REPORT
on the Free Movement of Workers in the United Kingdom in 2010-2011

Rapporteurs: Catherine Barnard, Cambridge University
Elspeth Guild, Radboud University Nijmegen
Alison Hunter, Wesley Gryk & Partners
Jonathan Kingham, Kingsley Napley solicitors
Richard Parrish, Edge Hill University
Steve Peers, Essex University
Simon Roberts, Nottingham University
Bernard Ryan, University of Kent
Helena Wray, Middlesex University

October 2011

Contents

Chapter 1 – Entry, Residence and Departure

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) 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/sitecontent/documents/policyandlaw/ecis/

Admission and Exclusion

In 2011 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. As noted in previous years, the 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* where the European Court of Justice held that unpublished rules could not be invoked to justify interferences with the free movement of persons.

The Regulations 2009, now provide wide 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.

There have been no significant developments in relation to exclusion over the last twelve months.

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, it generally remains the case that 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. The Pilot Scheme in relation to removing homeless EEA nationals that commenced in 2010 is continuing, more details of which are below; this is currently confined to the most destitute in several boroughs but may be rolled out to the rest of the UK in due course.

The issue of work seekers' access to social benefits is dealt with in full in Chapter IV.

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.

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

Article 7(3)(a) to (d) Retention of worker status
These are transposed by Regulations 6(2) (a) to (d).

In *FMB (EEA reg 6(2)(a) – 'temporarily unable to work') Uganda*[1] the Upper Tribunal upheld the first instance Immigration Judge's finding that temporarily unable to work simply means any incapacity that is less than permanent; the length of period of incapacity is not determinative. Following a period of work, the claimant's father had been too ill to work for four years, until his condition stabilized following successful medication, and he then commenced studying. He did not lose worker status throughout his period of incapacity.

Articles 8(3) and Article 10: Processing of EEA registration certificates and cards
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 sup-

1 [2010] UKUT 447 (IAC)

porting documents are submitted. Regulation 18 confirms that documents certifying permanent residence should be issued 'as soon as possible'.

Last year's report noted the changes in the UKBA's EEA application procedures implemented in June 2009 to try and deal with the ongoing issue of delay in applications, and particularly the difficulties being encountered by applicants and representatives in relation to the new pre-sift procedure. In many cases this was actually making the application procedure slower as valid applications were being regularly returned as invalid, sometimes repeatedly, due to the lack of understanding of EU law by the UKBA staff undertaking the pre-sift process. Since then the UKBA have continued to try and address the issue of delay and brought in a new Chief Caseworker who had previously overhauled the Nationality department to review the workflow systems and bring in efficiencies.

A new system of template minute sheets which assist caseworkers in standardizing decision procedures was implemented, and draft copies circulated to practitioners.

Practitioners are reporting that procedures for the return of passports for urgent travel are now working more quickly and smoothly than before (though of course they would prefer that in line with the Directive applications are decided quickly on receipt rather than this procedure being required). Previously it could take several weeks for a passport to be returned for urgent travel, now if the UKBA accept that it is a priority case they can usually be turned around in one week. There is now published guidance (ECI chapter 10) both on criteria for deciding cases on a priority basis and on return of documents. There has also been a welcome change in the procedure on endorsement where a passport has been returned to the applicant for travel where an application is still pending. This will now be done as a standalone document rather than the passport being re-requested for endorsement.

The UKBA website now states that all EEA applications will be decided within six months, and practitioners are reporting that most applications now take around four months to be decided, which is a considerable improvement on the previous situation. However, four months is still a significant amount of time for a right of residence to be confirmed. The practical effect of this delay is dealt with below in the chapter on family members as regards difficulties for family members obtaining work, and it remains the case that EEA nationals and their family members who require to travel regularly for their work will still consider utilising 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.

Unlike applications under national law, EEA applications do not requirement payment of a fee.

In the last year the UKBA announced a consultation on whether to introduce a premium (same day) service for certain EEA applications, including residence cards and permanent residence, at their Public Enquiry Offices. A suggested application fee of £300 was mooted for this. The Immigration Law Practitioners Association have written to the UKBA to ask what the basis of the legal advice they have been given is to justify this charge given that this in excess of the price of a premium passport for UK nationals (being the closest national equivalent).

Finally on the issue of applications, an ongoing study was undertaken last year by a group of practitioners on behalf of the Immigration Law Practitioners Association on the questions and documents asked for EEA applications made in and out of the UK. The results showed clearly that a number of unnecessary questions and documents are requested in these forms that go beyond the requirements of the Directive. Perhaps the worst offender is the EEA family permit online application form which is based on the standard visitor visa appli-

cation form for non-EEA nationals and which asks very many detailed intrusive questions about an individual's family members, their employment and finances, all of which have nothing to do with their right to enter and reside in the UK under the Directive. These studies are being sent to the UKBA as they are prepared.

2. SITUATION OF JOBSEEKERS

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 a 'qualified' person' including job seekers, workers, the self-employed, the self-sufficient and students.

Regulation 16(4) defines 'jobseeker' as a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

An Asylum and Immigration Tribunal decision in AG and Ors (EEA-jobseeker-self-sufficent person-proof) German [2007] UKAIT 00075 confirmed the standard position that an EEA national seeking work has an initial right of residence for six months, but that can be longer if they are genuinely seeking work and have a reasonable chance of being engaged.

Chapter 3 of the ECIs states that 'A 'qualified person' may also be a *jobseeker*, although the EEA national must be able to show evidence that s/he is seeking employment and is also able to show a genuine chance of being engaged in employment. We would generally expect a jobseeker to obtain employment within 6 months of beginning his/her search. It is highly likely that an individual claiming a right of residence as a jobseeker will also be exercising Treaty rights as a self-sufficient person. Jobseekers have no entitlement to access social assistance of the host member state (Article 24(2) of the Directive refers), although they may in certain circumstances be able to import benefits from their home country, which would then be paid to them in the UK by DWP.'

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.

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.

In practice, it generally remains the case that 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.

There is no specific transposition of Article 14(4)(a) and (b). Regulation 19(3)(a) provides for the removal of an EEA national where they do not have or cease to have a right to reside under the Regulations (ie as a 'qualified person'). The Pilot Scheme in relation to removing homeless EEA nationals that commenced in 2010 is continuing, more details of which are below; this is currently confined to the most destitute in several boroughs but may be rolled out to the rest of the UK in due course.

