiative in Spain as concerns gypsy people is that, on April 9, 2010, the Spanish Government approved the Plan of Action for the development of the Gypsy population 2010-2012 which will benefit approximately 700,000 persons of the Gypsy ethnic group who reside in Spain and who represent 1.6 % of the total population. The presence of a Gypsy population which makes Spain the second country of the EU, after Rumania, with higher presence of Gypsy people. This Plan is a clear commitment of Spain with the initiatives adopted at European level.

The Plan is based on *five governing principles*: equality, citizenship, participation, social inclusion and institutional cooperation. The aspects which will be addressed in this plan are, among others, the following: education and employment, health care, housing and women. This report only specifies the activities of the plan addressed to improving access to employment and training.

In education and employment, the Plan of Action will affect the need to *normalise the university education* of this group and *combating adolescent academic failure*. As regards primary education, access to this has been normalised as *more than 90%* of Gypsy pupils attend class.

With regard to *employment and improved social measures*, the Plan promotes action to facilitate the access of the Gypsy population to employment, both as employed and self-employed workers. Approximately 50% of the Gypsy working population pay Social Security contributions as self-employed workers. The young people, women and persons with low qualifications have more difficulties to access employment. The following areas of action in employment should be highlighted:

- a) Boosting the training of the Gypsy population so that they can access, remain and gain promotion in jobs.
 - Developing specific programmes for the training of Gypsies at risk of social exclusion, who have special training needs or difficulties insertion or requalification.
 - Boosting training in new technologies (ICT) for the Gypsy population in order to address digital literacy as a transversal skill which facilitates improved employability and access to the job market.
- b) Establishing the lines of priority action so that the Gypsy population can access employment both as employed workers and as self-employed workers.
 - Informing the Gypsy population about the information, guidance and intermediation services of the Public Employment Services, about employment legislation, self-employed work and the social enterprises.
 - Supporting the regularisation and normalisation of the non-declared professional activities in which a high percentage of the gypsy population work, through informative or advisory activity.
 - Facilitating information to the Gypsy population regarding access to micro-credits and other forms of financing in order to set up as an employed or self-employed worker.
- c) Improving the information and obtaining of data on the employment situation of the Gypsy population, broken down by gender.

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Identifying the access of the Gypsy population to existing or emerging deposits of employment.

Measuring the impact and analysing the evolution of public and private action as regards insertion, improvement of qualifications and participation in training resources; by sectors and activities broken down by gender.

- d) Transversally incorporating the perspective of gender, the principle of equality of treatment and non-discrimination regarding the policies on access, permanence and promotion in employment of the Gypsy population.

Carrying out awareness actions in order to eliminate discrimination in the access, permanence and promotion of the Gypsy population in the job market.

Chapter II: Members of the family

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

Royal Decree 240/2007 extensively defines the concept of family of nationals of the EU and of the EEA. Thus, article 2 of Royal Decree 240/2007 includes the family members stipulated in article 2.2 of Directive 2004/38. As regards the family or assimilated members in article 3.2 a) and b) the Spanish legislator preferred to refer its regulation to the general regime on aliens through the Nineteenth Additional Provision of Royal Decree 2393/2004 establishing the obligation to facilitate their reunification.

In the case of family members of Spanish citizens, in the drafting of article 2.1 of Royal Decree 240/2007 they were initially excluded from the application of Royal Decree 240/2007, which entailed inverse discrimination. Efforts were made to palliate this by adding the Twentieth Additional Provision to the general regime on aliens stipulated in Royal Decree 2393/2004. However, this anomaly resulting from the drafting of article 2.1 of Royal Decree 240/2007 was the subject of an appeal for annulment resolved by the Spanish Supreme Court through its *Decision of June 1, 2010* with substantial effects on the extension of the family members of nationals of the EU/EEA and Spaniards to whom Royal Decree 240/2007 will be applied and the elimination of some references which restricted the use of certain rights by the family members.

