

REPORT
on the Free Movement of Workers
in the United Kingdom in 2009-2010

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Chapter I

Entry, Residence, Departure and Remedies

Texts in Force

- Immigration Act 1971, Immigration Act 1988
- Immigration and Asylum Act 1999
- Immigration (European Economic Area) Regulations 2000
- Anti-Terrorism, Crime and Security Act 2001
- Immigration (Swiss Free movement of Persons) (No. 3) Regulations 2002
- Nationality, Immigration and Asylum Act 2002
- Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003
- Accession (Immigration and Worker Registration) Regulations 2004
- Immigration (European Economic Area) and Accession (Amendment) Regulations 2004
- Immigration (European Economic Area) (Amendment) Regulations 2006 (the 2006 Regulations)
- Accession (Immigration and Worker Authorisation) Regulations 2006
- UK Borders Act 2007
- Immigration (European Economic Area) (Amendment) Regulations 2009
- European Casework Instructions (ECIs) at: <http://www.ukba.homeoffice.gov.uk/site-content/documents/policyandlaw/ecis/>

Admission and Exclusion

In 2009, there have been few changes to admission and exclusion practices. The UK remains outside the Schengen free travel area. As noted in the 2009 report, additional powers were given to the authorities to expel and detain EU nationals in the Regulations 2009, which came into force on 1 June 2009.

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

As regards the instructions, the Border Force Operations Manual which provides instructions to Immigration Officers on dealing with passengers at borders is currently being updated and has not yet been published. The current version European Casework Instructions provide no information on the admission of EEA nationals. It is unclear whether this means that there are further instructions which are being used but are not published. Should this be the case, then there could be questions of compatibility with the ECJ's decision in C-345/06 *Heinrich* (by analogy) where the European Court of Justice held that unpublished rules could not be invoked to justify interferences with the free movement of persons.

In October 2009 the Asylum and Immigration Tribunal, held that the well publicised exclusion of the Dutch politician Geert Wilders was unlawful.¹ Mr. Wilders had been refused admission to the UK at Heathrow airport on 12 February 2009 under regulation 19 of the

1 GW (EEA reg 21: 'fundamental interests') Netherlands [2009] UKAIT 00050.

Immigration (European Economic Area) Regulations 2006 on the basis that his exclusion was justified on grounds of public policy and/or public security, in accordance with regulation 21. Mr Wilders is a Dutch MP and leader of the right wing Freedom Party. He is a vocal critic of the Islamic religion and the intention of his visit was to show his controversial film 'Fitna' in a House of Lords Committee room and subsequently at a press conference room at the invitation of Lord Pearson of Rannoch and Baroness Cox, with both showings to be followed by a question and answer session, the latter of which was to be open to members of the public. The exclusion was authorised by the then Secretary of State. The reasons for refusal given were a pending prosecution by the Amsterdam Appeal Court for incitement to hatred and discrimination, and the threat his presence in the UK could pose to public safety and public order (in particular that it could foster hate and lead to inter-community violence within the UK). In their judgment allowing Mr Wilders' appeal, the AIT held that what are the 'fundamental interests' of a society within the meaning of Regulation 21, a threat to which may justify the exclusion of an EEA national, is a question to be determined by reference to the legal rules governing the society in question, and that it is unlikely that conduct that is subject to no prohibition can be regarded as threatening those interests. As the showing of the film and was not subject to any prohibition in the UK, his exclusion could not be justified. The AIT also criticized the Secretary of State's reasons for refusal: the pending prosecution was irrelevant as Mr Wilders was not at the time of decision or appeal convicted by any Court, and in relation to the threat to public order, the Secretary of State had failed to show any of the feared incidents had occurred in the Netherlands as a result of his activities there.

The Regulations 2009, now provide wider powers to detain EU nationals – Reg 24 provides that "if there are reasonable grounds for suspecting that a person is someone who may be removed from the UK that person may be detained under the authority of an immigration officer". This purports to permit Immigration Officers to take detention decisions against EU nationals without a court decision, on the basis of their own suspicion.

Residence

Work Seekers: Article 7(1)(a)

The 2006 Regulations, Regulation 13 implements the right to reside for three months subject to the public policy, security or health provisos and the "unreasonable burden on the social assistance system" test. Beyond the three months, Regulation 14 defines those exercising free movement rights as "qualified" person" including job seekers, workers, the self employed, the self-sufficient and students. The definition of workers and self employed is not dealt with in the Regulations and some very brief guidance is contained in the ECI's Chapter 1 while both self-sufficient persons and students are carefully defined. In practice, work seekers are not subject to specific immigration related obstacles regarding their residence so long as they do not have third country national family members (though see below regarding the Pilot scheme which may change this position in due course). However, their access to social benefits is limited. The main benefit for job seekers is Job Seekers Allowance which is contribution based. For those not eligible, for instance because they have not contributed, the key benefit is income support. But this is only available to persons who fulfill both the habitual residence and the right to reside tests (see chapter 4). However, for working age per-

sons, these benefits are designed to integrate the individual back into the labour market. Thus under the European Court of Justice's doctrine in C-22/08 and 23/08 *Vatsouras* these are benefits which cannot, because of their link to labour market participation be categorized as falling within the remit of Article 14(1) of Directive 2004/38. At the moment, however, this does not appear to be the case. For those who no longer work or exercise self employed activities for the reasons set out in Article 7(3)(a) to (d) of Directive 2004/38 there is a serious problem with the transposition of (c) (Directive 2004/38) as Reg 6(2)(b)(i) of the Regulations 2006 states that a person who is no longer working shall not cease to be treated as a worker if "(c) he was employed for one year or more before becoming unemployed". This is not consistent with the Directive which requires that subject to certain conditions, worker status shall be retained after termination of a fixed term contract of less than one year's duration, or following involuntary unemployment within the first year.

There is no limit on how long an EU national can stay without completing formalities. There is no obvious transposition of recital 9 of the Directive. Access to housing is particularly problematic for work seekers. Schedule 3, Paragraph 5 of the Nationality, Immigration and Asylum Act 2002 provides for an exclusion for EU nationals from receiving housing assistance under s 17 of the Children Act 1989, though there is an exception under Paragraph 3(b) if this exclusion would lead to a breach of the person's rights under the Community Treaties. In a 2005 judgment the High Court held that "The fact that a person is an EU national does not automatically apply [the exclusion]. The exception in 3(b) should always be noted. For a work seeker, as opposed to a worker, in housing and Children Act cases it is likely that there will be no material right which has to be taken into account which overrides the exclusion on paragraph 5. But for a worker, and specifically for a worker who for whatever reason loses his job and thus needs to fall back on some sort of benefit, the situation is different. Indeed, Article 7(2) of 1612/68 explicitly refers to that possible situation."² The main issue is that dealt with above regarding access to benefits which have a work related element. As regards the right of third country national family members to remain after the death or departure of the EU national principal where the children are enrolled in school, the UK authorities interpret this provision as requiring residence but not labour market access (Reg 10). See also on this point in chapter 6.

Articles 8(3) and Article 10: Processing of EEA registration certificates and cards – the problem of unlawful delay

The issuing of residence certificates to EEA nationals is governed by Part 3 of the Immigration (European Economic Area) Regulations 2006. Regulation 16 provides that the UK authorities *must* issue a registration certificate *immediately* on application. Regulation 17 confirms that a residence card should be issued to eligible family members or extended family members of EEA nationals *no later* than six months after the date an application and supporting documents are submitted. Regulation 18 confirms that documents certifying permanent residence should be issued "as soon as possible". The report submitted last year confirmed the serious problems of delay in processing times caused by the UKBA's transfer of EEA case working from the UKBA office in Croydon to its Liverpool offices in 2008, with

² *R(Conde) v Lambeth LBC* [2005] EWHC 62 (Admin) [2005] HLR 29.

the redeployment of significant numbers of experienced caseworkers away from EEA case-work.

In June 2009 the UKBA sought to remedy this situation by bringing in new procedures for all EEA applications. They specified that the use of their standard forms was mandatory for all applicants and required the submission of all original documents at the outset – rather than sending in certified copies and then following up with originals when the application was actually being dealt with, to facilitate travel in the interim. Following lobbying from immigration lawyers and others that the former position was in direct contravention to the Directive (given in particular that many of the questions asked and documents requested in the standard forms go beyond the requirements of the Directive) the latter remains in force and there is now a ‘pre-sift’ procedure where applications are returned if incomplete. The UKBA have stated that one of the main reasons for the long previous delays were the large numbers of incomplete applications they had received. In a letter to the Immigration Law Practitioners Association of 3 December 2009 Eddy Montgomery, a Director of Operations at the UK Border Agency, stated that “we are now clearing new complete EEA1 applications³ within a matter of working days and are committed to clearing all new complete EEA 2, 3 and 4⁴ applications within the 6 month requirement set out in the Directive.”⁵ He went on to say that they were addressing the backlog by writing to all affected applicants and requesting missing information in order to complete those cases.

Practitioners are finding that the pre-sift procedures are often being carried out by people with little understanding of EU free movement law and applications which do contain sufficient original evidence are regularly being returned as incomplete with little explanation given. The backlog clearance exercise has led to a large number of refusals which are not on the face consistent with the Directive. In the experience of one firm, in several instances with long pending applications individuals were contacted by the UK authorities and requested to submit original documents within six weeks. This was despite the fact that the individuals tried to contact the EEA team either to ask for an extension of this time (eg where a long holiday had been booked) or a guarantee of the return of the EU national’s original passport within two weeks for urgent business travel. Instead the applications were refused with wording stating that the applicant is liable to removal from the UK and should leave. This appears to be directly in contravention of the Directive: in all cases the applicants have clear rights to reside under the Directive, they have just been subject to serious shortcomings in the administrative procedures of the UKBA.

In addition, it would appear, at least anecdotally, that the changes are having only a partial effect in speeding up processing times, and some residence card and Permanent Residence applications are still outstanding beyond six months which were sent subsequent to June 2009. Many cases sent in prior to that date are still pending. It is difficult to quantify this, however, and the UKBA no longer publish average waiting times figures as in previous years. In these circumstances we understand that a number of judicial review applications have been made to the High Court in March and April 2010 in relation to unlawful delay on long pending residence card applications, but at the time of writing no decision has been made on this issue that we are aware of. We also understand that in a number of instances, the UKBA have expedited applications following the threat of judicial review.

3 The relevant form for EEA nationals other than EU 8 and EU 2 nationals.

4 The relevant forms for third country national family members and EU 8 and EU2 nationals.

5 There was no indication of how many cases were in the backlog.

Another side effect of the new procedures has been the ending of the previous arrangements whereby EEA caseworkers at the UKBA could return original passports to applicants within a few days where urgent travel was required while an application was pending. There is now a procedure whereby applicants who do require to travel urgently can telephone the UKBA and request the return of passports. In non-routine cases the UKBA say that they “will try to return your documents to you within 10 working days of you making us aware of your travel plans”. Again, the experience of this in practice has been mixed.

The practical effect of the ongoing delays is dealt with below in the chapter on family members as regards difficulties for family members obtaining work, but these and the new obstacles as regards return of passports have created a situation whereby EEA nationals and their family members who require to travel regularly for their work are and have been choosing in increasing numbers to utilise domestic law immigration routes to be able to live and work in the UK rather than rely on their free movement rights under the Directive. In one particularly noteworthy example the writer of this chapter recently interviewed a dual national of Italy and a non-EEA state who had opted to obtain Tier 2 sponsorship⁶ on his non-EEA passport so that his non-EEA wife could obtain a visa as his dependant and thereby have no difficulties confirming a right to work to a UK employer.

Unlike applications under national law, these applications do not require payment of a fee.

Transfer of residence card or stamp

Problems arise on the expiry of passports. The UKBA states “If you are issued with a new passport and want your residence card or family member residence stamp transferred you will need to make a new application. You should complete the appropriate application form and provide the required supporting documents.” What this means is that a new application will result in the same delays mentioned above.

The UK authorities’ delay appears incompatible with the Member States’ obligations and it a source of great friction between citizens of the Union and the UK authorities.

Permanent residence: Articles 17, 18 and 24

The UK Border Agency’s interpretation of the provisions of Article 16(1) and 17 of the Directive in respect of EU8 and EU2 nationals continues to be restrictive, despite the Commission’s provision of its opinion. The case of *GN (EEA Regulations: Five Years Residence Hungary)* [2007] UKAIT 00073 (referred in previous reports) has not been challenged. UKBA requires evidence that every month over the full five year period the individual was exercising a treaty right – for instance monthly wage slips for the full five year period, evidence of continuing residence in the UK etc. As noted in last year’s report, when a solicitor suggested that the authorities have such information through their national insurance records, the UKBA stated that it was the obligation of the applicant for permanent residence to prove that he or she fulfils the requirements. Please see Chapter 6 for further detail on this. The most adversely affected individuals are those with third country national family members. As regards Article 24 – the right to equal treatment, UK universities accord study *loans* on evi-

6 A national law work related immigration status.

dence of three years residence as established in the *Bidar* decision of the ECJ. While EU nationals still can encounter administrative ignorance at universities, as soon as the position is made clear the administrations obey the law.