The issue of work seekers' access to social benefits is dealt with in full in Chapter IV.

Transfer of residence card or stamp:

Problems continue to arise on the expiry of passports. The UKBA website 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 length of time for decision as mentioned above. The same position applies for transferring permanent residence endorsements

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. The case of *GN (EEA Regulations: Five Years Residence) Hungary*[2] (referred in previous reports) remains the stated position in UKBA guidance.

In *Secretary of State for Work and Pensions v Taous Lassal*[3] the CJEU held that continuous periods of five years' residence completed before the date of implementation of Directive 2004/38, in accordance with earlier EU law instruments, will count towards acquiring permanent residence. Also, that permanent residence acquired in that way will not have been lost by absences of less than two years prior to the date of transposition.

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.

Article 17 is transposed accurately by Regulations 15(1)(c) to (e) and 5(1) to (7).

As regards Article 24 – the right to equal treatment, UK universities accord study **loans** on evidence 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

2 [2007] UKAIT 00073
3 Case C-162/09

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 our last report we noted the commencement of a pilot project by the UK Border 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. We noted that this was likely 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 (whose nationals have more restricted access to benefits than EU15 nationals- see below). The pilot project ('No One Left Out: Communities Ending Rough Sleeping') continues; and a freedom of information request from the AIRE centre revealed that as at June 2010 116 individuals had been served with 'minded to remove' letters, 40 with immigration decision notices and 13 were administratively removed following the intervention of the police/UKBA. These include EU2, EU8 and EU 15 nationals. The project is being monitored by the AIRE Centre, ILPA and the Migrants Right Network who in a joint letter to the Department of Communities and Local Government of 12 August 2010 wrote that from the cases they had heard of 'the UK Border Agency's typical approach to these matters is limited to identifying rough sleepers as EU nationals and then serving them with a notice to report within two weeks to a police station with evidence that they are either in employment or education. The persons asked to report appear to be informed that the inability to provide assurances of engagement in either employment or education within this time span will mean that the individual concerned cannot rely on any rights under EU law and will be liable for removal from the UK.'

The project is currently confined to a limited number of boroughs including Peterborough and Westminster but those organizations which are monitoring it understand that it is intended to be rolled out to the whole of the UK subject to final evaluation. Most attempts by these organisations to (i) provide representations as to the lawfulness of the scheme or (ii) to obtain information including as to how the pilot is being implemented, whether there is any internal guidance on this or advice as to its legality have been rebuffed and the UKBA's refusal to provide the latter as exempt information is currently subject to a complaint to the Information Commissioner. The project still appears to be primarily a policy response to alleviate street homelessness rather than a generic attempt to remove non-economically active EEA nationals. However, the manner of its implementation (both the unwillingness of the UKBA to engage with stakeholders and the cases seen where there does not seem to have been any regard to proportionality or significant attempt to ascertain any of the specific circumstances of the individuals concerned and whether they can be assisted to become economically active without removal) are highly concerning- particularly in the context of Article 14 (b) of the Directive.

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 county 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 have been heard by the First and Upper Tier Tribunals (Immigration and Asylum Chambers) which now form part of Her Majesty's Courts and 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.

3. SITUATION OF ROMA WORK SEEKERS

The situation of EU nationals of Roma ethnicity who have exercised their rights of free movement to come and find work in the UK was the subject of two detailed research reports in 2009: 'the situation of Roma EU citizens moving to and settling in other EU Member States'[4] and 'the movement of Roma from new EU Member States: A mapping survey of EU-2 and EU-8 Roma in England'.[5]

These reports note that a significant number of individuals and families of Roma ethnicity came to the UK following the Accession of the EU-8 in 2004 (including Roma from Hungary, Czech Republic and Slovakia) and then that of Romania and Bulgaria in 2007. In common with Roma emigration to other Member States following enlargement, the primary 'push factors' were to escape discrimination and poverty in countries of origin. One main 'pull factor' towards the UK was a perception that it was a country which was generally racially tolerant and which respected human rights. Most Roma who were surveyed confirmed that their overwhelming desire when coming to the UK was to gain work in the formal economy.

In some areas of integration the situation in the UK came up more positive than in many of the other member states: there were few problems at the border reported, or in access to healthcare or schooling- indeed some of the UK's policy responses in relation to the education of EU Roma children were highly praised in the reports. The position as regards public attitudes and discrimination levels generally is mixed, however. At their worst, the reports note the series of attacks against approximately 100 Roma of Romanian origin in Belfast in 2009 (after which the Northern Ireland government paid most to return to Romania), overt campaigning against Roma by the far-right BNP party, and also racism and xenophobia in some parts hampering access to employment. In some circumstances xenophobic attitudes encountered were often against Eastern Europeans in general as opposed to specifically anti-Roma.

However, they also note that many Roma found the UK a tolerant place where they were respected by those in authority.

4 November 2009 - prepared by the European Roma Rights Centre and published by the EU Agency for Fundamental Rights

5 August 2009 - prepared for the UK Department of Children, Schools and the family by European Dialogue

The issues of real difficulty to EU national Roma seeking work in the UK are those of accessing work, and social assistance while looking for work. As they are largely seeking work within low skilled sectors, they have found themselves particularly hard hit by the labour market restrictions imposed on EU-8 and EU-2 nationals.

As noted elsewhere in this report there is no housing or social assistance available to EU-8 or EU-2 nationals unless they have worked in continued authorised employment under respectively the Worker Registration Scheme for EU-8 nationals or the various employment options to EU-2 nationals for 12 months (there are some exemptions, but these will not apply to most Roma who arrived after the relevant date of accession).

For nationals of EU-8 countries, who are able to work without restriction but who must register this within one month under the Workers Registration Scheme, one significant problem highlighted by the reports is dependence on accessing work through temporary employment agencies for low skilled jobs. In some cases exploitation of EU-8 Roma workers by agencies or employers was reported including keeping people on temporary contracts and paying low wages. This problem is exacerbated by the Workers Registration Scheme restrictions, which for example require a degree of employer involvement with the registration process. Also, there continues to be a level of ignorance amongst both A8 nationals and employers in the low skilled sector/gangmasters about the registration requirement. The WRS will end in April 2011.

For EU-2 nationals the starting position is far more difficult, the only legal employment in most cases is short term agricultural or food processing work under the Seasonal Agricultural Worker Scheme.