In its Decision, the Supreme Court annulled the reference to family members of Community citizens ‘from another Member State’ on making an agreed interpretation based on the following:

‘... article 3 of Directive 2004/38/EEC includes its subjective area, the situation of ‘any citizen of the Union who is transferred to or resides in a Member State other than the State of his nationality, as well as the members of his family ‘ ; an expression which does not exclude the family of the Spaniard --- regardless of his nationality --- resident with him (possibly through family reunification) in another State of the European Union in the event of return from this other Member State to the State of his nationality, that is to say, Spain. Exclusion which, if produced with the expression of article 2, first section of the cited Royal Decree challenged as these family members of the Spanish citizen, who obviously do not have Spanish nationality, are submitted to a regime of different rights, as stipulated in the Twentieth Transitory Provision for the Regulations approved by Royal Decree 2393/2004, of December 30. In short, , the return of a Spanish citizen to his country of origin from another Member State of the European Union with his family, who are extra-European, cannot affect the European regime of the same family applied to the same family in the other Member State to the extent that this Community status which Directive 2004/38 / EC projects and regulates, cannot be limited or impaired by the internal regulation of one of the Member States.’

The Decision of the Spanish Supreme court also *eliminates from the drafting of article 2. a), c) and d) the reference to ‘legal separation’* as a reason not to apply Royal Decree 240/2007 to the family member of a national of the EU/EEA or to a Spaniard. The argument used by the Spanish Supreme Court is grounded on the fact that article 13 of Directive 2004/38 does not include legal separation among the stipulated cases but only ‘divorce, matrimonial annulment or the termination of the registered union’. Therefore, the Supreme Court, through the interpretation and direct application of article 13 of the Directive under the Decision of

the EUCJ of February 13, 1985 in the *Aussatou Diatta Vs Land Berlin* case, the Supreme Court eliminated from Royal Decree 240/2007 any reference to the concept of ‘legal separation’ insofar as, from the perspective of Spanish Law, this situation does not entail the dissolution of the matrimonial bond.

The same ‘*legal separation*’ expression is contained in article 9 of Royal Decree 240/2007, which deals with the ‘Personal maintenance of the right of residence of family members in the event of the decease, departure from Spain, annulment of the matrimonial bond, divorce, legal separation or cancellation of the registration as a registered couple, in relation with the holder of the right to residence’. Specifically, the reference to legal separation is contained in its section 1, in its section 4, and in its section 4. a). In the light of article 13 of the Directive and of the Case Law of the EUCJ cited, the Court eliminates these references. The *consequence* of this annulment is that the legal separation will not entail an impediment to the concession or renewal of a residence permit of a family member of a citizen of the Union; the legal separation will not affect the right to residence of the spouse holding a family residence permit of a Citizen of the Union in force.

As regards the common law couples registered in the Supreme Court the reference to ‘*the possibility of two simultaneous registrations in this State are prevented*’ is eliminated by article 2.b) of Royal Decree 240/2007. This internal Spanish legislation only considered as common law couples those registered in and ad hoc registry of a Member State when this State has a registration system of common law couples’ which prevents the possibility of two simultaneous registrations in this State’. That is to say, only those Member States which have a single system of registration. In order to justify this elimination, the Supreme Court again interprets Directive 2004/38 and concludes that,

‘This requirement goes beyond what is established in Directive (Article 2.2 .b), which, on defining the ‘family members’ only refers to the ‘the partner with whom the citizen of the Union has a registered union, in accordance with the legislation of a Member State’, with no more requirements. Or this requirement has to do with a requirement not included in the Community Directive, which entails a restriction as regards the subjective content of the same and, therefore, this must be annulled. There are several European internal systems with a multiplicity of registrations ---as occurs in Spain --- however, without the praiseworthy attempt which, undoubtedly, the regulations entail in order to prevent possible duplicity fraud, this may serve to support the restriction intended as the solution for other fraud must be regulated from other judicial perspectives’.

The consequence of this elimination is that Royal Decree 240/2007 will be applicable to registered common law couples with Community citizenship and these will be irrelevant if the Member State in which they are registered guarantees or not the impossibility of two simultaneous registration. This consequence is especially important in Spain, taking into account that the couples registered in Spain in the Registers of Stable Couples in the Autonomous Communities and Town Halls are excluded. An exclusion which is now eliminated.