Departure

The UK Borders Act 2007 provides, at sections 32 and 33, for the automatic expulsion (deportation) of anyone who is: not a British citizen, convicted of an offence and sentenced to a period of imprisonment of at least 12 months or of an offence which has been designated under the Nationality, Immigration and Asylum Act 2002 (serious criminal). There is one excluded category – certain Irish and Commonwealth citizens; and a number of exceptions including where removal would breach the UK’s EU obligations. On 8 April 2009 the UK authorities issued a press release stating “Also today, the Government is delivering on its promise to be tougher on European criminals and remove those that cause harm to our communities. From today the deportation referral threshold for European criminals will be cut from 24 months imprisonment to 12 months for drugs, violent and sexual offences. This means these offenders will be automatically considered for deportation. Mr Woolas said: ‘We are determined to remove people that harm our communities – wherever they are from. That is why we are making it easier to kick out European criminals and stop them from returning. In 2007 we removed over 500 European nationals. By reducing the threshold for deportation, we will ensure that we can remove even more.’ Tough new powers to remove Europeans who are not exercising their Treaty Rights – by working, studying or by being self-sufficient – were also introduced today. This will mean that anyone from Europe who is not playing by the rules will not be allowed to stay.”

In June 2009⁷ the Court of Appeal clarified the position as to whether any period spent by an EU national in prison in the UK could count towards the ten year continuous residence period after which, under regulation 21(4)(a) of the 2006 Regulations and Article 28(3)(a) of the Directive any decision to deport can only be made "imperative grounds of public security". The Court held that it did not. In his leading judgment Stanley Burnton LJ noted that while time spent in prison was not expressly excluded from residence in the Article 28(3) of the Directive, Recital 24 of the Preamble to the Directive (which is implemented in Article 28(3)) provides that “the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be”. As such a purposive reading of the Directive in his view meant that time spent in prison should not be included as it is not time spent integrating in the host Member State. Further, the converse position would allow a situation where an EU citizen committed a serious crime in a host Member State, for which he was then convicted to a long term in prison, which time he would accrue towards the higher standard of protection against deportation. In his judgment Sedley LJ agreed with the majority, particularly given the facts of the case where the individual had never worked and was a persistent and serious offender. However, his support is not wholehearted and he notes that there will be no doubt loose ends that will require judicial tying up in due course, such as time spent in prison following wrongful conviction that is subsequently overturned on appeal.

7 *HR (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 371; [2009] WLR(D) 144.

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Finally, shortly prior to the time of writing, it has come to the notice of practitioners that the UK Border Agency have commenced a pilot project, in conjunction with local police forces, to commence removal proceedings against EU nationals who have been in the UK for more than the three months initial residence provided for in the Directive and who are not self-sufficient and not working/job seeking or self-employed. This has likely been implemented following pressure on homeless services of local authorities and other relevant agencies caused by the increased numbers of homeless EU nationals in the UK, particularly from EU2 and EU8 states. No further details are available as yet.

The implementation of Article 14(4)(a) and (b) of the Directive is slightly less problematic as expulsion is less a problem than refusal of access to social benefits.

Remedies

Decisions taken by the UK Border Agency or Entry Clearance Officers in relation to the rights of admission and residence of EEA nationals and their EEA or third country national family members under EU free movement law attract a full right of appeal under the 2006 Regulations. Appellants already in the UK cannot be removed while an appeal is pending.

Since February 2010 all immigration appeals are now heard by the First and Upper Tier Tribunals (Immigration and Asylum Chambers) which form part of the Tribunals Service, an executive agency of the Ministry of Justice. These replace the previous one tier Asylum and Immigration Tribunal. The Upper Tier Tribunal is now a superior court of record.

Chapter II

Members of the Worker's Family

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

Family members

The implementation of *Metock* has, as set out before in the last report, been clearly and fully implemented in the guidance.

However, the Immigration (EEA) Regulations 2006 remain un-amended and do not take account of *Metock*. This remains a failure to comply with the good faith obligation and the result is that the law still indicates that national Immigration Rules apply to family reunification of EEA nationals exercising Treaty rights in the United Kingdom.

The higher courts have had few problems interpreting *Metock* in relation to Article 2(2) family members and have embraced it fully. They have overturned findings by the Tribunal that the meaning of 'dependency' adopted in *Jia* represented a shift away from the purely factual definition in *Lebon* towards something more closely resembling the dependency of necessity required under domestic law (*SM (India) v ECO (Mumbai)* [2009] EWCA Civ 1426). Article 2(2) family members do not need to have been dependent in the country of origin or the country from where they came. While other family members applying under Article 3(2) may be required to produce evidence from that country under Article 8(5)(e), this requirement does not apply to Article 2(2) family members (*Pedro v Secretary of State for Work and Pensions* [2009] EWCA Civ 1538). While the higher courts have therefore been fairly robust in their interpretations, the fact that these arguments have been aired suggests that the government remains keen to define the outer limits of the free movement rights of third country family members and more restrictive views have sometimes been applied within the Tribunal until corrected at a higher level.

Extended family members

In its guidance to caseworkers, the United Kingdom government has maintained its position that the right of admission under Article 3(2) is discretionary. The UK courts have found that other family members, applying under Article 3(2), are covered by the finding in *Metock* and prior lawful residence within the EEA is not a requirement. The dependency or cohabitation in the same household must have taken place in the country from which they came and in the sufficiently recent past so that refusal of a family permit would inhibit the exercise of Treaty rights by the EU citizen (*KG (Sri Lanka)* [2008] EWCA Civ 664; *Bigia* [2009] EWCA Civ 79).

In relation to durable relationships, the UK Border Agency applies the criteria applicable under the domestic rules including a requirement for two years prior cohabitation. The guidance to officials does not admit the possibility of a durable relationship being evidenced in

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other ways, for example through a joint house purchase, as suggested by the Commission's guidance. The requirements for establishing a durable relationship have not been substantively considered within the United Kingdom courts.

The Immigration (EEA) Regulations 2006 specifically exclude from the meaning of spouse/civil partner anybody who has entered into a marriage of convenience or civil partnership of convenience. There has been an increased emphasis in tackling this method of abuse by the UK Border Agency and guidance to immigration officers and entry clearance posts makes it clear that abuse should be considered in all applications. We are not aware that there has been an increase in house raids although there have been some requests for interviews of married couples.

It is apparent that the government is keen to assert its ability under Article 35 of 2004/38/EC to regulate suspected sham marriages involving EEA nationals. In *ZH (Afghanistan) v SSHD* [2009] EWCA Civ 1060, lawyers acting for the government argued that an 'abuse of rights' under Article 35 goes beyond marriages of convenience entered for the 'sole purpose' of enjoying rights of free movement and residence and that the burden of showing that there has not been an abuse of rights is on the applicant. In the event, the Court of Appeal did not decide these issues as further factual findings were needed and the case was returned to the Tribunal. However, it is probable that the issues will be litigated again on another occasion.

The position in relation to people entering into marriage or civil partnership who are subject to immigration control remains the same as in the last report. These people, including third country nationals wishing to marry EEA nationals, have to obtain written permission from the Secretary of State in the form of a certificate of approval from the UK Border Agency and give notice at a designated register office. The scheme governing the certificate of approval scheme has been the subject of extensive litigation in the UK courts. The House of Lords found that aspects of the scheme's implementation breached Article 12 ECHR while the legislation governing the scheme was discriminatory as it exempted marriages in the Church of England (*R (on the application of Baiji) v SSHD* [2008] UKHL 53). The current position is that the scheme remains in place but certificates of approval are not refused on the basis of immigration status and, while the procedure is cumbersome and obliges irregular third country nationals to bring themselves to the notice of the authorities, it appears that EEA nationals have been able to marry their third country national partners and then obtain their residence card from within the United Kingdom. The government has, so far, failed to remove the exemption for Church of England marriages, which may disproportionately affect non-UK EEA nationals. It has announced its intention to repeal the entire scheme and replace it with new measures although there is no information as to what these may be and, as the election has now been called, such action is unlikely to be the first priority for a new government.

In terms of retained rights applications, the position in relation to *Baumbast* remains that the UK Border Agency is taking a strict line on interpreting these cases. However, the current guidance complies with the recent ECJ judgment in *London Borough of Harrow v Ibrahim* Case- 310/08. Where applicants argue that rights are retained after the EEA national has ceased to be a qualified person after leaving the UK, the Tribunal has found that it is for the applicant to show that this has happened (*MJ and others (Art.12 reg 1612/68 – self-sufficiency)* [2008] UKAIT 00034).

In relation to retained rights after divorce, the UK Border Agency is insisting that for the one year period that the couple have been in the United Kingdom, that they show that they

have cohabited. The UK Border Agency is also extremely strict on requiring the applicant to show that the EEA national was exercising Treaty rights at the date of divorce which is proving extremely difficult. The UK Border Agency is not willing to use their powers to check national insurance or tax records to aid the applicant.

Fiancés and proposed civil partners of EEA nationals, although not granted a right in the Citizens' Directive, are able to apply to entry clearance posts under the Immigration Rules and are granted the same rights as United Kingdom nationals or people with permanent residence in the United Kingdom.

Reverse Discrimination

The family members of United Kingdom nationals who have worked in another EEA state and then return to the United Kingdom are covered by Regulation 9 of the Immigration (European Economic Area) Regulations 2006. The United Kingdom national, according to the Regulations, needs to have been a worker or a self-employed person in another EEA state before returning to the United Kingdom. Nothing further is set out, so for example, it is not clear what the position for somebody who had been self-sufficient or a student would be. In practice, if the United Kingdom national has been a worker or a self-employed person, entry clearance posts are willing to grant third country national members family permits.

The current regulations and guidance do not make provision for family members of UK nationals where a *Carpenter*-type situation arises.

The courts have found that UK citizens who also have the nationality of another EEA country but have always lived in the UK are not exercising Treaty rights for the purposes of admitting non-EEA family members as they derive the right to reside from nationality law and not from EU law (*McCarthy v SSHD* [2008] EWCA Civ 641).

2. ENTRY AND RESIDENCE RIGHTS

Family Permit

Family permits are given priority over other applications and since the issuing of the guidance after *Metock*, most cases have been prioritised and dealt with swiftly. Entry clearance posts also clearly seem to understand that no fee is chargeable. Swiss nationals do not have any issues having the same rules applied to them as other EEA nationals.

Family permits are granted for six months giving the applicants this window of space to travel to the United Kingdom. One issue which has been problematic here is that given the delay in issuing residence cards, third country national family members frequently have obtained further six month family permits at embassies outside the United Kingdom.

One improvement appears to be the fact that entry clearance posts which are not those of the country of origin of the family member are accepting these applications.

Residence Cards

Although towards the end of 2009, there was an improvement in turnaround times from the date of application to issuing of these cards, the delay is now regularly six months or more. There is no culture within the UK Border Agency of needing to deal with these applications in line with similar applications for British nationals and in fact, the UK Border Agency sees the six months as a deadline.

The UK Border Agency has also introduced a 'pre-sift' system. This means that as soon as the application arrives at the UK Border Agency, the enclosures are checked to see what has been included. This has led at times to applications being returned even though documents have been enclosed but, obviously, have been overlooked. The application is not logged at the UK Border Agency but returned to the applicant and would need to be resubmitted. Once the application has passed this pre-sift, certificates of application are generally sent out quickly.

Third country nationals are often being asked for evidence by the UK Border Agency which they should not have to provide. An example of this is evidence of cohabitation since a marriage or civil partnership or a request to provide civil partnership ceremony photographs. In addition, as applications remain outstanding for a very long time, the UK Border Agency is routinely writing to ask for updated information about, for example, the EEA national working.

One improvement over the last year has been the system for retrieving passports. Some EEA nationals are now getting their passports returned more swiftly while the application is maintained in the queue. However, other sources indicate that there are still substantial problems

The courts have found that time spent in prison does not contribute towards the five years residence required for permanent residence (*Bulale v SSHD* [2009] EWCA Civ 806; *HR (Portugal) v SSHD* [2009] EWCA 371). The finding affects both EEA nationals and their family members in terms of their vulnerability to deportation but will have additional significance for non-EEA national family members whose position is generally more precarious pending permanent residence.

Entry under MRAX

Generally, immigration officers are becoming more aware of the right for an applicant to enter under the provisions of MRAX and routinely do allow entry for non-visa nationals in this fashion. Generally though, the UK Border Agency discourages this. So for example, cases where a residence card application is outstanding and the passports are requested back to enable travel, the accompanying letter states:

"Family members of an EEA national, who are not themselves EEA nationals, wishing to return to the United Kingdom should apply for an EEA Family Permit at a British Diplomatic Post abroad before returning to this country. An EEA Family Permit is issued free of charge and on a priority basis.

It should be noted that any such application would need to be supported by evidence to show that the EEA national is in the United Kingdom, is exercising Treaty rights and that the relationship is as claimed".

This is of course highly problematic given that the UK Border Agency still has the documents which would be required. It also, quite frankly, is not feasible for many to make family permit applications while on holiday or a short business trip.