The unfortunate picture shown by the reports is that many EU-2 and EU-8 Roma have found themselves in low paid and unstable unemployment, or, with no access to work in the formal economy or to housing assistance or social assistance, working in the black economy or not at all- with homelessness and exploitation by private landlords a problem for many.

One of the writers of this chapter spoke with one of the authors of the above reports who works in a Roma support NGO and she confirmed that the position in 2011 remains largely the same.

Chapter II: Family members

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 remained un-amended and did not take account of *Metock* until May 2011. Throughout 2011, this remained a failure to comply with the good faith obligation and the result was that the law indicated that national Immigration Rules apply to family reunification of EEA nationals exercising Treaty rights in the United Kingdom. In a letter dated 24 June 2010, Damian Green, the immigration minister, indicated that he would be reviewing the legislation to establish whether it was compliant with *Metock.* Officials in the UK Border Agency have indicated that they intend to change the Regulations and the amendment was finally made in SI 2011/1247 which entered into force on 1 June.[6]

As set out in last year's report, the higher courts have had few problems interpreting *Metock* in relation to Article 2(2) family members and have embraced it fully.

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. Although the UK courts have found that other family members (OFMs), applying under Article 3(2), are covered by the finding in *Metock* and prior lawful residence within the EEA is not a requirement, the UK government does not accept this.

The Immigration (EEA) Regulations 2006 and the instructions to caseworkers require that the condition of prior residency or dependency must have been met in another EEA state in which the EEA citizen also resided. This is arguably a double gloss on the words in Article 3(2) ('in the country from which they have come'). Other aspects of Article 3(2) have continued to cause difficulty in the courts as the government has asserted a more restrictive interpretation. The Upper Tribunal (Immigration and Asylum Chamber) (in *MR and others (EEA extended family members) Bangladesh* [2010] UKUT 449 (IAC)) has now made an Article 267 reference to the CJEU for determination of the following points:

- Does the obligation in Article 3(2) to 'facilitate' entry of OFMs require national legislative provision?
- If an OFM cannot comply with national legislative provisions, can he/she rely on the direct applicability of Article 3(2)?
- Does Article 3(2) require the OFM to have resided in the same country as the Union citizen and his/her spouse before the Union citizen came to the host state?
- Must 'dependency' have existed shortly before Union citizen moved to the host state?

6 It provides: '(3) In regulation 8, at paragraph 2(a) for 'an EEA State' substitute 'a country other than the United Kingdom'. (4) In regulation 12, for paragraph (1)(b) substitute—'(b)the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there.'

- Can the member state impose requirements on the nature or duration of dependency to prevent it being contrived or unnecessary?
- Must dependency continue after entry to the member state?

In relation to durable relationships, the Home Office usually applies the criteria applicable under the domestic rules including a requirement for two years prior cohabitation. The guidance to officials has been updated and now admits the possibility of a durable relationship being evidenced in other ways, for example through a joint child (European Casework Instructions 5.3.1).

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 Home Office and guidance to immigration officers and entry clearance posts makes it clear that abuse should be considered in all applications. We are not aware of any formal statistics showing an increase in house raids although anecdotal evidence suggests that they have increased. There has also been increased publicity about sham marriages. Home Office officials have mentioned that the number of marriage interviews conducted with spouses of European nationals is likely to increase once the backlog of European applications has been dealt with.

The position in relation to people entering into marriage or civil partnership who are subject to immigration control in practice 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 Home Office and give notice at a designated register office. Assuming the necessary order is approved by parliament, the scheme will be abolished on 9th May 2011. For some years, the scheme has operated in attenuated form although the statutory exception for Church of England marriages, found unlawful in both the domestic courts and the ECtHR, remained in force. The ECtHR judgment, *O'Donoghue v UK* opened the way to damages claims by EEA citizens, UK nationals and their third country spouses who were wrongfully refused permission to marry particularly if this happened after the scheme was first found unlawful in 2006.

In terms of retained rights applications, the position in relation to *Baumbast* remains that the Home Office is taking a strict line on interpreting these cases. The current guidance does not recognise the right of a child to remain for education in accordance with Article 12 Regulation 1612/68 as explained by the CJEU in *London Borough of Harrow v Ibrahim* Case- 310/08. It does not acknowledge that the right to remain for education crystallises when the child installs him or herself as a family member of an EU worker and continues even if the worker subsequently ceases work. The Upper Tribunal recently found that, for the purposes of the right to permanent residence, time runs from the time education begins while seeking employment was insufficient to engage Article 12 1612/68(*MDB and others v SSHD* [2010] UKUT 161 (IAC)).

In relation to retained rights after divorce, the Home Office is still insisting that for the one year period that the couple have been in the United Kingdom, that they show that they have cohabited although at Tribunal level, immigration judges appear to be accepting that the couple do not have to have cohabited but need purely to have been officially married. The Home Office 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 Home Office is not willing to use their powers to check national insurance or tax

records to aid the applicant given the capacity constraints that they have and their understanding of the burden of proof.

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 Europe 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 UK's Court of Appeal has 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). That decision was distinguished by the Upper Tribunal (*MAH (dual nationality – permanent residence) Canada* [2010] UKUT 445 (IAC)) on the basis that the dual citizen in *McCarthy* had never worked and therefore had not exercised rights as an EU citizen. The judgment in *McCarthy* is, of course, awaited but the recent decision in *Zambrano* may have repercussions in this area also as may the decision in *Lassal* which offers a broad interpretation of 'permanent residence'.

The government has dealt with the *Chen* judgment through amendments to the immigration rules. A recent Upper Tribunal case suggested that there is a right under EU law of the parent carer to enter (not just to remain) subject to meeting the conditions implied in *Chen.* Consequently, a family permit is the appropriate mechanism (*M (Chen parents: source of rights) Ivory Coast* [2010] UKUT 277 (IAC). Consistent with UK case law, the leave that is currently granted precludes employment or recourse to public funds. In light of the concerns raised by the Commission in relation to the restriction of the UK immigration rules to allow parents in *Chen* type scenarios to work and its incompatibility with Article 23 of Directive 2004/38/EC, we understand from UKBA that this is to be amended and *Chen* parents will be allowed to work. No time frame for the change to the Immigration Rules has been announced. Questions of parental self-sufficiency and right to work must now be even more in question following *Zambrano.*

Unlike other EU states, the UK Border Agency is yet to comment on *Zambrano* or give guidance on how it is to be implemented. The rights of citizen children to live in the UK with their non-citizen parents was strengthened through a recent interpretation of the domestic law (*ZH (Tanzania) v SSHD* [2011] UKSC 4 but the findings in *Zambrano* go further and it is likely that policy towards such children will have to be substantially reviewed. It can

only be assumed that the officials will be concerned about the possible repercussions of the case, particularly if it is given a meaning which would widen European citizenship (and therefore European rights) to British citizens, other than just British children in the United Kingdom. There is the potential for undermining much of the current restrictive domestic immigration regime controlling the entry of spouses and other relatives although presumably it would be necessary to show that the presence of these relatives is necessary to ensure the citizen's enjoyment of their EU citizenship rights.