Finally, the Decision of the Supreme Court eliminates the requirement stipulated in the Nineteenth Additional Provision which required that the citizen of the EU-EEA-Switzerland regardless of whether this is of second level, so that the stipulations on the facilitation for obtaining the residence visa or an authorisation of residence for exceptional circumstances jurisdiction are applicable to a family member. The Supreme Court states that ‘*the expression ‘relationship to the second level’ entails an interpretative restriction and a limited transposition of the concept, more extended, of ‘any other member of the family’ stipulated in article 3.2.a) of Directive 2004/38’.*

2. ENTRY AND RESIDENCE RIGHTS

The Decision of June 1, 2010 of the Supreme Court contributes to the use of the right of residence of the family members of the citizens of the EU/EEA-Switzerland in the event of their decease. Thus, the Supreme Court annuls the second paragraph of article 9.2 of Royal Decree 240/2007 as it is considered that its drafting entails

‘A restrictive interpretation of Directive 38/2004/EEC and a limited transposition of rights, which, in no way contain restrictions to the continuation of the right to residence, which are seen in the precept challenged, in the event of the decease of a citizen of the European Union. In fact, article 12.2 of the aforementioned Directive stipulates that ‘the death of a citizen of the Union will not entail the loss of the right of residence of the family members who do not have the nationality of a Member State and who have resided in a host Member State as members of his family for, at least, one year before the death of the citizen of the Union ... This referral to the general regime on aliens (article 96.5 of the Regulations approved by Royal Decree 2393/2003) and compliance with the requirements expressed for the obtaining of a new and independent residence authorisation, entails a restrictive extra-limitation of the function of the transposition of Community legislation which must be adapted to the direct effect of the content of Directive 38/2004/EEC.’

The effect of this annulment, in the event the decease of a citizen of the EU-EEA-Switzerland, *his family member may maintain the right to reside in Spain* under the Community Alien Regime (Royal Decree 240/2007) on condition that he has resided in Spain in his capacity as member of the family previous to the death and communicates this decease to the Spanish authorities.

3. IMPLICATIONS OF THE *METOCK* AND *CHEN* JUDGMENT

In 2010, two Decisions issued by Spanish Courts appealed to the doctrine of the EUCJ in the *Metock* and *Chen* case as regards the concession of the resident card as a Community family member.

The Decision of the *High Court of Justice of Castilla y León*, 66/2010 of January 29, annulled the resolution whereby the residence permit of a Community family member was rejected as it was considered that the Spanish Authorities cannot deny this based on the fact that applicant, married to a Spaniard, did not have a visa and entered Spain illegally. The Court recognises the right to a residence permit of the Community family member taking into account the *Decisions of the EUCJ of July 25, 2002 (the Case of the Movement against Racism, Anti-Semitic and xenophobia ASBL (MIRAX) against Belgium)*, and, especially, taking into account the stipulations in its *Decision of July 25, 2008 (Blaise Baheten Metok Case and others against the Ministry of Justice, Equality and Law Reform)*, which establishes that

‘given the need not to interpret the provisions of Directive 2004/38 restrictively and to deprive these of their useful effects, it must be interpreted that the terms ‘the members of the family of a citizen of the Union who accompanies him’, recorded in article 3, section 1, of the aforementioned Directive, also refer to the family members of a citizen of the Union who entered together with the citizen in the Host Member State, with no necessity, as regards the second case, to distinguish whether the nationals of a third party have entered in this Member State before or after they became family members. It is extremely important that ‘article 3, section 1 of Directive 2004/38 included in number 99 of this Deci-

sion which stipulates that ‘article. 3, section 1, of Directive 2004/38 must be interpreted in the sense that the national of a third country, the spouse of a citizen of the Union who resides in a Member State and does not have the nationality of this State, which accompanies the citizen of the Union or which meets the requirements may adapt to the provisions of this Directive, regardless of the place or time of their marriage, or the circumstances in which this national of a third country entered a host Member State.’

In the *Decision of the Contentious –Administrative Court, 29/2010 of January 29*, the Spanish Court recognises the right to the issue of a residence permit as the family member of a citizen of the EU, despite the existence of a criminal record, for the progenitor of a Spanish minor. The Court states that, if the progenitor was not permitted to reside with the minor, the minor would be deprived of his right to the use of his right to reside in Spain. In order to reach this conclusion, The Courts based the case on the *Decision of the EUCJ of October 19, 2004, Case C-200/2002 Zu and Chen* and in the *Decision of the EUCJ of June 18, 1987, case 316785 Lebon*.