3. ACCESS TO WORK

The problem arising for third country national family members in terms of their access to the labour market, remain very much as set out before. Although the certificate of application letters for spouses and civil partners state that the person can work, many employers are reluctant to accept them. In particular, if a residence card has not been granted within six months, employers are unwilling to continue their employment relationship with third country nationals. This is particularly problematic in light of legislation in the United Kingdom under which employers have to be able to show that their employees have the right to work at any given time or face significant fines and there are cases where third country nationals have not been able to obtain work or have been sacked.

The UK Border Agency has a helpline which allows employers to ring in to see the status of any given application which is outstanding. However, in our experience, the quality of the advice given, particularly in relation to European applications, has at times been poor and inaccurate.

In relation to applications for third country nationals in durable relationships, the UK Border Agency is now sending out letters of application which remain silent on the right to work. Therefore until a decision is taken by the UK Border Agency in these applications, a third country national would in practice find it nearly impossible to work.

In terms of EU8 Europeans, there are no specific problems that we are aware of in terms of access to the labour market.

4. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

Regulation 13 of the 2006 Regulations provides for an initial right of residence up to three months and Regulation 14 for the period after three months. It states that an EEA national is entitled to reside so long as he or she remains a qualified person. The definition of that term includes a job-seeker. Family members of qualified persons are entitled to remain. This is clearly set out in the Domestic Regulations.

The picture in relation to family members of job-seekers is not absolutely clear. If applying for a residence card, the UK Border Agency does require documentation to show that somebody is indeed looking for a job. If the job-seeker were recognised, a family member should not expect to have particular problems proving their right to remain in the United Kingdom. Given the delays, the UK Border Agency in these types of situations is likely to request updated information about whether the applicant has started work or proof of the applicant continuing to seek a job.

This issue has become of some importance in relation to EU8 nationals. The UK Border Agency is currently approaching some EU8 nationals who are not in work and requesting that they leave the country within one month if they are not able to prove Treaty rights. This will presumably also affect their family members.

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EU8 family members will also be affected by the findings of the House of Lords in *Zalewska v Department of Social Development* [2008] UKHL 67, that the requirement to reregister under the Workers' Registration Scheme if employment changes during the first year is proportionate and may result in refusal of 'worker' status and of social benefits.

Chapter III

Access to employment: a) Private sector and b) Public sector

1. ACCESS TO EMPLOYMENT

Text(s) in force

- Race Relations Act (RRA) 1976 as amended by The Race Relations Act 1976 (Amendment) Regulations 2003
- SI 2007/617 The European Communities (Employment in the Civil Service) Order 2007

Draft legislation, circulars, etc.

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

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

a.1. Equal treatment in access to employment

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

However, they focus primarily on entry and residence requirements, not equal treatment. The immigration and border agency's website gives detail as to how to apply to work in the UK: <http://www.bia.homeoffice.gov.uk/eucitizens/workerregistrationscheme/>. It lays down the detailed rules which apply to nationals of the accession states.

<http://www.directgov.gov.uk/en/Employment/Jobseekers/index.htm> is a government website listing all jobs in, say childcare, for particular regions. There is no limit on the website as to nationality. For those on benefits, Jobcentre plus provides a personal adviser to help an individual look for work: <http://www.direct.gov.uk/en/Employment/Jobseekers/programmesandservices/index.htm>.

JobCentre Plus is covered by the Department of Work and Pensions (<http://www.dwp.gov.uk/>). Jobcentre Plus is part of a network of *public* employment services that belong to the European Employment Services (EURES) (<http://ec.europa.eu/eures/home.jsp?lang=en>). Under the Race Relations Act 1976, JobCentre Plus cannot discriminate on the grounds of nationality of the applicant (see further below), although some of the benefits that it can advise on are subject to residence criteria. Under s.14 of the Race Relations Act (RRA) 1976 employment agencies cannot discriminate on racial grounds which includes nationality.⁸

Equally, employers are not allowed to discriminate on the grounds of nationality either in respect of the arrangements they make for the purposes of determining who should be of-

⁸ On nationality, see *BBC Scotland v Souster* [2001] IRLR 150.

ferred that employment⁹ or the terms on which that employment is granted¹⁰ or by refusing or deliberately omitting to offer employment. Section 1 RRA prohibits both direct and indirect discrimination on racial grounds which are defined in s. 3 as to include ‘colour, race, nationality or ethnic or national origins’. The reference to colour and nationality, which was found in the original 1976 Act, shows that the British legislation is broader in scope than the EU’s Race Directive 2000/43. The 1976 Act has, however, been amended by *The Race Relations Act 1976 (Amendment) Regulations 2003* to implement those aspects of the EC Directive not already covered by the 1976 Act. In particular, the Regulations introduced a new definition of indirect discrimination and the prohibition of harassment. However, these changes apply only to those areas falling within the scope of the Directive (ie race, ethnic or national origins but not colour or nationality). The Race Relations Act applies to all those employed at an establishment in Great Britain (s.8). It is not subject to a nationality or residence requirement. The Race Relations Act is due to be repealed and replaced by the Equality Act 2010 most of which is due to come into force in October 2010.

In practice in some sectors, migrant workers enjoy preferential treatment in terms of access to certain (low quality jobs). This is not always to their benefit. An Equality and Human Rights Commission inquiry uncovered widespread evidence of the mistreatment and exploitation of migrant and agency workers in the meat and poultry processing sector.¹¹ Workers reported physical and verbal abuse and a lack of proper health and safety protection, with the treatment of pregnant workers a particular concern. Many workers had little knowledge of their rights and feared raising concerns would lead to dismissal. While migrant workers were most affected, British agency workers also faced similar mistreatment. The inquiry uncovered frequent breaches of the law and licensing standards in meat processing factories – some of which supply the UK’s biggest supermarkets – and the agencies that supply workers to them. It also highlighted conditions which flout minimum ethical trading standards and basic human rights. One third of the permanent workforce and over two thirds of agency workers in the industry are migrant workers. At one in six meat processing sites involved in the study, every single agency worker used in the past twelve months was a migrant worker. This is in part due to difficulties in recruiting British workers to what is physically demanding, low paid work. It may also be due to perceptions amongst employers and agencies that British workers are either unable or unwilling to work in the sector.

a.2. Language requirements

There are no formal rules on language requirements although most employers insist that English is spoken to a particular level. However, in the sectors referred to above, there is some evidence that employers are favouring non-native speakers. There have been newspaper stories that *British workers have been refused jobs at a factory supplying Asda, one of the largest supermarket chains, because they did not speak Polish.*¹² According to these re-

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

10 *Anyia v University of Oxford* [2001] IRLR 377.

11 <http://www.equalityhumanrights.com/media-centre/2010/march/inquiry-uncovered-mistreatment-and-exploitation-of-migrant-and-agency-workers/>.

12 <http://www.personneltoday.com/articles/2010/03/15/54832/polish-speakers-only-job-ad-sparks-chrc-investigation.html>.

ports the cooked meat manufacturer Forza AW would only hire British workers for its production line in East Anglia if they spoke Polish fluently.¹³ The company said the Polish language requirement outlined in a job advert was necessary because the health and safety training was conducted in Polish. Forza explained that there had been a mistake by the agency it used.

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

b.1. Nationality condition for access to positions in the public sector

EU law requires equal access to employment for EEA nationals, subject to the Article 45(4) TFEU exemption for the 'public service', a concept which has been given a restrictive interpretation by the Court of Justice. Generally, EEA nationals can be employed in all jobs in the public sector¹⁴ except for reserved posts.¹⁵ These are defined in the Order in the following terms:¹⁶

- (6) In subsection (1)(c) “a reserved post” means—
 - (a) a post in the security and intelligence services; or
 - (b) a post falling within subsection (7) or (8) which the responsible Minister considers needs to be held otherwise than by a relevant European.
- (7) The posts falling within this subsection are—
 - (a) a post in Her Majesty’s Diplomatic Service and posts in the Foreign and Commonwealth Office; and
 - (b) posts in the Defence Intelligence Staff.
- (8) The posts falling within this subsection are posts whose functions are concerned with—
 - (a) access to intelligence information received directly or indirectly from the security and intelligence services;

13 <http://www.dailymail.co.uk/news/article-1257784/Biggest-Asda-meat-supplier-excludes-English-speakers-instructions-given-Polish.html>.

14 2.—(1) Amend the Aliens’ Employment Act 1955 as follows.

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

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

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

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

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

(c) a person who is entitled to take up any activity as an employed person in the United Kingdom by virtue of Article 6(1) or 7 (rights of certain Turkish nationals and their family members to take up any economic activity, whatever their nationality) of Decision 1/80 of 19 September 1980 of the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963.

15 SI 2007/617 The European Communities (Employment in the Civil Service) Order 2007. See also section 75 of the Race Relations Act 1976 which extends the Act's coverage to Crown employment. However, section 75(5) provides that "nothing in this Act shall ... invalidate any rules ... restricting employment in the service of the Crown ... to persons of particular birth, nationality, descent or residence."

16 The Order makes equivalent amendments for Northern Ireland.

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- (b) access to other information which, if disclosed without authority or otherwise misused, might damage the interests of national security;
 - (c) access to other information which, if disclosed without authority or otherwise misused, might be prejudicial to the interests of the United Kingdom or the safety of its citizens; or
 - (d) border control or decisions about immigration.
- (9) In this section “the security and intelligence services” means—
- (a) the Security Service;
 - (b) the Secret Intelligence Service; and
 - (c) the Government Communications Headquarters.”.

More detailed guidance about ‘reserved posts’ is contained in the *Civil Service Nationality Rules*, published by the Cabinet Office, most recently in November 2007.¹⁷ Section 3 of this guidance lists ‘Reserved Posts’ in the civil service in which ‘[o]nly UK nationals may be employed’. Reserved posts are ‘generally those which, due to the sensitive nature of the work, require special allegiance to the Crown such that they can only be held by a UK national’.¹⁸ It continues ‘3.2 *Under no circumstances may any other nationals be employed in reserved posts.*’¹⁹ The guidance then spells out the posts covered:

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

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

3. In relation to posts within the Diplomatic Service and the Foreign and Commonwealth Office, it has been determined that special allegiance to the Crown is required in respect of these posts such that it is necessary to reserve these posts to UK nationals. Therefore only UK nationals are eligible for employment in posts in the Diplomatic Service and the Foreign and Commonwealth Office²⁰ unless the responsible Minister decides otherwise in relation to a specified post or posts.

¹⁷ <http://www.civilservice.gov.uk/jobs/Background/Nationality-Requirements/Nationality-Requirements.aspx>

¹⁸ Para. 3.1.

¹⁹ Emphasis in original.

²⁰ Except for those local staff in FCO posts abroad. These posts are open to persons regardless of their nationality.

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

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

The government anticipates that about 5 per cent of the posts in the Civil Service (27,000) will be reserved.²¹

b.2. Language requirements

See a.2 above.

b.3. Recognition of professional experience for access to the public sector

There are too many jobs in the public service to be able to spell out the professional experience required for each. However, given the strong ethos of equal treatment, migrants are not put at a particular disadvantage. This ethos is spelled out in the Civil Service Commissioners' Recruitment Principles.²²

Merit – means the appointment of the best available person: no one should be appointed to a job unless they are competent to do it and the job must be offered to the person who would do it best.

Fair – means there is no bias in the assessment of candidates. Selection processes must be objective, impartial and applied consistently.

Open – means that job opportunities must be advertised publicly and potential candidates given reasonable access to information about the job and its requirements, and about the selection process.

b.3 Other aspects of access to employment

There is no *concours* system in the UK although there a civil service exam.²³ For regulated professions, the relevant professional requirements will be required (eg being a solicitor or barrister).²⁴

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

22 <https://www.civilservicecommissioners.org/web-resources/resources/bb402f5120e.pdf>

23 <http://www.civilservice.gov.uk/jobs/Entry/index.aspx>.

24 <http://www.gls.gov.uk/>.

WORKING CONDITIONS IN THE PUBLIC SECTOR

It is difficult to generalize about working conditions in the public sector because each department sets its own pay scales and other benefits.²⁵ However, the ethos of equality means that EEA nationals are not put at a disadvantage. Furthermore, the principle of territoriality (discussed above) means that migrants will enjoy equal treatment with nationals in respect of matters such as trade union rights etc.

25 <http://www.civilservice.gov.uk/jobs/Background/Rewards-Benefits/reward-benefit.aspx>.

Chapter IV

Equality of treatment on the basis of nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Direct discrimination in working conditions regarding EEA nationals is fairly rare in UK legislation. However, section 54 and Schedule 3 Nationality Immigration and Asylum Act 2002 discriminates directly against EU nationals. The provision allows access to three kinds of benefit:

- Residential accommodation for adults who by reason of age, illness, disability or any other circumstances are in need of care and attention;
- Services for children and their families and children leaving care as adults;
- Accommodation provided for the promotion of well-being under the Local Government Act 2000.