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 being 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 to obtain 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.

The guidance for family permits has raised concern among practitioners. The guide to supporting documents requests documents from applicants which are not relevant to the assessment of whether somebody should qualify for an EEA family permit and is misleading. So for example, the application form requests information about and evidence of an applicant's current employment or studies and information about accommodation in the United Kingdom. Applicants also have to supply biometric information.

Residence Cards

Although there has been some improvement in turnaround times from the date of application to issuing of these cards, delays still regularly hit the six month mark, particularly if the application is in relation to an extended family member or retained rights. There is no culture within the Home Office of needing to deal with these applications in line with similar applications for British nationals and in fact, the Home Office sees the six months as a deadline and pulls applications routinely to try to avoid the six month deadline (rather than establishing systems which avoid this length of delay occurring). In a letter to the Immigration Law Practitioners' Association in August 2010, the UK Border Agency stated that 78.96% of cases were being dealt with within 6 months.

The forms on the Home Office website which cover applications for registration certificates as well as residence cards are flawed. These are not compulsory but the Home Office encourages their use. Most of the forms request more information than Article 8, Directive 2004/38 would allow. Within the forms there is also a request to disclose any criminal record. Initially this was not prefaced with the current caveat but has recently been amended and now states:

> 'Please provide details as requested below of any criminal convictions you may have both in the UK and overseas. However, please note that should you fail to provide this information this will not result in the rejection of your application.'

Quite clearly the expectation is that this should be completed and it is of concern to consider how the matter is dealt with if the section is left blank. There is no provision to ask the EU national or their family members for this information and if a Member State should consider it essential to ascertain whether a person is a danger for public policy or public security, the host member state should request the information from the state of origin of the applicant.

Third country nationals are often being asked for evidence by the Home Office 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 Home Office is routinely writing to ask for updated information about, for example, the EEA national working.

The Home Office's 'pre-sift' system remains in place. This means that once the application arrives at the Home Office, the enclosures are checked to see what has been included. The application is not logged at the Home Office but returned to the applicant and would need to be resubmitted. Once the application has passed this pre-sift, certificates of application are sent out. At times throughout 2010, applicants have had to wait in excess of four weeks to obtain the certificate of application. The UK Border Agency has suggested that a very high number of applications do not contain the correct documents. Of concern though, is if an applicant believes that an application is complete and is unable to pass pre sift. As the application is not logged and no substantive decision is taken, applicants can be left without a right of appeal and an adequate remedy.

The UK Border Agency is currently considering providing a same day service or express service for third country nationals to obtain residence cards. A free same day service to obtain a registration certificate currently exists in one place in the United Kingdom. The Home Office in September 2010 set up an online questionnaire to establish what type of service applicants would like and whether they would be prepared to pay for the service. The outcome of this consultation, including what type of provision and at what cost to the applicant has as yet not been announced.

Entry under MRAX

Generally, immigration officers are now 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. It is though not uncommon for applicants to be held for some time at the border for further checks to be carried out. The UK Border Agency continues to actively discourage this method of entering the United Kingdom and the letters sent back with passports which have been requested to enable travel, imply that this route is not open to visa nationals and that obtaining a family permit is the only method of re-entry to the United Kingdom. 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 Home Office 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. Given the relatively large number of decisions by the UKBA which are dealt with at around the 6 month mark or longer, this is a real issue of concern. The situation 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.

In relation to applications for third country nationals who are extended family members, the Home Office continues to send out letters of application which remain silent on the right to work. Therefore until a decision is taken by the Home Office in these applications, a third country national would in practice find it nearly impossible to work. The question of the right of OFMs to work is linked to the question, referred to the CJEU in *MR and others* discussed above, of the need for continuing dependency. The question of their positive and enforceable rights may also become clearer once the other issues raised in that reference have been clarified. In terms of A8 Europeans, there are no specific problems that we are aware of in terms of access to the labour market. The Home Office has however become increasingly stringent in ensuring that A8 nationals have complied with the requirements under the Worker Registration Scheme to register their employment for a year and to reregister if their employment changes during the first year of work. This has become apparent when third country national family members apply for residence cards and is in light of the findings of the House of Lords in *Zalewska v Department of Social Development* [2008] UKHL If the A8 national at any time did not comply with the registration requirements they are obliged to reregister which leads to a different registration process for the third country national family member than if they had worked for the year and were correctly registered. This inevitably leads to delays in obtaining documentation for family members.

The question of the right to work of parents in *Chen* type situations has been addressed above.

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 remains somewhat unclear and is of course affected by delays in dealing with applications. If applying for a residence card, the Home Office does require documentation to show that somebody is indeed looking for a job. One issue which can arise is that an applicant may find it difficult to pass the pre sift if they are unable to show that the EU national is working, self employed, self sufficient or a student. 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 Home Office 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. As discussed above, the children of job-seekers may not be able to remain in education under Article 12 Regulation 1612/68 if, in the event, work is not found.

This issue continues to affect A8 nationals. The Home Office is continuing pilot schemes approaching particularly homeless A8 nationals who are not in work and requesting that they leave the country within one month if they are not able to prove the exercise of Treaty rights. This will presumably also affect their family members.