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

The *Instruction of January 31, 2006*, of the Department of Registries and Notary offices, on marriages of convenience establishes that, in order to prevent marriages of convenience, Instruction 9 of January 9, 1995 on proceedings previous to marriage when one of the spouses is resident abroad (Official State Gazette No. 21 of January 25, 1995). The holding of a civil marriage, or in the forms of the evangelical churches (Law 24/1992, of November 10), in the Jewish form (Law 25/1992) and in the Islamic form (Law 26/1992) – in this last case as a requisite not for authorisation but for registration – requires that, when one of the spouses is Spanish and consent will be given before a Spanish authority, previous proceedings must take place in order to accredit the nuptial capacity of this spouse and his/her true intention to contract matrimony. The purpose of these proceedings is to verify that all the legal requisites for the validity of the marriage are complied with, including the existence of true matrimonial consent.

Therefore, the aforementioned Instruction of this Department, of January 9, 1995, must be used as a means of ‘preventive, previous control’ not only of ‘matrimonial capacity’, but also of the ‘matrimonial consent’ of the spouses. This power of previous control is recognised for the Member States of the EU by the Resolution of the Council of December 4, 1997 on the measures which must be adopted as regards combating fraudulent marriages (DOCE C 382 of December 16, 1997), which expressly makes the exception that ‘this Resolution does not impair the power of the Member States to check whether a marriage is fraudulent before the marriage is held’.

When the marriage is held abroad, it can be registered in the Spanish civil Registry through two alternative registration mechanisms. Either through a *foreign certificate* which states that the marriage was held, which is the general rule on condition that the person in charge of the Spanish Civil Registry does not have any doubts about the ‘reality of the event’ nor of its ‘legality in accordance with Spanish Law’, or, failing this, through registration proceedings in order to accredit the legality of the marriage and the certainty that it was held (cf. articles 73 Law on the Civil Registries and 257 Regulations of the Civil Registries and the Resolution of February 11, 2003).

In the light of these two instructions, the *Provincial court of Seville, 127/2010 of April 22* declared that the marriage contracted on November 7, 2007 between Mr Mariano, a Nigerian citizen, and Ms Rosaura, a British citizen, was not valid as *'it was deduced that there was a lack of previous personal relations of the spouses and the fact that they did not effectively live together subsequent to the holding of the marriage*. Thus, it is shown that there is a true concealed willingness of the spouses (with a discordance between what is real and what is manifested), which leads this Court to the full conviction that there is a lack of matrimonial consent which determines its nullity; that is to say, that the marriage referred to is null due to simulation and was held in abuse of Law with the only intention to achieve benefits which the institution of matrimony generated for Mr Mariano so that he might obtain the residence permit of a Community family member'.

5. ACCESS TO WORK

The beneficiaries of access to work for the family members of citizens of the EU UE-EEA-Switzerland in conditions of equality has increased. Article 3.2 of Royal Decree 240/2007 excluded the right to access any activity, as an employed or self-employed worker, in the same conditions as Spaniards, for the 'descendants over twenty-one years of age who live at their expense, and the forebears living at their expense included in article 2. d) of the Royal Decree'. The Supreme Court eliminated this restriction for these family members as it considered that:

'Undoubtedly, this is another evident restriction; we cannot find any restriction in the employment area in article 2.2.d) of the Directive, nor in article 23 and similar articles ... in relation to these family members defined as the Directive is clear and unconditioned, in its expressions and in their meanings, undoubtedly, constituting a subjective extension in relation to the previous legislation which it modifies and repeals (Directives 90/364, 90/365, 93/96, and Regulation 1612/68). In addition, this right cannot be considered to be a right conditioned by or dependent on the situation, or the evolution of the economic situation of its holder. This is a restrictive and limiting transposition of the right to free movement of Community citizens (article 18 of the Treaty of the European Union), such as the right to free movement of workers (article 39.1 of the same Treaty)'.

The result of this elimination is that the residence permits of family members of citizens of the Union issued to them will not state any reference regarding a limitation of their right to work as employed or self-employed persons.

6. THE SITUATION OF FAMILY MEMBERS OF JOBSEEKERS.

In Spain, as we have analysed, the situation of jobseekers is not expressly regulated.