Access to these benefits is expressly prohibited to EEA nationals (other than British citizens) and their dependents. However, these benefits may be extended to EEA nationals if the performance is necessary for the purpose of avoiding a breach of a person's rights under EU law. The difficulty here is that the individual must show that he or she has EU rights (and the UK Border Agency takes the view that unless the individual comes within one of the specified categories in Articles 6 and 7 of Directive 2004/38 they are not exercising Treaty rights) and then the individual must show that it is *necessary* in order to avoid a breach of the rights to exercise a power favourably for the individual. Thus UK local authorities may require the individual not only to be a worker but to show why the provision of residential accommodation is necessary to avoid a breach of EU rights.

Indirect discrimination against EU national workers has been the subject of some concern. The UK's Trade Union Congress has expressed concern regarding the treatment of EU8 workers and continued its campaign to ensure that these workers are aware of their rights under UK labour law. At its annual conference in 2009, the TUC passed a resolution calling for a revision of the posted workers directive (96/71) better to protect workers. The resolution further calls for the UK authorities to exercise the possibility under the directive to extend coverage of sectoral or national collective agreements. This resolution was in part linked to the dispute at the Lindsey Oil Refinery in 2008 regarding posted workers (see 2008 Report).²⁶

2. SOCIAL AND TAX ADVANTAGES

As regards housing in response to the difficulties which EEA nationals (in particular EU8 and EU2 nationals) have been encountering, a UK professional organisation, the Chartered Institute for Housing (constituted as a charity in English law) has established a website providing detailed information on access to all types of housing for EEA nationals generally,

²⁶ <http://www.eurofound.europa.eu/eiro/2009/10/articles/uk0910029i.htm>.

EU8 and EU2 nationals specifically (<http://www.housing-rights.info/index.html>). However, see above regarding the direct discrimination problems which exist as regards housing.

A particular problem which is emerging in 2010 is in respect of ‘rough sleepers’. A number of non-governmental organisations have reported that among homeless persons who are without shelter there is a proportion of EU8 and EU2 nationals. UK Border Agency has indicated that it is cracking down on these persons with the sanction of expulsion (see chapter 1 for further details).

As regards tax advantages, regulation 3(5) Tax Credits (Residence) Regulations provides that Child Tax Credits and Working Tax Credits, which are social benefits administered under the tax system, are only available to EEA nationals who have a right to reside. This means that unless the EEA national has permanent residence or otherwise satisfies the right to reside test (see chapter VIII) they will not be eligible. The UK authorities accept that both types of credit are social advantages within the meaning of Article 7(2) Regulation 1612/68.

The UK authorities have changed the basis of the tax regime to one where there is greater equality on the surface regarding tax payers. The change in the exemption from UK taxation of some income based on the principle of domicile has come into force. It is not yet clear whether this will have specific impacts on EEA national workers in the UK.²⁷

Somewhat more problematic is the taxation of rental property following the ECJ’s decision in *Renneberg*. It seems that for UK taxpayers with rental property outside the UK losses can be claimed against future profits from the same property irrespective of where the majority of the taxpayer’s income arises. For individuals based in other Member States who rent out property in the UK basic rate tax should be deducted from the rent either by the letting agent or the tenant.

The UK entered into a number of tax treaties with other EEA states in 2009/10. On 24 June a protocol with Belgium was signed. It updates the exchange of information provisions in line with OECD standards and provides for binding arbitration in the event of protracted disputes between the two tax authorities. It also provides for zero withholding tax to direct investors and pension funds. On 2 July 2009, the UK and Luxembourg signed a protocol on exchange of information in the field of tax. On 7 September 2009 a protocol with Switzerland was signed with the same objective and with Austria on 11 September. A double taxation convention with France entered into force on 18 December 2009 which applies to corporation tax, income tax and capital gains tax. This will be valuable for a number of British nationals who are resident in France and have encountered friction regarding applicable tax authorities. It also closes a loophole through which British nationals resident in France but selling a property in the UK were not liable to capital gains tax in either state.²⁸ Finally, a double taxation agreement was signed with Germany on 30 March 2010 in the OECD model form providing for exchange of information, agreed rates of taxation on dividends for direct investors, pension funds and other investors, an exemption for interest and royalties from source state taxation and provision that all UK pensions are taxable solely in the UK.

Not surprisingly, purchases made on the internet are resulting in conflict between the UK tax authorities regarding VAT payment and customers. The problems seem to revolve around whether items are being sent from one EU Member State to another or are arriving

²⁷ http://www.hmrc.gov.uk/cnr/nr_landlords.htm.

²⁸ <http://www.connexionfrance.com/capital-gains-tax-changes-for-british-people-in-france-10608-news-article.html>.

from outside the EU (eg the USA) in which case VAT is charged. There does not appear to be an issue regarding EU workers as such in these cases.²⁹

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

As mentioned above, the UK authorities accept that tax credits constitute benefits under Article 7(2) of the Regulation. What is less clear is how the UK authorities are dealing with the relationship between social advantages under Article 7(2) and social assistance under Directive 2004/38 and considered in *Vatsouras*.

The general situation as regards Article 7(2) Regulation 1612/68 is that it is claimed by EEA nationals primarily in respect of social benefits. In so far as tax benefits are types of social benefits (such as Child Tax Credits, and Working Tax Credits) the effect is the same – it is the social aspect which is disputed. On 1 May 2004 the UK authorities introduced a test of the ‘right to reside’ which EEA nationals must pass before they can claim social benefits. All EEA nationals are affected by the test which may apply to exclude them from benefits when they are unable to work because of illness, disability or childcare responsibilities unless they can show that they are a ‘qualified person’ with a right to reside under EEA law as applied in UK law.³⁰ The UK courts have held that lawful presence in the UK is not the same as a right to reside.³¹ The courts have also rejected the principle that EEA nationals can acquire a right to reside directly from EU law as citizens of the Union. What this means is that EEA nationals seeking social benefits in the UK are likely to be refused unless they can show that they have a positive qualifying right to reside within the terms of the relevant benefit regulation.³²

29 See for example *O'Neill v HM Revenue and Customs* <http://www.bailii.org/uk/cases/UKFTT/TC/2009/TC00169.html>.

30 Regs 6 & 14 SI 2000/2326.

31 *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657.

32 I. Macdonald QC & R. Toal, *Macdonald's Immigration Law and Practice*, LexisNexis London 2009, p. 312-313.

Chapter V

Other obstacles to free movement of workers

The continued application of border controls between the UK and other EU Member States constitutes an obstacle to the free movement of workers. While this obstacle is permitted by the UK protocol to the TFEU, the operation of the border controls and flanking measures are still subject to EU law on free movement of workers. In March 2010 the UK and French Immigration Ministers confirmed their support for the common action to “fight against illegal immigration through Calais” to the UK.³³ In the press release, the two Ministers confirmed that over the five year period they had stopped around 61,000 persons attempting to enter the UK “illegally”. The UK Minister stated “The Joint Operational Coordination Centre is one of the best examples of joint national border control in the world. We are driving home the message that illegal migration will not be tolerated, and by working with France we have made our border stronger than ever. The centre allows us to share intelligence and carry out joint operations. It comes as part of the £15 million investment that Britain pledged last year to increase searches of vehicles and goods heading for Britain. In 2009, officers working at our border controls in France searched over one million lorries and stopped 29,000 individual attempts to cross the channel illegally. Our last set of asylum application figures was the lowest for 18 years, in part because of these controls.”³⁴

It is unclear what the position of these persons is in France. Further, as noted in last year’s report, whether EU nationals are included in the numbers of persons stopped and if so whether they have received reasoned, written decisions on the grounds set out in the Directive is not indicated.

Pension Credit, a social benefit introduced to improve the economic position of elderly women, has been designated a special non-contributory benefit in Annex IIa Regulation 1408/71 and thus not exportable. This means that elderly British women who rely on the benefit (the take up rate is 2/3s women) find an obstacle in their way should they seek to exercise a free movement right to live in another Member State.

HM Inspector of Prisons carried out a follow up report on foreign prisons ending January 2007. In the report there are two matters of interest to this report. First the Inspector found that “Foreign nationals who had been in open conditions, or were on licence in the community, were returned to closed prisons, even if their behaviour had been exemplary. The trawl was so indiscriminating that it included some British citizens (who are not deportable in any circumstances), Irish and EEA nationals (who are deportable only in limited circumstances), and those who had committed only minor offences, but had lengthy residence and family ties only in the UK.”³⁵ This was the result of a state policy to expel foreign national prisoners. More worrying is a further extract from the report: “‘It is mental torture. They drive you so mad because you cannot get information. Then, you cannot tell your family what is happening and everyone is upset...My father became ill – he has been hospitalised because of poor health.’ (HMIP-17). The above interviewee, an EU citizen, was expecting to be released until shortly before the end of his sentence. He had stated at an early stage (13 months prior to his release date) that he would not appeal against his deportation and the

33 <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2010/255022/58-new-centre-calais>.

34 <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2010/255022/58-new-centre-calais>.

35 <http://www.justice.gov.uk/inspectorates/hmi-prisons/docs/foreignnationals-rps.pdf>.

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prison had his passport ready for travel. He was given no explanation for the subsequent three months of detention he had experienced.”³⁶

Border controls and detention continue to be substantial obstacles to free movement of workers in the UK. This conclusion is further supported by the 2009 report of the Independent Chief Inspector of the UK Border Agency. At finding 11.5 – 11.11 the Inspector considered the targets which the UKBA set itself for admission at the borders. The report states “The UKBA operates queueing time targets which specify that 95% of EEA passengers do not wait longer than 25 minutes. The target for non-EEA passengers is 45 minutes. These targets, however, are subject to agreement with the local port operator.” 25 minutes is indeed a substantial period of time to spend waiting at a border in an EU where the abolition of border controls on the free movement of persons within the internal market was to have been achieved by 31 December 1992.

36 <http://www.justice.gov.uk/inspectionates/hmi-prisons/docs/foreignnationals-rps.pdf>.

Chapter VI

Specific Issues

1. FRONTIER WORKERS

Frontier workers: the main sources of concern in this area relate to Northern Ireland and Gibraltar. A non-governmental organisation, Borderwise, which brings together the Citizens Advice Bureaux (and receives EU funding via the Peace and Reconciliation Programme) provides an increasingly valuable information and assistance service to frontier workers between Ireland and Northern Ireland. Among the innovations is a table of interdependences for frontier workers regarding what benefits are available and in which state depending on where the individual and his or her family is living and working. An on line advice service is also available. For issues which are particularly complex, such as maternity benefits, Borderwise provides clear briefings on how to make claims. The Eures Cross Border service also receives questions about the Ireland/Northern Ireland cross border provision of services and provides advice to individuals.

The dispute about the treatment of Spanish workers who have worked in Gibraltar continues this year as it has done for a number of years. The source of the problem is access to the social benefits system. A three tiered system of social benefits was established in Gibraltar which resulted in Spanish workers coming mainly in the lowest and least beneficial scheme. The accrued benefits from the scheme are significantly less valuable than those of the top tier scheme. Despite attempts to reach a solution between Spain and Gibraltar on the issue, whereby the Spanish government settled outstanding claims of frontier workers on an aggregation basis does not seem to have resolved the problem. In 2009, Spanish workers demanded recognition of their status as frontier workers (the main non governmental bodies were CITIPEG and ASCTEG) to enjoy higher social benefits in Gibraltar than the equivalents in Spain. The main benefits which are contested are: injury at work compensation and medical retirement.

2. SPORTSMEN/SPORTSWOMEN

This report considers nationality and transfer rules in relation to the operation of basketball, football, handball, ice-hockey, rugby league and volleyball in the United Kingdom.

Basketball

The international governing body of basketball is FIBA. FIBA defines the rules of the sport, including those regulating the transfer of players (see FIBA Internal Regulations 2008 accessible at www.fiba.com). FIBA-Europe regulates the sport at European level. The international transfer regulations apply to all member federations. The British Basketball League (BBL) is the top tier professional basketball league in the UK. The league operates a closed league franchise system so no system of promotion and relegation operate with the second tier of basketball, namely the English Basketball League (EBL) and the Scottish Basketball League (SBL). In the BBL, for any match in its competitions, a club shall register on the scoresheet a maximum of 3 Non National players (meaning non-EU). In the EBL

Division One (men and women), for any match in the League and the Men's National Trophy, a club shall register on the scoresheet a maximum of 2 non-national players. According to BBL rules, teams must field no more than six import (non-EU) players in any one season, although only three are allowed to be registered to a roster at any one time. Signings are allowed to be made throughout the pre-season and during the regular season until the league's transfer deadline, which is on 28 February. For further discussion on transfer windows see the discussion under 'football'.