Permanent Residence

The Regulations and guidance do not reflect the implications of the CJEU's decisions in *Lassal* and the Attorney General's opinion in *Teixeira* for defining lawful residence. The Regulations provide that permanent residence is conditional on five years' residence by the Union citizen 'in accordance with these Regulations'. The Directive requires only 'lawful residence' and it is not apparent that this must be through the exercise of the specific free movement rights in the Directive. While the non-EEA family member must still 'legally reside' with the Union citizen for five years, it is arguable that the regulations governing the Union citizen's residence do not reflect the purposive approach of *Lassal* to the possible disadvantage of family members particularly when it interacts with other domestic requirements that are arguably too narrow. For example, in *FK (Kenya) v SSHD* [2010] EWCA Civ 1302, the family member's claim for permanent residence failed because the Union citizen did not have sickness insurance throughout her stay, a requirement that is anyway questionable. The Upper Tribunal has recognised that 'residing with' does not require cohabitation including for spouses (*PM (EEA – spouse – 'residing with') Turkey* [2011] UKUT 89 (IAC).

Chapter 3: Access to employment

Text(s) in force
Equality Act 2010
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).

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

1.1 Equal treatment in access to employment (eg assistance of employment agencies)

The *European casework instructions* (http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/) contain guidance and information for caseworkers dealing with European applications under the Free Movement of Persons Directive (2004/38/EC). However, they focus primarily on entry and residence 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://backtowork.direct.gov.uk/index.html?PRO=emc&CRE=Jobs 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

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 (http://ec.europa.eu/eures/home.jsp?lang=en) (EURES). Under the Equality Act 2010 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.55 of the Equality Act 2010 employment agencies cannot discriminate on racial grounds which includes nationality.[7]

Equally, employers are not allowed to discriminate on the grounds of nationality either in respect of the arrangements they make for the purposes of determining who should be offered that employment or the terms on which that employment is granted or by refusing or deliberately omitting to offer employment.[8] Section 13 Equality Act 2010 prohibits direct discrimination on racial grounds and s.19 prohibits indirect discrimination. Race is identified as a protected characteristic in s.4 Equality Act 2010, racial grounds are defined in s. 9 as to include colour, nationality, ethnic or national origins. The reference to colour and nationality, which was found in the original Race Relations Act 1976, shows that the British legislation is broader in scope than the EU's Race Directive 2000/43.

7 On nationality, see *BBC Scotland v Souster* [2001] IRLR 150.
8 S.39(1) Equality Act 2010.

The original Race Relations Act 1976 applied to all those employed at an establishment in Great Britain (s.8). The Equality Act 2010 has removed the territorial limitation.

1.2 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.

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

2.1 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 give a restrictive interpretation by the Court of Justice. Generally, EEA nationals can be employed in all jobs in the public sector[9] except for reserved posts.[10] As we saw in last year's report, the UK government has tightened up the rules on reserved posts. These are defined in the Order in the following terms:[11]

> (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

9 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.

10 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.'

11 The Order makes equivalent amendments for Northern Ireland.

(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;
(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.[12] 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'.[13] It continues '3.2 Under no circumstances may any other nationals be employed in reserved posts.'[14] 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 Office[15] unless the responsible Minister decides otherwise in relation to a specified post or posts.

12 http://www.civilservice.gov.uk/jobs/Background/Nationality-Requirements/Nationality-Requirements.aspx
13 Para. 3.1.
14 Emphasis in original.
15 Except for those local staff in FCO posts abroad. These posts are open to persons regardless of their nationality.

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.[16]

2.2 Language requirements

See 1.2 above.

2.3 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:[17]

> *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.

See also the civil service's 'professional skills for government competence framework' [18] which is used for jobs and careers in the Civil Service. It sets out the skills that staff in the Civil Service need to do their job well, at all levels and no matter where they work

16 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
17 https://www.civilservicecommissioners.org/web-resources/resources/bb402f5120e.pdf
18 http://www.civilservice.gov.uk/about/improving/psg/index.aspx

3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

There is no *concours* system in the UK although there a civil service exam.[19] For regulated professions, the relevant professional requirements will be required (eg being a solicitor or barrister).[20]

19 http://www.civilservice.gov.uk/jobs/Entry/index.aspx.
20 http://www.gls.gov.uk/.

Chapter 4: 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 (TUC) is worried about the treatment of EU8 workers and it has continued its campaign to ensure that these workers are aware of their rights under UK labour law. [21]

1.1 Recruitment procedures

The procedures for applying to the civil service are clearly set out on the web: see eg http://beta.civilservice.gov.uk/jobs/faststream/index.aspx

1.2 Recognition of diplomas

EU law places various requirements upon Member States as regards the recognition of professional qualifications and experience. Where a qualification is a precondition for the practice of a profession in a member states, equivalent qualifications obtained in other Member States must be accepted. Where there are differences between qualifications as to duration and content, there is an obligation to make an individual assessment of an applicant's rele-

21 http://www.tuc.org.uk/extras/migrantchallenges.pdf

vant professional experience which the individual has obtained.[22] In any event, recruitment processes must permit an applicant's professional qualifications and experience obtained in other Member States to be taken into account.[23]

As I have pointed out in the past, there is room for disagreement as to the extent to which the above principles apply to public sector recruitment. Firstly, it is unclear whether these requirements govern not only Member States rules on access to professions, but also the recruitment policies of parts of the public service. If recognition is to be required in recruitment, this is perhaps because of the principle of non-discrimination on grounds of nationality, rather than the specific principle of recognition of qualifications. Secondly, to the extent that recruitment practices are governed by recognition obligations, it is unclear whether that is the case for the exempt section of the public service. While the Court of Justice in *Burbaud* appeared to treat it as significant that the career in question there was non-exempt,[24] the point cannot be taken to be resolved.

In the case of the UK, the system of public service recruitment is open to criticism for the lack of published requirements as regards the recognition of qualifications and experience. That said, if it is thought that a refusal of recognition amounts to unjustified indirect nationality discrimination, there is the possibility of legal action under the Equality Act 2010.

1.3 Recognition of professional experience for access to the public sector

This is not spelled out. There is no evidence of the UK having rules, found in some Member States, giving candidates additional points for having done military service or equivalent in the UK.

2. SOCIAL AND TAX ADVANTAGES

2.1 General situation[25]

Social advantages

Housing

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, 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.

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

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

24 *Ibid*, para 40.

25 Much of what follows draws on Chapter IV: Equality of treatment on the basis of nationality drafted by Elspeth Guild and Dr Simon Roberts for the 2008-9 report.

'Rough sleepers' are emerging problem. 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. The UK Border Agency has indicated that it is cracking down on these persons with the sanction of expulsion. According to the *Guardian,* more than 200 rough sleepers in the pilot project have been considered and over half have been served with removal notices.