Chapter III: Access to employment

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

1.1. Equal treatment in access to employment

In theory there is an apparent absence of direct or indirect discrimination in Spanish legislation and practice. The private work placement agencies have the same obligations as regards EU or EEA citizens and their families as does the National Employment Institute as the public authority by virtue of the Resolution of July 11, 1996.

1.2 Language requirement.

No questions.

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

2.1 Nationality condition for access to position in the public sector.

Royal Decree 406/2010, of March 31 (Official State Gazette of April 1), whereby the public offer of employment in the State Administration for 2010 was approved with 345 posts distributed in free access posts and those with internal promotion and those for professional staff and those for auxiliary staff. The announcement does not refer to the requisite of nationality to access these posts.

This Royal Decree was implemented by Order PRE/1740/2010, of June 21, whereby selective processes for joining or accessing Corps and Ranks of the State Administration, and its implementation is entrusted to the Permanent Selection Commission (Official State Gazette 30.6.2010). Despite the fact that there is no reference to nationality, the limitations included in Royal Decree 543/2001 must be taken into account. As we mention in previous reports the Royal Decree 543/2001 of 18 May listed the State public service post not open to EU citizens: Diplomatic corps, Arm forces, Judiciary, State economists, State tax authorities, prison civil servants, etc...Furthermore, different Decrees of the Autonomous Communities (i.e, Madrid)² added to their own list the post of firemen or forestall agents and they set up their post.

In relation to access to the Armed Forces, *Royal decree 35/2010, of January 15*, was approved, whereby the Regulations for joining, promotion and the organisation of training in the Armed Forces was approved, article 15.1 requires Spanish nationality but it again permits that nationals from Spanish American countries can access in the terms stipulated in its section 2 when it establishes that,

² Decree 230/2001, of October 11, whereby access to the Civil Service of the Administration of the Autonomous Community of Madrid by nationals of the other Member states of the European Union is regulated (Official Gazette of the Community of Madrid. 23-10-2001).

‘those who do not have Spanish nationality but are the nationals of countries from Annex 1 determined in the announcement can participate in the selection processes in order to train to become a professional in the Armed Forces as troops and sailors, or non-commissioned officers and second lieutenants in the Military Health Corps in the speciality of Medicine. In these cases, the quota of posts will be established in the annual provision. Apart from what is stated in the previous section, they must also accredit the following requirements: a) Be a temporary or long-term resident in Spain. b) Be of legal age in accordance with the stipulations in the national law of the applicant. c) Have no criminal record in previous countries of residence due to offences which exist in Spanish legislation. d) Not being considered rejectable in the territorial areas of countries with which Spain has signed treaties in this regard....’.

2.2 Language requirements.

No questions.

2.3 Recognition of Professional experience for access to the public sector.

In relation to the recognition of certificates in order to access the civil service, The Spanish Authorities approved *Order PRE/2061/2009, of July 23*, whereby *Order APU/3416/2007, of November 14* was modified, which established the common bases which will govern the selective processes for joining or accessing corps or ranks of the State Administration. The objective of this Order was to comply with the Decision of the EUCJ of October 23, 2008, condemning Spain for failing to comply with article 3 of Directive 89/49, adapting the Order of 2007 insofar as it is a rule which all the announcements of posts in the State civil service refer.

Specifically, *Order PRE/2061/2009* gives a new drafting in section nine 5 of *Order PRE/3416/2007* which establishes the following,

‘5. Certification: Holding the certification which is required in the specific bases of each announcement. The candidates with certificates obtained abroad must accredit that they hold the corresponding validations or the the credentials which accredit their possible approval. *This requisite will not apply to the candidates who had obtained the recognition of their professional qualifications, in the area of regulated professions, under the Provisions of Community Law*’. This clause appears in all the public State orders or resolutions announcing posts in the State Administration.