Handball

Handball is a minority sport in the UK. It is regulated by the British Handball Federation (BHF). The BHF is responsible for preparing and entering British teams at World, Olympic, and other international competitions administered by the International Handball Federation (IHF). The Home Nation Associations are responsible for matters relating to the development of the sport from school through to adult clubs, in their respective countries. There are no restrictions on non-UK citizens competing in British handball, subject to the normal rules regulating player transfers. For international transfers a request for an International Transfer Certificate is made by the receiving Federation to the releasing Federation. A payment of a transfer fee of €150 (non-contract player) or €750 (contract player) must be made by the receiving Federation/club to the releasing Federation and to the EHF.³⁷ The fee requirement for non-contract players may amount to a restriction under Article 45 Treaty on the Functioning of the European Union (TFEU) and require justification.³⁸

Football

UEFA Cup Competitions: New eligibility criteria were incorporated into the 2006/07 UEFA regulations and these rules must be observed by British clubs entering European club competitions. The new rule provides that squad lists for UEFA club competitions will continue to be limited to 25 players for the main 'A' list. From season 2006-2007, the final four places are reserved exclusively for 'locally trained players'. A locally trained player is either a 'club trained player' or an 'association trained player'. In the following two seasons, one additional place for a club trained player and one additional place for an association trained player is reserved on the A list with the final numbers of four club trained and four association trained players in place for the 2009 season. A club trained player is defined as a player who, irrespective of his nationality and age, has been registered with his current club for a period, continuous or non-continuous, of three entire seasons or of 36 months whilst between the age of 15 and 21. An association trained player fulfils the same criteria but with another club in the same association. In the event that a club fails to meet the new conditions for registration, the maximum number of players on the 'A' list will be reduced accordingly. Should a club list an ineligible player in the places reserved for home-grown players, those players will not be eligible to participate for the club in the UEFA club competition in question and the club will be unable to replace that player on list 'A'. UEFA made the recommendation for national associations to apply the same rule for domestic competitions. UEFA argues that the rule is needed to promote competitive balance, encourage the education and

³⁷ The transfer regulations are accessible at www.eurohandball.com.

³⁸ Out of contract payments were prohibited by the court in Case C-415/93 *Union Royale Belge Sociétés de Football Association and others v Bosman and others* [1995] ECR I-4921.

training of young players and protect national teams. The European Commission has indicated that the rule may be compatible with EU law on these grounds.³⁹

FIFA Proposal: FIFA has proposed the adoption of a 6+5 rule according to which a football club must begin a game with at least six players entitled to play for the national team of the country where the club concerned is located. This means that a maximum of five players may be used at the beginning of the match who are not entitled to play for the national team of the league association concerned. FIFA's aims are to guarantee equality in sporting and financial terms between clubs, the promotion of junior players, to improve the quality of national teams, and to strengthen the regional and national identification of clubs and a corresponding link with the public.⁴⁰ On 28th May 2008, the 58th FIFA congress in Sydney adopted a resolution supporting the aims of the 6+5 rule.

The English Premier League: Premier League clubs entering UEFA club competitions must adhere to UEFA's home-grown rule. From the 2010/11 season, the Premier League will introduce a squad cap of 25 and a domestic home grown player quota of 8 from that 25 man squad.

The Football League: Since the 2009/10 season the Football League (those clubs not participating in the English Premier League) have operated a 'home grown player' rule requiring at least four players from clubs' sixteen man matchday squads to be registered domestically, for a minimum of three seasons, prior to their 21st birthday.⁴¹

Football Transfer System: The rules governing the transfer of players in British football must be compatible with the FIFA Regulations on the Transfer and Status of Players (October 2009 version). These regulations contain a number of restrictions on a players free movement although these restrictions may be capable of justification on grounds relating to the 'specificity of sport'.⁴² For example, Article 6 states that 'players may only be registered during one of the two annual registration periods fixed by the relevant association'. In the UK these periods are normally from the last day of the season to the end of August and throughout January. In *Lehtonen*, the ECJ considered that although a transfer window amounted to a restriction, it may be justified as late season transfers could substantially alter the sporting strength of teams in the course of the championship thus calling into question the proper functioning of sporting competition.⁴³ Articles 13-18 of the FIFA Regulations are designed to promote contract stability between professionals and clubs. Once again, a number of restrictions on a players free movement are evident within these provisions, such as the provision for a 'protected period' of a players contract and the sanctions on that player that flow from a breach of that provision (Article 17). Such restrictions are justified by FIFA on the grounds that they promote contract stability and youth development and that they promote team building and fans' association with teams.⁴⁴ Article 19 places restrictions on the transfer of minors with a view to preventing the exploitation of the young, even though

39 Commission Press Release IP/08/807, 'UEFA rule on home-grown players: compatibility with the principles of free movement of persons', 28/05/08.

40 As stated in the Institute of European Affairs Report, 'Expert opinion regarding the compatibility of the 6+5 rule with European Community law', 24/10/08.

41 The Football League Press Release, 'League clubs vote to introduce 'home-grown players' rule', 18/12/08.

42 See in particular Article 165 of the Treaty on the Functioning of the European Union and reference made to it in the most recent sports related case of the ECJ, Case C-325/08 judgment of 16 March 2010 (*Bernard*).

43 Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681. Paragraph 54.

44 For a full discussion see Parrish, R. & Miettinen, S. (2008), *The Sporting Exception in European Union Law*, Den Haag: TMC Asser Press.

minors can be economically active and thus benefit from free movement rights Article 20 provides that ‘training compensation shall be paid to a player’s training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during *or at the end of the player’s contract*’. Whilst this system places potential restrictions on a players free movement, the provisions are potentially justified with reference to the need to encourage investment into youth development.⁴⁵

Ice Hockey

Ice Hockey UK was formed to take over from the British Ice Hockey Association as the National Governing Body. Affiliated to the International Ice Hockey Federation (IIHF), IHUK is the internationally recognised umbrella body in the United Kingdom. Ice Hockey UK acts as a consultative body to the Work Permits UK and has an input into the criteria that are laid down for players coming from non-EEA countries. Ice Hockey UK is responsible for ensuring that all overseas players are properly cleared to play and that the rules and by-laws of the IIHF are upheld.

Elite Ice Hockey League (EIHL) – The EIHL is the top level professional league in the UK. It is a closed league governed by a board of directors. 10 overseas players are permitted in Elite League Ice Hockey sides. An overseas player is defined as a ‘non-British trained player’. Whilst it is normal for British players to be in a minority in the EIHL, the league does supply most of the players to represent the Great Britain team.

English Premier Ice Hockey League (EPIHL) – The second tier of British ice hockey is the EPIHL although no system of promotion and relegation operates with the EIHL. This league is run by the English Ice Hockey Association. The league is development for British-trained athletes (min 2 years league play at Under 19 levels) and there is a maximum on game day of 4 non-British trained players on each team. A maximum of 3 non-British trained players can be on the ice at any time unless non-British players have team penalties. Personal penalties restrict non-British trained players on the ice unless game suspensions affect the number of players allowed to play. Teams are free to procure additional non-British players but are still limited to dress 4/skate 3. UK Border Agency mandates place restrictions on this league for non-EU players & University players/coaches unless they hold an EU passport. No visas or work permits are allowed.

English National Ice Hockey League (ENIHL) – This league is run by the English Ice Hockey Association. The league is development for British-trained athletes (min 2 years league play at Under 19 levels) and there is a maximum on game day of 2 non-British trained players on each team. A maximum of 1 non-British trained player can be on the ice at any time unless non-British players have team penalties. Personal penalties restrict non-British trained players on the ice unless game suspensions affect the number of players allowed to play. Teams are free to procure additional non-British players but are still limited to dress 2/skate 1. UK Border Agency mandates place restrictions on this league for non-EU players

⁴⁵ Out of contract payments were prohibited by the court in Case C-415/93 *Union Royale Belge Sociétés de Football Association and others v Bosman and others* [1995] ECR I-4921. For recent jurisprudence see ECJ Case C-325/08 *Bernard*. See also Court of Arbitration for Sport (CAS) ruling 2008/A/1519-1520, *Matuzalem*.

& University players/coaches unless they hold an EU passport. No visas or work permits are allowed.

The international transfer system for ice hockey is regulated by the IIHF International Transfer Regulations which can be accessed at <http://www.iihf.com>.

Rugby League

The 'Super League' is Europe's top rugby league competition. Established in 1996 the Super League was intended to be a European league although for long periods only English clubs have competed. Currently, of the fourteen participating clubs licensed by the Rugby Football League (RFL), twelve are English, one is Welsh and one is French (the Catalans Dragons). Super League is a closed league with participants being determined via the issuance of RFL licenses rather than through a system of promotion and relegation.

Club Trained Player Rule: A club trained player rule was introduced into Rugby Super League in 2008. The rule places eligibility restrictions on the composition of the 25 man squad, particularly in setting a minimum quota for club trained and federation trained players. A 'Club Trained Player' is a player who has been on the Club's register for any 3 full seasons before the end of the season in which he ceases to be eligible by age for Academy rugby league (21). A 'Federation Trained Player' is a player who, for any 3 full seasons before the end of the season in which he ceases to be eligible by age for Academy rugby league (21) has been on one of the Club's register or the register of another Club being a member of the same rugby league federation. From 2011, the club trained quota is 8, the federation quota 12 and the 'overseas' quota 5.⁴⁶ An overseas player is someone who cannot produce satisfactory evidence to the RFL that he is a Professional Player in accordance with the EU Rules guaranteeing the free movement of workers. Section B1 of the RFL Operational Rules states that 'the purpose behind the "Home Grown Player" Rule is to encourage clubs to develop and better develop their own players so that there are more players coming into the game and so that the standard improves. A further purpose is to afford an opportunity to junior players to play in top level competitive matches in order to aid their development and ensure the development of the sport'.

Transfer System: Super League operates a transfer system for contract players and contract expired players. For players under contract a transfer fee can be payable. A Player who was transferred during the previous Season or before the start of a Season may not return to the transferring Club until 28 days of the Season next following has elapsed and any application to register a Player with the transferring Club in such circumstances shall be refused. Players who have reached the end of their contract and are outside the Compensation Expiry Date cannot command a compensation fee. The Compensation Expiry Date refers to the 1st of December immediately after a Player has both reached the age of 22 and is also a Contract Expired Player but if on or before 30 November in any year a Player's contract has expired and he has already turned 21 years of age, then his Contract Expiry Date shall be the date of his 22nd birthday and not 1st December next following.

Salary Cap: Super League operates a salary cap. A club must ensure that the combined earnings of the top 25 players (the 'aggregate first tier liability') must not exceed £1,600,000 (one million six hundred thousand pounds) at any time during the salary cap year. Clubs will only be allowed to sign a new player if they have room under the cap. Clubs are also permit-

46 Subject to exemptions for certain clubs outside traditional rugby league heartlands.

ted to spend a maximum of £50,000 on players outside the top 25 earners (the ‘aggregate second tier liability’) who have made at least one first grade appearance for the club during the year. Costs for players outside of the top 25 earners who do not make a first team appearance will be unregulated. Any player who has played for the same club for at least ten consecutive seasons will have half their salary excluded from the salary cap for his eleventh and subsequent seasons (the long service concession). This is subject to a maximum of £50,000 for any one club. The Super League operate a series of sanctions for salary cap infringements. In the ‘Super League Salary Cap Regulations’, the RFL explains that the cap was adopted in order ‘regulate the value of playing talent available to each club’ as a means to ‘protect and promote the long-term health and viability of the game of rugby league’. The RFL add that the cap aims to ‘protect the integrity of the Super League competition by ensuring that the determinative factor in the sporting outcome is on-field sporting merit and not off-field financial considerations’. This will contribute to competitive balance and the maintenance of public and commercial interest in the sport. It will also contribute to financial stability by ensuring that clubs do not trade beyond their means.

Volleyball

Volleyball is a minority sport in the UK. It is regulated by the British Volleyball Federation (BVF). As far as can be determined, no direct or indirect discrimination against Community citizens takes place in UK volleyball.

Comment on Article 165 TFEU

Title XII (Article 165) of the Treaty on the Functioning of the European Union (TFEU) provides that ‘The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function’. Under this provision, Union action is to be aimed at ‘developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen’. The competence allows the Union to adopt incentive measures in the field of sport but it specifically excludes the harmonisation of national laws.

Article 165 does not contain a horizontal clause requiring the EU institutions to take account of the ‘specific nature of sport’ in the application of other Treaty competencies such as free movement and competition law. Therefore, Article 165 does not amount to an invitation for sports bodies to adopt discriminatory practices within their respective sports. Nevertheless, Article 165 is likely to be raised in future cases involving sport. For example, in *Bernard*, the first post-TFEU sports case of the Court of Justice, Article 165 was cited to corroborate the Court’s view that the specific characteristics of sport allows football clubs to seek compensation for the training of their young players where those players wish to sign their first professional contract with a club in another Member State.⁴⁷

In this connection, it is conceivable that reference to the promotion of *fairness and openness in sporting competitions* contained within Article 165(2) will be raised to defend rules designed to promote solidarity and competitive balance in sport, rules designed to promote

47 Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United*, judgment of 16 March 2010.

the local training of players, rules designed to promote contract stability, player release rules designed to promote national team sports, rules on dispute resolution and the ousting of the jurisdiction of courts, anti-doping rules, rules excluding non-nationals from sporting competitions, rules on selection criteria and rules concerning the composition of national teams. However, the references to *openness* and *fairness* in sporting competitions could also be raised by those excluded or discriminated against in such competitions and by those who consider that prevailing governance standards in sport, particularly in relation to stakeholder representation, do not conform to such principles.