In *Lekpo-Bozua v London Borough of Hackney* [2010] EWCA 909 the Court of Appeal rejected any attempts to use Article 21 TFEU to qualify the strict rules of UK law on housing need in the case of a student who did not satisfy the requirements of Article 7(1)(c) of Directive 2004/38 on sufficient resources.

Social assistance and social advantage

The position is less clear as to 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. 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.[26] The UK courts have held that lawful presence in the UK is not the same as a right to reside.[27] 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. This means that EEA nationals are likely to be refused social benefits in the UK unless they can show that they have a positive qualifying right to reside within the terms of the relevant benefit regulation.[28] Job seekers are unlikely to satisfy that test.

Tax advantages

As regards tax advantages, regulation 3(5) of SI 2003/654 Tax Credits (Residence) Regulations 2003 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 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.[29]

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

26 Regs 6 & 14 SI 2006/1003.
27 *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657.
28 I Macdonald QC & R Toal, *Macdonald's Immigration Law and Practice* LexisNexis London 2009, pp 312-313.
29 http://www.hmrc.gov.uk/cnr/nr_landlords.htm

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.

From 6 April 2011 the UK tax authorities have changed the rules applicable to the offsetting of losses on holiday accommodation which UK tax residents let out as a business activity. UK tax payers will no longer be permitted to offset losses from this business activity against profits from income sources other than that related directly to the property. The new rule is non-discriminatory in that it applies to all relevant property irrespective of where in the EU it is. However, there are exceptions for some business activities.

2.2 Specific issue: the situation of jobseekers

Regulation 13 of the 2006 Regulations makes provision in UK law for the initial right to reside for up to three months, subject to the public policy, security or health provisos and the requirement not to become an 'unreasonable burden on the social assistance system'. Regarding a person residing in the UK beyond the initial three month period, Regulation 14 provides an extended right of residence for, among others, a 'qualified person' so long as he or she remains a qualified person. Such a qualified person is defined by Regulation 6 to include a jobseeker, a worker, a self employed person, a self-sufficient person and a student.

In practice, jobseekers are not subject to specific immigration related obstacles regarding their residence so long as they do not have third country national family members. However, their access to social assistance is limited. The main benefit for jobseekers is Job Seeker's Allowance (JSA), eligibility for which is determined either by reference to the prior payment of national insurance contributions (contribution-based JSA) or on a means-tested basis (income-based JSA).[30] However, some EU citizen/EEA national jobseekers, for example lone parents, may be registered as looking for work but they are paid Income Support rather than Jobseeker's Allowance.

An EU citizen/EEA national jobseeker who is being paid income-based JSA or Income Support is eligible to receive Housing Benefit and Council Tax Benefit as well. However, only income-based JSA (and not income support) is expressly available to EU citizen/EEA national jobseekers arriving in the UK to seek work (and even then only upon satisfaction of the habitual residence test). To establish jobseeker status, an EU citizen/EEA national arriving in the UK would have to provide evidence that he or she was seeking employment and had a genuine chance of being engaged. In summary, for an EU citizen/EEA national, arriving in the UK to seek work, income-based JSA (and thereby Housing Benefit and Council Tax Benefit) is available where the EU citizen/EEA national satisfies both the habitual residence test and the right to reside test (i.e. establishes jobseeker status).[31]

30 An EEA national seeking work as a jobseeker will have a right of residence where he or she enters the United Kingdom in order to seek employment and can provide evidence that he or she is seeking employment and has a genuine chance of being engaged. The period of this right of residence is usually at least 6 months but it may be longer. For most persons, entitlement to JSA is sufficient evidence that they have a genuine chance of being engaged, see CIS/1951/2008 [2009] UKUT 11 (AAC), para 21. See also: I Macdonald QC & R Toal, *Macdonald's Immigration Law and Practice* LexisNexis London 2011, pp 312-313.

31 Jobseeker's Allowance Regulations 1996, SI 1996/207, Reg 85A, Housing Benefit Regulations 2006, SI 2006/213, Reg 10 and Council Tax Benefit Regulations 2006, SI 2006/215, Reg 7.

From 1 May 2011 when the transitional arrangements for EU Accession State nationals from the A8 States end, those Accession State nationals will be in the same position as other EU citizens/EEA nationals and will be able to be hold jobseekers status in the UK. Thus they will be able to access income-based JSA (and thereby Housing Benefit and Council Tax Benefit). The position for A2 nationals from Bulgaria and Romania remains unaltered on and after this date and restrictions will still apply to them.

An EU citizen/EEA national jobseeker in the UK is not eligible for social housing or homelessness assistance, Housing Act 1996, ss 160A and 185, and the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, SI 2006/1294, Regs 4, 6. In addition, s 54 and Schedule 3, paragraphs 1 and 5 of the Nationality, Immigration and Asylum Act 2002 provide for the exclusion of an EU citizen/EEA national (jobseeker) from receiving assistance (including assistance with accommodation) under s 17 of the Children Act 1989 where he or she would fall to be assisted together with a child, though there is an exception under paragraph 3(b) if this exclusion would lead to a breach of a person's rights under the EU Treaties. In a 2005 judgment, *R (Conde) v Lambeth LBC*, the England and Wales 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 in 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.'[32] The findings in the case of *R(Conde) v Lambeth* as regards work seekers/jobseekers may require to be revisited in the light of the judgment in Cases C-22/08 and C-23/08 *Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*.

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

Chapter VI: Specific Issues

1. FRONTIER WORKERS

The main source of frontier workers for the UK is between the Republic of Ireland and Northern Ireland. Gibraltar remains a source of friction but attracted less attention in 2010. In the Republic of Ireland/UK context, access to social benefits and tax treatment are the most solicited of issues. The treatment of cars and driving licences is also a matter which has attracted some attention.

According to UK tax rules, income tax and national insurance contributions of UK residents are ultimately the responsibility of the UK authorities. While the frontier worker must pay tax in the country where he or she works, if he or she also lives in the UK then he or she must account for the income in the UK as well. For persons resident in Northern Ireland and working in the Republic, this means the individual will pay tax directly to the Irish authorities but be required to submit a tax return in the UK. The person will be eligible for credit or tax relief based on Irish tax paid on account of the Ireland/UK double taxation agreement. Where the individual lives in the Republic and works in the UK the situation is reversed –tax is paid initially to the UK then accounted for in Ireland. A special tax relief – Trans-border Workers Relief is available for these persons. There is an outstanding issue on whether a UK tax entitled Universal Social Charge must be treated as tax paid.