3. OTHER ASPECTS OF ACCESSING EMPLOYMENT.

The analysis of several orders and resolutions announcing access to certain civil service posts take into account seniority in similar posts in the Spanish Administration or training courses taken which are related to the post announced. These evaluation criteria, other than nationality, may entail a disadvantage for citizens of the EU-EEA-Switzerland. Among many others, the following can be cited as examples of announcements in the State Administration: *ORDER FOM/1384/2010, of May 19*, whereby a selective process for was announced to join the Corps of Aeronautical Engineers through free access and through the system of internal promotion. *ORDER FOM/1385/2010, of May 19*, whereby a selective process for was announced to join the Corps of Technical Aeronautical Engineers through

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free access and through the system of internal promotion. *ORDER ARM/1638/2010, of June 9*, whereby a selective process for was announced to join the Corps of State Meteorology Observers through free access and through the system of internal promotion. *All of these give different scoring to the criteria of seniority and training courses which, in practice, entails a disadvantage for non-nationals.*

Chapter IV: Equality of treatment on the basis of nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

In *Annex I of Order PRE/1740/2010, of June 21*, whereby selective processes are announced in order to join or access the Corps and Ranks of the State Administration, and this is entrusted to the Permanent Selection Commission (Official State Gazette 30.6.2010), and the internal promotion posts for professional civil servants and permanent auxiliary staff are stipulated. In the evaluation criteria reference is made to the fact that seniority of two years in the State Administration is taken into account together with training criteria when the training is directly related to the functions of the Corps the person wishes to join and which has been announced, taught or approved by the National Institute of Public Administration, by other Public Administration Institutes or by Trade Union Organisations or other promoter agents within the framework of the IV Agreement on Continuing Training in the Public Administrations. These criteria may entail a disadvantage for citizens of the EU-EEA-Switzerland who entered the Spanish Administration in 2009 as professional civil servants or permanent auxiliary staff.

2. SOCIAL AND TAX ADVANTAGES.

In 2010, *Law 2/2010, of March 1* (Official State Gazette, 2.3.2010) was approved, through the transposition of certain Directives in the area of indirect imposition and the *Law on Non-Resident Income Tax* is modified in order to adapt this to community legislation. In relation to Non-Resident Income Tax, modifications were added in the Revised Text approved by Royal Decree approved by Legislative Royal Decree 5/2004, of March 5, concerning articles 14, 24 and 31 of the same, which are intended to favour the free movement of workers, the provision of services and the movement of capital in accordance with Community Law. The aforementioned modifications declare that dividends and participations in profit obtained with no mediation of permanent establishment for pension funds equivalent to those regulated in the Revised Text of the Law on Pension Plans and funds approved by Legislative Royal Decree 1/2002, of November 29, are exempt, with residence in another Member State of the European Union or due to permanent establishments of these institutions located in another Member State of the European Union. Furthermore, special rules are established for the determination of the tax base corresponding to income obtained with no mediation of the permanent establishment of taxpayers resident in another Member State of the European Union.

Article 25. 1. a) of the Law on Non-Resident income Tax (IRNR) includes a single tax rate of 24% for income obtained by non-residents in Spain. This single rate may, in practice, entail that the non-residents who obtain income similar to a Spanish resident are taxed with a higher percentage. In relation to this Law, the tax Department issued two binding consultations referring the solution to the bilateral Agreements of Spain and Portugal of October 26, 1993 and with France of June 27, 1973 modified by the Agreement signed on October 10, 1995.

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Article 62.6 of the Law on Income Tax (IRPF) came into force on January 1, 2010 and established a tax rate of 19% on income from savings. This provision is the result of Spain complying with the Decision of the EUCJ of October 6, 2009.

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

No questions.

2.1 Specific issue: The situation of jobseekers.

No questions.

Chapter V: Other obstacles to free movement of workers

No questions.

Chapter VI: Specific Issues

1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES)

As regards the *Law on Income Tax for Non-Residents*, the Tax Department issued two binding consultations referring to the solution to the bilateral Agreements in order to prevent dual taxation of Spain and Portugal of October 26, 1993 and with France of June 27, 1973 modified by the Agreement signed on October 10, 1995.

The first consultation is *No. V1619-09 on Income Tax (IRPF) and Non-Resident Income Tax (IRNR)* of a Portuguese citizen not resident in Spain who, in application of article 15.4 of the Agreement, must pay Non-Resident Income Tax (IRNR) as his tax address is considered to be in Portugal. The second is consultation *No. V0950-09 on the Income Tax (IRPF) or Non-Resident Income Tax (IRNR)* of a French citizen not resident in Spain who, on obtaining income from work financed by Spanish public funds, must pay Income Tax (IRPF) in Spain due to the stipulations in article 17 of the Hispano-French Agreement.