Article 165(2) also aims to protect *the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen*. This has implications for the ongoing debate within European sport, particularly football, on rules designed to protect minors, including the prohibition of the international transfer of minors (see discussion above). This passage also has implications for rules designed to promote the education and training of young athletes.

Also contained in Article 165(2) is reference to developing *cooperation between bodies responsible for sports*. In the White Paper on Sport, the Commission argued that governance issues in sport should fall within a territory of autonomy and that most challenges can be addressed through self-regulation which must however be ‘respectful of good governance principles’.⁴⁸ It is therefore anticipated that the Commission will give further encouragement to efforts within football, and the sport sector generally, to promote social dialogue as a solution to some of the labour related conflicts within sport. Some issues, such as rules designed to protect minors, could be agreed within the context of a social dialogue.⁴⁹ A social dialogue committee in European professional football was established in July 2008 bringing together representatives of football employers, employees and UEFA.

3. THE MARITIME SECTOR

The rules on taxation of mariners provide that as regards national insurance contributions there is no discrimination with UK nationals. Special arrangements are made to ensure that Regulation 1408/71 is respected. EEA nationals resident in the UK but working on non-British ships are treated the same way as UK nationals in a similar situation as regards national insurance contributions. However, discrimination is still a substantial problem in the sector. An Early Day Motion laid before the UK Parliament on 30 June 2009 indicates exactly where the problems are:

“That this House is appalled that in the 21st century ships, including ferry services, which regularly trade on fixed routes between UK ports and between the UK and Europe, are allowed to pay poverty wages substantially below the minimum wage to non-UK seafarers including rates as little as £1.50 per hour; is dismayed that this super-exploitation is legal as a result of a loophole in the Race Relations Act which allows non-UK seafarers to be paid rates below agreed UK levels and also due to the exemption of seafarers from the National Minimum Wage; urges the Government to bring forward amendments to the Equality Bill to outlaw this discrimination and to reform the Race Relations Act as it applies to seafarers; and calls on the Government to bring for-

48 Commission of the European Communities (2007), ‘White Paper on Sport’, COM(2007) 391 final, s.4.

49 See Articles 153-155 TFEU.

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ward immediately legislation to ensure that non-UK seafarers are protected by the provisions of the national minimum wage.” G. Prosser MP.⁵⁰

So far no action has been taken by the UK authorities.

4. RESEARCHERS/ARTISTS

The United Kingdom does not have specific provisions on the recruitment of researchers and artists. Their treatment falls within the general rules on social benefits and taxation. However, for artists issues arise regarding access to business assistance. Researchers are confronted by questions of access to research funding. Artists must decide whether to enter into economic activities as individuals (workers or self employed) or as companies which will have tax consequences – up to 50% taxation for individuals but 30% for companies. There are a wide variety of support schemes for artists operated by various levels of government offering direct grants to support employment, rebates on taxes, tax credits for investors in small businesses and R & D tax credits. Some incentives are based on where the investment will be made (ie discriminatory on the basis of the place of investment – Grant for Business Investment); the Business Link portal provides assistance with preparing business plans and other activities; it does not appear to discriminate on the basis of nationality; a loan scheme for start up businesses exists Enterprise Finance Guarantee (EFG) which is based on the turnover of the business. Some sectors are excluded but these are unlikely to affect researchers and artists.

Researchers may suffer discrimination on the basis of their institutional affiliation. For instance, the ESRC, the main state research funding authority for social science research makes funding available only for universities, colleges of higher education and independent research institutes in the United Kingdom approved by the ESRC. A researcher must be affiliated with such an institution to be eligible to apply for funding. The Leverhulme Trust, another important source of research funding in the UK provides for its early career fellowship funding that applications “Should normally hold a degree from a UK higher education institution by the time of taking up the Fellowship. Those without a UK degree will be considered if, at the time of application, they hold an academic position in the UK. It is likely that applications from candidates having an association with the UK academic community of less than two years' duration will be strengthened by a move of employing institution.”

5. ACCESS TO STUDY GRANTS

EEA nationals and their family members are entitled to pay home student fees if they have been living in the EEA for three years before the course begins and the main purpose of the residence was not for full time studies during any part of the three years. Children of Turkish workers ordinarily resident in the UK are also covered by the same rule.

Student support is financial support provided by the UK authorities to some students. It is available only for designated courses and the rules vary depending on whether the institu-

50 <http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=38980>.

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tion is in England, Wales, Scotland or Northern Ireland. It is comprised of a loan for tuition fees and a loan for living costs. For students from low income families there is a non-repayable maintenance grant up to £2,906 per year. These schemes are also open to EEA students and their family members or child of a Turkish worker provided they fulfil the three year rule above. Any EEA national with permanent residence is also entitled. The residence requirement of three years applies equally to EEA nationals and their family members and UK nationals and their family members.

Any student attending a course lasting six months or more is entitled to free National Health Service treatment.

Chapter VII

Application of Transitional Measures

Transitional measures imposed on EU-8 Member States by EU-15 Member States

Extension of transitional period to 30 April 2011

During 2009, the formal decision was taken to extend the transitional measures applicable to EU-8 nationals for a further two years. Accordingly, the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004 No 1219) were amended to provide for the continuation of the United Kingdom's registration system until 30 April 2011. This was done by the Accession (Immigration and Worker Registration) (Amendment) Regulations 2009 (SI 2009 No 892, in force 29 April 2009).

According to the Explanatory Note to these Regulations, the reason for this extension of the transitional arrangements was "a serious disturbance to the United Kingdom labour market". No fuller explanation appears to have been given in Parliament or in official publications.

Amendment of the rules concerning EU-8 nationals who are family members

The reports for 2007 and 2008 highlighted the failure of the United Kingdom legislation to fully provide for the right to work of EU-8 family members. A solution has now been provided by the Accession (Worker Authorisation and Worker Registration) (Amendment) Regulations 2009 (SI 2009 No 2426, in force 2 October 2009).

The previous position was that an EU-8 family member of an EEA or Swiss resident was exempt from the registration requirement, except if they were the family member of an EU-8 or EU-2 worker.⁵¹

As a result of changes made by Regulation 3 of SI 2009 No 2426, an EU-8 family member of an EEA or Swiss resident is now also exempt from registration where they are the family member of an EU-8 or EU-2 worker.⁵² That is because the only exception is where the primary EU-8 or EU-2 national has not qualified for an extended right of residence, beyond the initial three-month stay, through being self-employed, a worker, a student or self-sufficient.⁵³ For this purpose, the concept of 'family member' is given a broad definition, through a cross-reference to Regulation 7 of the Immigration (European Economic Area) Regulations 2006 (SI 2006 No 1033). In the case of an EU workers, this covers spouses, civil partners, descendants of the individual, spouse or civil partner who are under 21 or are dependent, dependent relatives in the ascending line of the individual, spouse, or civil partner, and anyone who qualifies as an 'extended family member' and has a residence document.

In addition, Regulation 3 of SI 2009 No 2426 for the first time exempts an EU-8 spouse, civil partner or child under 18 who is the family member of a person with permission to

51 Accession (Worker Registration) Regulations 2004, SI 2004 No 1219, Reg 2(6)(b), as previously amended.

52 Accession (Worker Registration) Regulations 2004, SI 2004 No 1219, Reg 2(6)(b), as amended by SI 2009 No 2426.

53 The extended right of residence is provided for in Regulation 13 of the Immigration (European Economic Area) Regulations 2006, SI 2006 No 1033.

work under general immigration law (the Immigration Act 1971). This was presumably necessary in order to comply with the standstill and Community preference principles in the Accession Treaties.

Case law

There was one significant Asylum and Immigration Tribunal determination on the right to work of EU-8 nationals in 2009. *JL (Poland)* [2009] UKAIT 00030 concerned a Polish national who had not registered their employment within one month, as required under the Worker Registration Scheme, but who did register the employment later on. The AIT interpreted Regulation 7(2) of the Accession (Immigration and Worker Registration) Regulations 2004 to mean that the employment was authorised only *prospectively* from the date of registration. The result was that, until one year from the date of registration, the worker was not eligible to obtain a registration certificate, in order to confirm their exemption from an ongoing registration requirement.

Transitional Measures imposed on workers from Bulgaria and Romania

Current policy

On 3 November 2009, the Government announced its intention to maintain the requirement of work authorisation for Bulgarian and Romanian nationals at least until the end of 2011.⁵⁴

Because of the ‘standstill’ obligation in the Accession Treaties, EU-2 nationals continue to be eligible for two lower-skilled schemes. It was announced in the statement of 3 November 2009 that the annual quota for the seasonal agricultural workers scheme (SAWS) would remain at 21,250 places for 2010 and 2011, and that the quota for the sectors-based scheme (SBS) in food processing sector would remain at 3,500 places for 2010 and 2011.

Amendment of the rules concerning EU-2 nationals who are family members

The reports for 2007 and 2008 highlighted the failure of the United Kingdom legislation to fully provide for the right to work of EU-2 national family members of EU citizens. A partial solution has now been provided by the Accession (Worker Authorisation and Worker Registration) (Amendment) Regulations 2009 (SI 2009 No 2426).

The previous position was that an EU-2 family member of an EEA or Swiss resident was exempt from the authorisation requirement, except if they were the family member of an EU-2 worker.⁵⁵ An amendment was required because the Accession Treaties applicable to Bulgaria and Romania provide for a right to work for the spouse and qualifying descendants of EU-2 workers from the third year – i.e. from 1 January 2009.

As a result of changes made by Regulation 2 of SI 2009 No 2426, an EU-2 spouse, civil partner or descendant of an EEA or Swiss national who is resident in the United Kingdom is

54 Immigration Minister Phil Woolas, written statement, House of Commons, 3 November 2009, col. 38WS.

55 Accession (Worker Authorisation) Regulations 2006, SI 2006 No. 3317, Reg 2(b), as previously amended.

exempt from authorisation. This category now includes the case where the individual in question is the family member of an EU-2 worker.⁵⁶

Two deficiencies in this provision should be noted:

- In relation to descendants, provision is made only for EU-2 nationals who are under 21 or dependent on the EU-2 worker. This leaves out descendants who are part of the family of the EU-2 worker, but dependent in whole or in part on the EU-2 worker's spouse.
- No provision is made for other EU-2 nationals who are family members, as is done in the case of the EU-8 above. Specifically, the relatives in the ascending line of the EU-2 worker or spouse and 'extended family members' are excluded.

In addition, Regulation 2 of SI 2009 No 2426 for the first time exempts an EU-2 spouse, civil partner or child under 18 who is the family member of a person with permission to work under the Immigration Act 1971. This was presumably necessary in order to comply with the standstill and Community preference principles in the Accession Treaties.

Case law

There were two significant Asylum and Immigration Tribunal decisions on the right to work of EU-2 nationals in 2009.

The first of these was *SH (Bulgaria)* [2009] UKAIT 00020, decided on 15 January 2009. It concerned a Bulgarian national who had been issued entry clearance on the basis of a work permit for one year from 16 February 2006. He then entered the United Kingdom and commenced work on 18 February 2006, with the work lasting for more than 12 months. The Secretary of State refused to issue a registration certificate confirming a right of residence as a worker, on the ground that the appellant had not satisfied the requirement of a period of 12 months' lawful employment which ended on or after 1 January 2007.

As outlined by the AIT, the central question was whether a two-day gap in lawful employment (17 and 18 February 2007) could be decisive against the appellant. The AIT upheld the interpretation of the Secretary of State that the requirement of being "admitted to the labour market" for 12 months referred to actual lawful employment. In reaching this conclusion, it followed the decision of the House of Lords in *Zalewska* [2008] UKHL 67 (discussed in the 2008 report) and of the AIT in *EA (Bulgaria)* [2008] UKAIT 00017.

The AIT went on to hold that the refusal of a registration certificate because of a two-day gap was not contrary to the EU law principle of proportionality. In so doing, it again followed the approach of the House of Lords in *Zalewska* (there, in relation to access to social security benefits). The AIT's main arguments were that the authorisation test had a legitimate monitoring function; that the Accession Treaty itself set out the requirement of 12 months' lawful employment; and that it would have been possible for the worker and their employer to have obtained a new work permit for the last two days.

It may however be doubted that the AIT in *SH (Bulgaria)* correctly applied the test of proportionality. There is an obvious unfairness in allowing the state to rely upon a situation it has created through a gap between the periods of the immigration permission and of actual employment. For that reason, the state's interest in rigorous immigration control for a further

⁵⁶ *Ibid.*, Reg 2(b), as newly amended.

two days appears insufficient to justify the denial of the appellant's underlying right to work and reside in the United Kingdom as an EU citizen.

The second decision of interest is *IP and others (Bulgaria)* [2009] UKAIT 00042, decided on 11 August 2009. In it, the AIT considered the position of a Bulgarian worker who had been in and out of employment in the United Kingdom since before 1 January 2007.