As regards Working Tax Credits, a UK social benefit paid through the tax system, frontier workers who live in other EU countries but work in the UK are entitled to the credit (though they must physically work in the UK not just work for a UK based employer). Applications for tax credits give rise to substantial numbers of complaints by EU nationals to the UK tax authorities. The North South Ministerial Council (an intergovernmental body) notes the existence of substantial complaints about (a) delay; (b) difficult to obtain information about a claim; (c) incorrect information. The North South Ministerial Council has established a dedicated website – Border People to assist frontier workers.

Cars also constitute a source of friction for frontier workers. While frontier workers are not required to exchange their licences, if an individual resides in the Republic for more than 185 days a year then he or she is deemed ordinarily resident there are should have an Irish driving licence. According to the North South Ministerial Council problems with car insurance are frequent notwithstanding Directive 2009/103 which establishes a single market for motor insurance. Differential rates for insurance on the basis of cross border activities have not yet disappeared. The registration of vehicles imported from the Republic also raises questions. A first year rate for registration of a vehicle differs from the normal rate. Changes came into force on 1 April 2010 which differentiate categories of vehicles and rates.

2. SPORTSMEN/SPORTSWOMEN

Introduction

The first section of this report discusses the recent European Communication on 'Developing the European Dimension in Sport'. The second section explores on-going debates concerning the impact of the Article 165 of the Treaty on the Functioning of the European Union

(TFEU). The third section considers the protection of minors in sport with a particular focus on current issues in European football. The fourth section evaluates nationality and transfer rules in relation to the operation of basketball, football, handball, ice-hockey, rugby and volleyball in the United Kingdom. The final section discusses the findings of a recent European Commission Study into the Equal Treatment of Non-Nationals in Individual Sports Competitions, with particular reference to the situation in the UK.

Comment on the 2011 Communication on Sport[33]

On 18 January 2011, the European Commission adopted a Communication entitled 'Developing the European Dimension in Sport'. This is the first policy document issued by the Commission in the field of sport after the entry into force of the Lisbon Treaty. Section 4.3 of the Communication sets out the Commission's thinking in relation to 'free movement and the nationality of sportspeople':

1. The organisation of sport on a national basis is part of the traditional European approach to sport. While the Treaty prohibits discrimination based on nationality and enshrines the principle of free movement of workers, the Court of Justice has taken into account the need to preserve certain specific characteristics of sport in past rulings dealing with the composition of national teams or deadlines for transfer rules for players in team sport competitions.
2. In the area of professional sport, rules entailing direct discrimination (such as quotas of players on the basis of nationality) are not compatible with EU law.
3. Rules which are indirectly discriminatory (such as quotas for locally trained players), or which hinder free movement of workers (compensation for recruitment and training of young players), may be considered compatible if they pursue a legitimate objective and insofar as they are necessary and proportionate to the achievement of such an objective.
4. Based on Article 45 TFEU, the free movement rules apply only to workers and professional players in the framework of an economic activity. However, the free movement rules apply also to amateur sport as the Commission considers that following a combined reading of Articles 18, 21 and 165 TFEU, the general EU principle of prohibition of any discrimination on grounds of nationality applies to sport for all EU citizens who have used their right to free movement, including those exercising an amateur sport activity.

The Commission elaborates on this approach in the accompanying Commission Staff Working Document on 'Sport and Free Movement'.[34]

It is also interesting to note that the Commission considers that the time has come for an overall evaluation of transfer rules in professional sport in Europe (para. 4.4). Some possible lines of inquiry are discussed in section 4 below.

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

33 European Commission (2011), 'Communication: Developing the European Dimension in Sport', COM(2011) 12 final, 18/01/2011.

34 European Commission (2011), 'Staff Working Document: Sport and Free Movement'. SEC(2011), 66 final, 18/01/2011.

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 appear to 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.[35]

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 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 below). 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'.[36] 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.[37] A social dialogue committee in European professional football was established in July 2008 bringing together representatives of football employers, employees and UEFA.

35 Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United*, judgment of 16 March 2010.
36 European Commission (2007), 'White Paper on Sport', COM(2007) 391 final, s.4.
37 See Articles 153-155 TFEU.

UK Sport – Nationality Rules and Transfer Fees

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 score sheet 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 score sheet 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.[38] 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.[39]

Football

The potentially discriminatory effects of the UEFA home-grown player rule and the provisions contained in the FIFA Regulations concerning the protection of minors are discussed below in section 3 ('Protection of Minors'). The rules governing the transfer of players in British football must be compatible with the FIFA Regulations on the Transfer and Status of Players. These regulations contain a number of restrictions on a player's free movement although these restrictions may be capable of justification on grounds relating to the 'specificity of sport'.[40] For example, Article 6 states that 'players may only be registered during

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

39 Out of contract payments were prohibited by the court in Case C-415/93 *Bosman*.

40 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*).

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 Court of Justice 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.[41]

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 player's free movement are evident within these provisions, such as the provision for a 'protected period' of a player's 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.[42] In addition, the method of determining compensation for contract breaches outside the protected period may give rise to concerns regarding the mobility of players. For example, the Court of Arbitration for Sport has, in a line of cases, moved away from a 'player friendly' model of calculating compensation to one in which replacement costs can be taken into account.[43] The calculation of compensation costs, and indeed the uncertainty as to costs a player faces when considering breaching a contract within the unprotected period, may render the exercise of free movement rights less attractive.

Article 20 of the FIFA Regulations 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 player's free movement, the provisions are potentially justified with reference to the need to encourage investment into youth development.[44]

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.

---

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

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

43 See CAS cases *Webster*, *Matuzalem* and *De Sanctis*.

44 Out of contract payments were prohibited by the court in Case C-415/93 *Bosman*. However, training compensation was, in certain circumstances, deemed to be compatible with EU law in ECJ Case C-325/08 *Bernard*.

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 & 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.

Rugby League 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.[45] 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

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

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'.

Rugby League 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 the 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.

Rugby League 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 permitted 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 operates a series of sanctions for salary cap infringements. Aside from the competition law issues raised under Articles 101 and 102 TFEU, a salary cap may amount to a non-discriminatory restriction on a workers free movement and questions of objective justification require consideration. 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.