As regards the application of the Agreement made by Spain and France in order to prevent dual taxation, The through REGIONAL DECREE 90/1996, of December 10, the Regional Government of Guipúzcoa created a Register of Trans-frontier Workers, in the Department of Inland Revenue and Finance. Article 2 of the Regional Decree determines that natural persons must register and it establishes that they be considered to be trans-frontier workers as a condition for Agreement to be applied to them. To achieve this, they must meet the following requirements: a) that their normal residence is in Spain. b) That they obtain wages, salaries or other remuneration deriving from employed work in the Historical Territory of Gipuzkoa, except for the following: - Expenses for attending meetings and other similar remuneration of the members of Boards of Directors or the Shareholders' Meeting of companies acting as resident companies. - Remuneration received by civil servants and employees of the territorial Public Administrations or by public law legal persons. - Pensions paid for services provided to the Public Administrations or to public law legal persons unless this is received by a natural person who does not have Spanish nationality. c) That they normally return every day to their normal place of residence.

In 2011, The Autonomous community of Navarra also created its *Register of trans-workers through the SPECIAL REGIONAL ORDER 59/2011, of April 29*, of the Regional Minister of Economy and Inland Revenue, whereby the procedure is regulated and form 047 for the application for the recognition of the condition of trans-frontier workers (*Official Gazette of Navarra no. 92, of 13.5.11*). Only the trans-frontier workers registered in this registry can invoke the Agreement to prevent dual condition between Spain and France.

2. SPORTSMEN/SPORTSWOMEN

Basketball:

Article 20.2 of the General and Competition Regulations approved by the General Assembly of the Spanish Basketball Federation of May 29, 2010 establishes that

‘2.- For a player to be able to subscribe to an application for a licence, he must meet the following requirements: a) Be Spanish or have the nationality of any of the Member States of the European Union

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or of the European Economic Area. In addition, non-Community alien players who have applied for legal residence in Spain can also apply for a licence. However, limitations can be applied to the regulations of each competition depending on the regulation of the job market and the protection of the Spanish national sports teams. b) Not to have a commitment in force with any other Club’.

The reference to the fact that limitations can be established in each competition in order to protect the job market and the national sports teams is very generic and could give rise to discretionary or arbitrary limitations by the Spanish Basketball Federation.

Article 28.1 a) and b) of the General Regulations regulates the obligations concerning the non-Community players. However, its drafting expressly refers to the fact that a transfer will be required in international transfers of Community players together with the FIBA levy.

Furthermore, in the *Competition Bases of the Adecco League Gold/Silver and the Women’s League for the 2011/2012 Season*: point 4.3.1 regarding the configuration of the teams stipulates that,

‘1. The teams must maintain a minimum of eight and a maximum of eleven players registered and contracted during the full season, respecting the following configuration: *an obligatory minimum of 6 home grown players*. A non-obligatory maximum of 2 non-Community alien players. 2. A ‘home grown player’ is considered to be a player who in his first year in the junior category and his first year in the senior category (inclusive) regardless of his nationality and age, he has been registered with any club affiliated to the Spanish Basketball Federation in a continual period which is no less than 3 seasons. In order to calculate the seasons, at least 6 months permanence in each one of these must be calculated’.

The definition of home grown player and the reservation of 66 places for these entails a clear quota preferably in favour of national or long-term resident alien players (whether these are Community or not).

Handball:

Point 1.6 in the regulations regarding licences of the Royal Spanish Handball Federation for the 2010/2011 season establishes that ‘at least three must be national players who can be selected for Spanish national teams’.

Volleyball:

Point 9.4 of the regulations of the Royal Spanish Volleyball Federation for the 2011/2012 season stipulates that ‘in the League of the Spanish Volleyball Federation First Division and second Division *it will not be possible to process more than five licences of players whose Federation of origin is not the Royal Spanish Volleyball Federation*. In each match a maximum of five players whose Federation of origin is not the Royal Spanish Volleyball Federation can form part of the line up’. This rule means that there is a clear limitation when requiring a quota of five players who had not been previously registered in the Royal Spanish Volleyball Federation.