The AIT decision found that the main appellant did not require authorisation to work under the legislation governing the employment of EU-2 nationals, the Accession (Immigration and Worker Authorisation) Regulations 2006 (SI 2006 No 3317). This was because of an amendment to those Regulations in 2007 (SI 2007 No 3012), which exempted an individual from the need to obtain authorisation if on 31 December 2006 they had leave granted under the Immigration Act 1971, which contained no limitation as to their right to work.

The eventual outcome before the AIT was the main appellant was entitled to a registration certificate as a worker, notwithstanding periods of unemployment. This was in application of the ECJ decision in *Vatsouras* on 4 June 2009, concerning the application of the free movement of workers principle.

Case law on Departure

A High Court decision of interest is *Abdullah v. Secretary of State for the Home Department and Asylum and Immigration Tribunal* [2009] EWHC 1771, 15 June 2009. This concerned an Iraqi national who was removed from the United Kingdom under general immigration law, as an overstayer. He sought a residence document on the basis of a durable relationship with a Polish woman resident in the United Kingdom. A residence document was however refused by the Secretary of State on factual grounds.

One issue in the case was whether there was a right of appeal in the case of a refusal of a residence document on the basis of a durable relationship. Under Regulation 2(1) of the 2006 Regulations, a decision that an individual is not entitled to a residence document is an 'EEA decision' against which there is a right of appeal. The apparent obstacle for the applicant was that Regulation 26(3) of the 2006 Regulations provides that a person claiming to be a "family member or relative of an EEA national" has no right of appeal unless they produce "an EEA family permit" or "other proof that [they are] related as claimed to an EEA national." Nevertheless, in his decision of 15 June 2009, Blair J endorsed the construction of both parties that the rule in Regulation 26(3) did not apply to those claiming a right to stay on the basis of a durable relationship, as they were neither 'family members' nor 'relatives' within the meaning of the 2006 Regulations.

A second issue in the case was whether the right of appeal against a refusal of residence documentation had suspensive effect (i.e. prevented removal). The conclusion of Blair J was that it was not suspensive, because Regulation 29 of the 2006 Regulations expressly provided only for the suspensive effect of decisions concerning *an EEA decision* to refuse admission or to remove. There was therefore no suspensive effect for a refusal of a residence document, or a related removal, under *general immigration law*. The compatibility of the conclusion on the second point with the effective protection of rights under EU law may be questioned, however. In practice, the refusal of the residence document had the effect of permitting the applicant's removal from the United Kingdom.

It may be added that an appeal on the second issue was terminated by the Court of Appeal on 22 February 2010: *R (A (Iraq)) v. Secretary of State for the Home Department* [2010] EWCA Civ 250. This was due to a number of factors: that the applicant had married

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the Polish national, and so had no interest in the outcome; that the number of persons affected by the High Court decision was likely to be small; that the Government planned to withdraw the underlying right of appeal against the refusal of residence documents; and, that the appeal was likely to involve complex questions of EU law.

Chapter VIII Miscellaneous

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

This chapter discusses the Right to Reside test as it applies to UK benefits and examines the relationship between the test and Regulations 1408/71 and 1612/68 with reference to the developing body of UK case law. The Right to Reside test now applies to benefits that are social security benefits and fall within the scope of Regulation 1408/71 (Income Support, State Pension Credit, Income based Jobseeker's Allowance, and Income related Employment and Support Allowance, Child Benefit and Child Tax Credit and Health in Pregnancy Grant) and benefits that are not covered by Regulation 1408/71 but are social advantages under Regulation 1612/68 (Housing Benefit, Council Tax Benefit, Social Fund Crisis Loans and housing assistance from local authorities).

The Legislation

In 1994 the UK introduced the 'Habitual Residence Test' into legislation through the Income-related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994 (SI 1994 No 1807). The test now applies to the receipt of the non-contributory means-tested benefits, Income Support, State Pension Credit, Income based Jobseeker's Allowance, Income related Employment and Support Allowance, Housing Benefit, Council Tax Benefit and access to local authority housing.

The Parliamentary Under-Secretary of State at the DWP, Maria Eagle, summarized how the Habitual Residence Test operates:

"The Habitual Residence Test is a condition for receiving certain income-related benefits. Since 1 August 1994, all people (except 'workers' for the purposes of EU law, refugees, people given exceptional leave to remain and people from Montserrat...(who claim the benefits covered by the test), including UK citizens who either return to or come for the first time to the UK, have to be habitually resident in the United Kingdom, the Channels Islands, the Isle of Man or the Republic of Ireland (the Common Travel Area) or be treated as being habitually resident in the United Kingdom, before they qualify for payment of these benefits..."

In practice, it is only people who are identified from their benefit claim details as having come/returned to the UK within the last two years immediately prior to their claim who are actively subjected to the Habitual Residence Test. (Originally the period was five years, but this was reduced as one of the outcomes following the Government's review of the Habitual Residence Test – 14 June 1999).

The term "habitual residence" is not defined in regulations, so in order to determine whether a person is habitually resident, a Decision Making Officer considers a variety of factors about the person's circumstances. European case law has established that factors to be considered include:

- the length, continuity and general nature of actual residence

- reasons for coming to the UK
- the claimant's future intentions.

This information is usually gathered by interviewing the customer.

In addition, UK case law has previously set out that an appreciable period of actual residence, together with a settled intention, are necessary to establish actual residence. What counts as an “appreciable period” though will depend upon the facts of each individual case.” The note points out that this is not an exhaustive or conclusive list and there may be other factors that are important in deciding whether a person is habitually resident in an individual case. (Letter to Tim Boswell from The Parliamentary Under-Secretary of State at the DWP, Maria Eagle during the parliamentary stages of the *State Pension Credit Bill [H.L.] 2001/02*, DEP 02/1278 cited by House of Commons Library Standard Note SN/SP/416 last updated 22 January 2010).

The Right to Reside Test

From 1 May 2004, in response to concerns about the impact of the enlargement of the European Union, legislation governing entitlement to benefits was amended to ensure that no person can be habitually resident in the Common Travel Area (the UK, Channel Islands, Isle of Man or Republic of Ireland) unless they also have a right to reside there.

While, prior to the amendment claimants had to be able to demonstrate that they were habitually resident in the Common Travel Area or treated as being habitually resident, following the amendment claimants must also show that they have a right to reside in the UK under UK or EU law.

The changes in 2004 mean that there are now two stages to the Habitual Residence Test:

- An initial test to determine whether the person has a ‘right to reside’; and
- The original Habitual Residence Test.

Any person who does not have a right to reside automatically fails the Habitual Residence Test. A person with a right to reside must also satisfy the main Habitual Residence Test, as outlined above, to be entitled to benefit.

There were further changes to the Habitual Residence Test from 30 April 2006 to take account of the new Rights of Residence Directive 2004/38/EC. The new Directive brought together existing EC directives on free movement as well as introducing new rights of residence for EEA nationals. This included the introduction of a right of residence for the first three months for everyone, including economically inactive people. Amendments to the Habitual Residence Test from 30 April 2006 were designed to ensure that persons who have a right to reside solely on the basis of the new three month right of residence will not satisfy the first stage of the Habitual Residence Test (the Right to Reside component). Thus while EEA nationals who are lawfully employed or are self-employed have a right to reside as an employed or self-employed person, those who are economically inactive – such as students, pensioners, or lone parents – only have a right to reside provided they have sufficient resources to avoid becoming a ‘burden’ on the social assistance system. The right of EEA nationals to reside in the Common Travel Area is set out in the Immigration (European Economic Area) Regulations 2006, which implement Directive 2004/38/EC.

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The regulations came into effect on the same date of accession to the EU of the ten new Member States. At the same time a Worker Registration Scheme was introduced to control access to the labour market for workers from the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. Nationals of these States are able to take up employment in the UK, providing they are authorised, under the scheme. If they do not have a job but come to the UK to seek employment they will need to be self-sufficient in order to have a right to reside.

The Case Law

The Habitual Residence Test has been tested before the UK courts and the European Court of Justice (see Swaddling, Case C-90/97, 25 February 1999). An increasing number of cases concerning the Right to Reside test are now coming before UK Tribunals/Courts:

Case CPC/1072/2006 (*Patmaliece*)

This case concerns a Latvian citizen whose claim for asylum in the UK was turned down but she was not deported. Her subsequent claim for State Pension Credit was disallowed on the grounds that she had no right of residence and therefore could not be treated as habitually resident in the UK. She appealed to the Appeal tribunal on the grounds that Article 3(1) of Regulation 1408/71 forbids discrimination on the grounds of nationality and that a residence test which all UK nationals can satisfy while some non nationals cannot, represents a direct and unjustifiable discrimination contrary to Article 3(1). The tribunal found in her favour citing *Collins v Secretary of State for Work and Pensions* (Case C-138/02) to reason that a residence clause may be justified only “on the basis of objective considerations that are independent of the nationality of the person concerned and proportionate to the legitimate aim of the national provisions and that while the aim might be legitimate, the Right to Reside test was certainly not independent of the nationality of the person concerned”. The tribunal said that it suspected that the same result could be achieved by reference to Article 12 of the EC Treaty.

The Secretary of State appealed against the Appeal tribunal’s decision to the Social Security Commissioner. The appeal was stayed to await proceedings that culminated in the decision of the Court of Appeal in *Abdirahman v. Secretary of State for Work and Pensions* (R(IS) 8/07) in which the Court found that a condition of a right of residence for entitlement to Income Support was legitimate notwithstanding Article 12 of the EC Treaty. In *Abdirahman*, the Secretary of State presented the argument to the Court of Appeal that the cases did not fall within the scope of the EC Treaty because EU law did not extend to cases where no right of residence exists under either the Treaty or the relevant domestic law and that therefore the question of indirect discrimination contrary to Article 12 does not arise. The Court of Appeal accepted this argument and added that if, as had previously been conceded before the Commissioners, there was indirect discrimination against non UK nationals, this was justified as a legitimate response to the manifest problem of ‘benefit tourism’.

In Case CPC/1072/2006 (*Patmaliece*), the Commissioner followed *Abdirahman* which he said “helpfully makes clear ... that the arguments fall to be raised under Article 18 first. Whether or not the claimant has a right of residence in the host Member State then deter-

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mines whether or not he or she is entitled to be treated in the same way as nationals of the Member State in relation to social assistance.”

The Commissioner reasoned that the fact that, in many other contexts, the European Court of Justice has said that unequal treatment must be justified on grounds independent of nationality, does not lead to the conclusion that nationality must always be a totally irrelevant consideration where social assistance is concerned. This, the Commissioner reasoned, followed from the principle that Member States have greater obligations to their own citizens than to nationals of other Member States which is evidenced by the fact that persons who depend on social assistance will be taken care of in their own Member State. Therefore, while the Commissioner accepted that Article 3 of Regulation 1408/71 might preclude the imposition of a condition of a right of residence in the host member country in respect of a social security benefit within the scope of the Regulation, he did not accept that it precludes the imposition of such a condition in respect of a special non-contributory benefit, at least in the case of a benefit that is income-related and had particularly strong characteristics of social assistance.

The Commissioner's decision was upheld by the Court of Appeal on 25 June 2009 under the name *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621.

The Court of Appeal reasoned:

“The conditions for entitlement to state pension credit depended on a claimant being “in Great Britain” within the meaning of the State Pension Credit Regulations 2002, namely being able to establish habitual residence, i.e. having a right to reside in Great Britain or in the Republic of Ireland. The benefit, which was a special non-contributory cash benefit coming within the scope of art 3 of Council Regulation 1408/71, as amended, nevertheless had the characteristics of social assistance, so that restrictions on entitlement to those who had become either economically or socially integrated might be justified by reference to the need to protect the finances of the country of residence.”

(The Court said that) “entitlement to the means-tested benefit under s 1 of the State Pension Credit Act 2002 depended on a claimant being “in Great Britain” within the meaning of reg 2 of the State Pension Credit Regulations 2002. All UK nationals passed the test of residency, as did Irish nationals. *Abdirahman v Secretary of State for Work and Pensions* [2008] 1 WLR 254 and *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310; [2008] WLR(D) 372 held that claimants seeking benefits characterised as social assistance were not entitled to income support, and that the country of residence had a legitimate aim in protecting its public finances. State pension credit, described as a hybrid benefit with characteristics of a social security benefit and social assistance, came within the scope of Council Regulation 1408/71, art 3 of which provided for equality of treatment for UK nationals and those of member states. The right to reside condition for entitlement to the benefit did not by itself entitle a claimant to the benefit; entitlement was based on the claimant being “in Great Britain”. All UK nationals satisfied the residency test; other nationals outside reg 2 of the 2002 Regulations might do so but with greater difficulty, e.g. whether as workers, members of the same family or for other reasons. The conditions for entitlement to the benefit were not overtly based on the nationality of a claimant. Once the claimant left Latvia arts 4(1) and 10 of Regulation 1408/71 ensured that Latvia could not withdraw or

modify her pension if she resided in another member state. The purpose of the Regulation remained unaltered after the inclusion, by amendment by Council Regulation (EC) 647/2005, of state pension credit within its scope: art 4(2a) and Annex IIa. Regulation 1408/71 was designed to promote the objectives of those articles within the EC Treaty enshrining the rights of workers to move and establish themselves within territories of the Community. Once that purpose was acknowledged, there could be no reason why the country of residence should not be permitted to justify conditions of entitlement reflecting either economic integration or a sufficient degree of social integration. State pension credit did not cease to be part of the UK's system of social assistance merely because it was also identified within the Regulation as a hybrid benefit. Entitlement depended on the legislation of the country of residence, and restriction on entitlement might be justified by reference to the need to protect the country's public finances. It would be inconsistent with the *Abdirahman* case and *Trojani v Centre public d'aide sociale de Bruxelles* (Case C-456/02) [2004] ECR I-7573 to conclude that indirect discrimination in the application of the right of residence condition was unjustified. Regulation 1408/71 did not have the effect of rendering the right of residence requirement illegitimate. It imposed no disadvantage on the claimant in the exercise of any rights under the Treaty; she retained her right to her Latvian pension." (ICLR, 2009).