3. THE MARITIME SECTOR

See the 2009 report.

4. RESEARCHERS/ARTISTS

No questions.

5. ACCESS TO STUDY GRANTS.

See Spanish Report on Study grants 2010.

6. YOUNG WORKERS.

See Spanish Thematic Report 2009.

Chapter VII: Application of transitional measures

Non applicable in the case of Spain.

Chapter VIII: Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ARTICLE 45 TFEU AND REGULATION 1612/68

EU citizens have claimed pensioners health care under the same conditions as Spanish nationals.

In Spain, *Spanish pensioners get prescription drugs for free*, but pensioners from other EU countries must submit an *additional document* and issued by health authorities in their country of origin, certifying that they are beneficiaries of a pension.

The EC considers that this measure violates European norms and constitutes ‘discrimination’ to pensioners who choose Spain as your holiday destination, and notes that the requirement to submit an additional document is contrary to the principles of the EHIC card, designed to streamline medical care in the twenty-seven member countries.

However, Spanish authorities have reiterated that Spanish citizens to obtain free medicines have specific *card attesting to its status as a pensioner*, because only who can prove this special condition can go to this benefit. So, EU citizens have to prove that pension terms to access these benefits.

The Spanish Labour Ministry says it has repeatedly called on the authorities of the European Union that the European health insurance card showing status of pensioner

National organizations or non-judicial bodies

In relation with last point we mention EURES Spanish services: Annual Papers on ‘Monitoring, Evaluation and Reporting’ contain a specific chapter that identifies obstacles to the free movement of jobseekers EU citizens in Social Security, Taxes, Qualifications, labor regulation, cultural and linguistic difficulties.

Finally, one of the obstacles to the free movement of workers is undeclared employment: International Labor Organization (ILO) in a report summarizing the weaknesses detected in the Labor Inspection services in Spain. One of the most striking is that, according to the agency, the system would be more effective if it should be opened in parallel criminal and administrative proceedings.

Another criticism noted by the ILO has to do with organizational matters. ‘There is not always good information coordination between the Labor Inspection and the competent authorities in resolving the various sanctions’. Also, ‘the collection of penalties is done by different government dispersed and collection entities.’

The report also warns that the slowness of the ‘increased costs’ and causes ‘expiration’ of them. So when the notice of violation is usually improperly exceed the maximum period of six months between notification and resolution. In that case, the process terminates automatically.

Spain is a country with a ‘growing trend’ toward the free movement of workers within the European environment. However, ‘the principle of territoriality in criminal law enforcement is not enough to prevent employers shirk their responsibilities when they violate the law.’ Or in other words, ‘cases of impunity for some companies in Spain’ hinder ‘the correct

implementation of the *acquis communautaire*.’ Labor Inspection service has set up cooperative programs with other countries, but ‘this collaboration has shortcomings with regard to cross-border enforcement of sanctions.’

5. SEMINARS, REPORTS AND ARTICLES.

- Rojas Castro, Manuel, Prorrateo comunitario de las pensiones del SOVI: El Tribunal Supremo complementa su anterior doctrina equivocada con el límite de las cotizaciones equivalentes cubiertas en otro Estado miembro hasta el 31.12.1966, que necesita ser corregida con el límite básico de 1.800 días. En, *Aranzadi Social* num. 19/2010. BIB 2010\150.
- Monereo Pérez, José Luis, La Coordinación Comunitaria de los Sistemas de Asistencia Sanitaria, *Aranzadi Social* num. 5/2010 num. 6/2010. BIB 2010\1110
- Villaverde Gómez, Begoña & Duardo Sánchez Aliuska, Trabajadores fronterizos y transfronterizos: tratamiento fiscal de sus rentas desde una perspectiva comunitaria. *Quincena Fiscal Aranzadi* num. 1/2011 - 2/2011. BIB 2011\57
- Sempere Navarro & Antonio V., De Bosman a Oliver Bernard (otra vez deporte y libre circulación). *Actualidad Jurídica Aranzadi* num. 799/2010. BIB 2010\1149
- Jurado Segovia, Ángel, Prestaciones familiares de la seguridad social. Evolución normativa y puntos críticos de la protección no contributiva, *Revista General del Derecho del Trabajo y de la Seguridad Social*, No. 24, marzo 2011.