There may be an application for permission to appeal to the Supreme Court in this case. The Supreme Court gave permission to appeal on 3 March 10. The full hearing is likely to be in Autumn 2010.

***Secretary of State for Work and Pensions v Lassal* [2009] EWCA Civ 157**

This is a Child Poverty Action Group test case. The facts as set out by CPAG are as follows: "Article 16 Directive 2004/38/EC – Whether residence prior to 2006 can be taken into account to establish permanent right to reside.

The claimant was a French national who lived in the UK as worker from September 1999 until February 2005 when she went to France to visit her mother. She returned to the UK in December 2005 to look for work and claimed Jobseekers' Allowance from January 2006 until November 2006 when she claimed Income Support on the basis of pregnancy. She was refused on the ground that she had no right to reside in the UK.

This was the Department for Work and Pension's appeal to the Court of Appeal against a decision in which the Commissioners held that the claimant had a permanent right of residence in the UK. The claimant was not represented in the Court of Appeal. CPAG intervened. The Court of Appeal took the view that Directive 2004/38/EC which came into force on 30/4/06, should be interpreted so as to allow periods of residence under earlier Community law instruments to count for the purposes of Article 16. Because this was not clear, the question summarised below has been referred to the European Court of Justice: Is Article 16 Directive 2004/38/EC to be interpreted as entitling an EU citizen to a right of permanent residence by virtue of the fact that she had been legally residence in accordance with earlier Community law instruments for a continuous period of 5 years ending prior to 30/4/06?"

CPAG note that the Department for Work and Pensions "should accept there is a permanent right of residence under domestic law for those lawfully resident for five years since 2/10/00 who have not been absent from the UK for more than 6 months, or 12 months in specified circumstances – see paragraph 6 Schedule 4 Immigration (EEA) Regs 2006."

This case was referred to the European Court of Justice on 10 March 2009 (2009) EWCA Civ 157 (C-162/09). The A-G's Opinion was published on 11 May 2010. He proposes that Directive 2004/38 be interpreted as meaning that a Union citizen who resided legally for a continuous period of five years in a host Member State, before expiry of the period transitional period has a right to permanent residence.

Blazej v Secretary of State for Work and Pensions – CIS/826/2009

Right to reside – A8 worker – claimant had not completed 5 years lawful residence at time of claim. Permission to appeal given by Upper Tribunal Judge on 22 February 2010.

Discussion: at the UK trESS seminar in June 2009 Pamela Fitzpatrick of the Child Poverty Action Group (CPAG) argued that:

- The Right to Reside test is excluding large numbers of claimants from entitlement to any UK benefits
- Special non contributory benefits such as Income Support are not payable unless the person has right to reside or permanent residence. There is no acceptance in the UK that a person covered by 1408/71 can claim Income Support under Regulation 1408/71 and can therefore be self supporting to gain the right to reside (Pamela Fitzpatrick, CPAG presentation to UK trESS seminar London 19 June 2009).

Cousins has continued his critique of the UK courts' treatment of right to reside cases. (See Cousins, 2007). Cousins argues with respect to *Patmalniece* that the reasoning of the Court is flawed in that the Court follows that of *Abdirahman* which Cousins has already argued was itself flawed on two counts (Cousins, 2007). Firstly that the Court was incorrect in its view that there is no need to justify the Right to Reside test and secondly, that the Commissioners had applied an incorrect standard as to the level of justification required and failed to consider whether the test was proportionate; questions which the Court of Appeal had in turn failed to give proper attention to because it had already (wrongly) concluded that the case did not fall within the scope of the Treaty (Cousins, 2007).

Cousins reiterates his view that in the light of recent decisions of the Court of Justice (for example, Case C-406/04 *De Cuyper* [2006] ECR I-06947 29; and Case C-192/05 *Tas Hagen and Tas* [2006] ECR I-10451) "*it is clear that the Right to Reside test constitutes a barrier to free movement of EU citizens.*" As such, it must be objectively justified. Cousins argues that the Court's approach in *Patmalniece* to objective justification has involved a repetition of the error in *Abdirahman*, in particular the Court of Appeal made little effort to assess the proportionality of the Right to Reside test (Cousins, 2009).

Pension Credit and Gender Discrimination

The Pension Credit is designed to provide higher minimum income guarantees, reduce complexity, achieve better integration with the tax system in the longer term, and encourage saving. There are two components of the Pension Credit: A guaranteed level of income below which no pensioner should see her or his income fall; and a savings credit designed to 'reward' claimants who have modest levels of income from a state retirement pension or from occupational or personal pension schemes. At present it is paid to pensioners who are aged 60 and over, but between 2010 and 2020 the age will rise to 65 in line with the rise of the

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state pension age for women over the same period. The UK considers the Pension Credit to be a 'special non-contributory benefit' under Regulation 1408/71.

There is an important gender dimension to the Pension Credit. Whereas 85 per cent of men reaching retirement age in 2005 had an entitlement to a full basic State Pension, this compared with only 30 per cent of women. The introduction of Pension Credit has improved the position of women, with two-thirds of recipients being female (White Paper, 2006). As a result of changes to the basic State Pension it is expected that around three quarters of women reaching State Pension age in 2010 will be entitled to a full basic State Pension, compared with around half of women who would have been without the changes. It is estimated that over 90 per cent of women (and men) reaching State Pension age in 2025 will be entitled to a full basic State Pension.

However, in the meantime at least, in making the Pension Credit non-exportable women are indirectly discriminated against.

2. Relationship between the rules of Directive 2004/38 and Regulation 1612/68 for frontier workers

There is a EURES (European Employment Services) Cross-border Partnership between Northern Ireland and Ireland to facilitate cross-border frontier working between the two countries. The Partnership aims to increase the pool of labour for employers and job opportunities for workers through providing information to employers on a range of cross-border recruitment and employment issues and to frontier workers and potential frontier workers on employment and training opportunities across the border, and the potential impact of cross-border employment on tax and social security obligations and entitlements. The Partnership covers the whole of Northern Ireland and the border counties of the Republic of Ireland (Cavan, Donegal, Leitrim, Louth, Monaghan and Sligo). The organisations involved in the Partnership are:

- An Foras Áiseanna Saothair (FÁS)
- Confederation of British Industry (CBI)
- Department for Employment and Learning (DEL)
- Dundalk Chamber of Commerce
- Irish Business and Employers Confederation (IBEC)
- Irish Congress of Trade Unions (ICTU)
- Londonderry Chamber of Commerce (See www.eures-crossborder.org).

There is no similar arrangement between Gibraltar and Spain.

3. Existing policies, legislation and practices of a general nature that have a clear impact on free movement of EU workers

The UK has changed its system of admission for employment and self employment from a work permit scheme to a points based scheme. The new system has been in effect since November 2009 and is gradually bedding in. For more information see UKBA <http://www.ukba.homeoffice.gov.uk/employers/points/>. The points based system is founded on the principle that there is a sponsor (the employer) who is registered with UKBA and then

makes the application. For students the same format is applied but it is the school or university which is treated as the sponsor. Failure on the part of the third country national to comply with conditions on leave to enter and remain in the UK may result in the sponsor being subject to sanctions including regarding the capacity to be a sponsor for future third country nationals.

3.1. Integration measures

For EU nationals, integration measures in the immigration/citizenship system only apply if the individual seeks to naturalize as a British citizen. In such a case the person must pass the test 'Life in the UK' or attend a combination of language and citizenship classes.⁵⁷

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

There is no specific legislation which establishes the Union preference principle in the UK. It is by virtue of the application of free movement of persons rules that this preference is achieved.

3.3. Return of nationals to new EU Member States *Bernard Ryan Kent University*

This question is taken to refer to nationals of the new member states who lack status in the United Kingdom. This will arise when they are outside the period of initial stay of three months, without being a worker, self-employed, a student, self-sufficient, a permanent resident, a family member of one of those, or without having leave given under general immigration law (the Immigration Act 1971).

Legal provisions

Nationals of the new member states who lack status are covered by the general provision in Regulation 19(3) of the Immigration (European Economic Area) Regulations (SI 2006 No 1033), according to which

“an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if– (a) that person does not have or ceases to have a right to reside under these Regulations ...”

It is provided in Regulation 19(4) that “a person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.”

Regulation 24(6) provides that a person to be removed shall be allowed one month to leave the United Kingdom, beginning on the date on which he is notified of the decision to remove him, before being removed pursuant to that decision”. There are exceptions to this principle “in duly substantiated cases of urgency”; “where the person is detained pursuant to the sentence or order of any court”; and where the person has entered the United Kingdom in breach of a deportation order or an exclusion order.

⁵⁷ http://www.lifeintheuktest.gov.uk/htmlsite/background_10.html

4. National organizations or non-judicial bodies to which complaints for violation of Community law can be launched

Depending on the type of complaint which the individual has, there are a number of bodies both official and non-governmental which may be able to help. First there is the Parliamentary Ombudsman's office⁵⁸ which can assist with maladministration issues. There are a number of other ombudsmen, for instance in financial services and banking⁵⁹ or the Adjudicators Office for Customs and Excise which can assist with VAT problems.⁶⁰

In the non-governmental sector, there are a number of national organisations which provide advice and assistance to individuals with legal problems including EEA nationals. The most important among these are:

- Citizens advice bureaux – this consists of a national umbrella organization and a national network of offices which provide free legal and financial advice to individuals,⁶¹
- The AIRE Centre – this is a specialised legal advice agency which provides advice and assistance on issues of EU and human rights law;⁶²
- The Joint Council for the Welfare of Immigrants – a body which campaigns for just immigration laws and also provides assistance to individuals;⁶³
- The UK SOLVIT office;
- The Child Poverty Action Group – provides information on access to social benefits but does not normally take on individual cases.⁶⁴

Free legal advice centres or clinics also provide services in respect of immigration. However, they normally have a catchment area which is consistent with the local authority which funds them.⁶⁵

5. Seminars, reports and articles

Seminars

On 11 June 2009, the Immigration Law Practitioners Association held an anniversary seminar on 31 Years of Free Movement of Workers in the UK. The speakers at the event included a designated immigration judge, the assistant director of the EEA projects team at UKBA, the director of a non-governmental organisation engaged in free movement of workers, an administrator from the European Commission and lawyers. The event was designed for lawyers and other advisers to individuals and focused on the legal issues around the realisation of free movement of workers. This seminar formed part of the European Commission's

58 http://www.ombudsman.org.uk/improving_services/special_reports/pca/improving_public_service/12-hmcs1.html

59 <http://www.financial-ombudsman.org.uk/>

60 <http://www.adjudicatorsoffice.gov.uk/pdf/ao1.pdf>

61 <http://www.citizensadvice.org.uk/>

62 <http://www.airecentre.org/>

63 <http://www.jcwi.org.uk/aboutJCWI>

64 <http://www.cpag.org.uk/>

65 <http://www.lawcentres.org.uk/>

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funded network activities on national implementation of free movement of workers. More than 40 participants attended the event.

The same association hold regular training courses for legal practitioners on EEA law. Courses were held on 25 March, 20 April 2010; 5 November, 18 October and 15 July 2009. Another provider of training, CLT, a commercial company also provided some training for advisers.

The main immigration law journal is the Journal of Immigration, Asylum and Nationality Law (published by Bloomsbury Professional). In 2009 the following articles were published which engaged issues of free movement of workers:

Berry, E 'The deportation of 'virtual national' offenders: The Impact of ECHR and EU Law' Vol 23 No 2 [2009] 206 – 208. This article reviews the UKBA policy on expulsion in the light, inter alia of EU obligations.

Donegan T 'Commission enforcement action against EU Member States for unlawful usage of premium telephone lines' Vol 23 No 1 [2009] 8 – 10.

Kubal A 'Why *semi-legal*? Polish Post-2004 EU Enlargement migrants in the United Kingdom' Vol 23 No 3 [2009] 229-230.

Peers, S 'Turkish visitors and Turkish students: New rights from the European Court of Justice' Vol 23 No 2 [2009] 197 – 203.

Books published this year included:

Burrell, K *Polish Migration to the UK in the 'New' European Union After 2004* Ashgate, Farnham, 2009.

Currie, S *Migration, work and citizenship in the enlarged European Union* Ashgate Farnham 2008.