Rugby Union

The Rugby Football Union (RFU) is the governing body of rugby union in England. Premier Rugby Limited (PLR) is the umbrella organisation that represents the twelve professional clubs in England. It was formed by those clubs to act as a central body to manage the elite club rugby game in England. The RFU and PRL signed a new agreement which will govern the professional game in England from 1 July 2008 until 30 June 2016. Part of this agreement provides for an English Qualified Players (EQP) Compensation Scheme in order to incentivise the fielding of English qualified players. A similar scheme operates in cricket. Financial inducements to field English qualified players may, for the purposes of Article 45

TFEU, amount to direct discrimination given that the inducements are not available to non-nationals. The scope for justification is therefore narrowed to the Treaty derogations of public policy, public security and public policy, none of which apply. A theoretical case could be made that the measure amounted to indirect discrimination on the grounds of nationality, given that the inducements are linked to qualification to represent England and not nationality. It therefore stands to reason that financial inducements directed at English qualified players would deter clubs from hiring players without an imminent prospect of such qualification (in other words non-nationals). Nevertheless, in these circumstances, open ended justifications to a claim of indirect discrimination would be available and these would relate to the objective of protecting the national team. This objective is particularly important in sports such as rugby union and cricket where the national team provides significant funds for the professional and amateur games.

Restrictions on non-EU players operate in rugby union but these appear compliant with current ECJ jurisprudence concerning EU association agreements. Rugby union also operates a salary cap. Each club must comply with the Premier Rugby Squad Capping Rules and Regulations.

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.

Study on the Equal Treatment of Non-Nationals in Individual Sports Competitions

Action no. 40 of the 'Pierre de Coubertin' Action Plan accompanying the 2007 White Paper on Sport announced that the Commission would launch a study to analyse all aspects of the issue of access to individual competitions for non-nationals. On this basis, the Commission awarded in 2009 a contract for a study on the equal treatment of non-nationals in individual sports competitions in the EU. The Study, published in early 2011, uncovered a number of potentially discriminatory practices in sport throughout Europe. Below is a summary of the findings as they relate to the situation in the UK. It should be noted that no information concerning national championships was received from 16 national federations. The main findings from those responding to the questionnaire were:

1. Where access was subject to club membership and or clearance by federation

In gymnastics, foreign gymnasts may enter British Events only when they obtain the permission of the relevant British Technical Committee.

2. Where access to the national championship is permitted but athletes are not able to establish a national record

In biathlon foreigners cannot set and hold British records. The justification for this was that non-British athletes are not eligible to compete for GBR internationally or at the Olympic Winter Games.

3. Where access to national championships is permitted but athletes are not able to become national champion

In gymnastics, to be eligible for selection to represent Great Britain or to become 'British Champion', a gymnast must hold or be eligible to hold a United Kingdom passport.

In triathlon the Elite British National Championships are open to anybody who can meet the performance criteria but athletes can only be British Champion if they are British.

4. Where residency requirements for participation in competitions is established

In aquatics anyone wishing to swim for England shall be a citizen of the United Kingdom, the Channel Islands or the Isle of Man and have been born in England, or have had at least one parent who was English by birth or be a naturalised citizen of the United Kingdom and have been continuously resident in England for a period of at least twelve months.

5. Where there is no access to the national championship

In badminton, in order for players to be selected they must meet the following criteria: be an affiliated member of and in good standing with England (BE); hold a passport of a country whose territory the BE has jurisdiction over; and have not represented any other Member Association for three years immediately preceding the date of the fixture; etc.

In biathlon, foreigners cannot set and hold British records.

In shooting, only GB nationals qualify for the finals.

Analysis

It follows from Treaty provisions, secondary EU legislation and the case law of the Court of Justice of the European Union on EU citizenship and freedom of movement that sports rules and practices can be grouped in four different categories:

1. Measures which do not fall under the EU free movement rules;
2. Measures which do not constitute a restriction to freedom of movement;
3. Measures which amount to a restriction of the right to free movement but are nevertheless capable of justification and proportionate;
4. Measures which cannot be justified and/or are disproportionate, therefore violate EU law, and may consequently no longer be applied in a Member State.

The Study made recommendations as to the location of discriminatory rules within the above framework. The findings can be located at:
http://ec.europa.eu/sport/library/doc/f_studies/study_equal_treatment_non_nationals_final_rpt%20_dec_2010.pdf

3. THE MARITIME SECTOR

This is the subject of a separate report under the direction of Professor Barnard.

4. RESEARCHERS AND ARTISTS

There are seven research councils in the UK which provide funding to researchers. These are:

- Arts and Humanities Research Council (AHRC)
- Biotechnology and Biological Sciences Research Council (BBSRC)
- Engineering and Physical Sciences Research Council (EPSRC)
- Economic and Social Research Council (ESRC)
- Medical Research Council (MRC)
- Natural Environment Research Council (NERC)
- Science and Technology Facilities Council (STFC)

Eligibility for funding from the Councils takes place in two ways – either the researcher is employed at an institution which receives funding or is resident in the UK at the time of making the application and about to take up a post with such an organization. Full time or part time employment is usually sufficient. The Natural Environment Research council expressly states that its funding possibilities are open to researchers of any nationality. The tax treatment of researchers follows that of other workers. PhD students may have the option of treating their grant as otherwise than income and therefore not subject to income tax, depending on the circumstances.

The Arts Council has an international policy which includes some funding for individuals, arts organisations and other people who use the arts in their work. The scheme is limited to those based in the EU. This does raise the question of the eligibility of those based outside the UK but elsewhere in the EU for other Arts Council funded activities. The tax treatment of artists raises specific problems as regards the withholding of tax pending a tax return by the individual where the amount of money earned may be fairly limited. 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.

A study by researcher Newell of the University of Warwick published in 2009 examines the treatment of employed and self-employed persons in the UK. (ID UK0801019Q).

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 institution 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.

Migrant workers who seek to study at UK universities may be entitled to fees support, living cost support and any access to learning fund which a university may have. In order to qualify as a migrant worker for the purposes of university study the student must:

- Be ordinarily resident in the UK on the first day of the first academic year of the course (eg 1 September, 1 January or 1 April depending on when the start of the course takes place) unless the individual is self employed or a frontier worker;
- By ordinarily resident somewhere in the EEA for three years before the commencement of the course;
- Earn at least £7,500 per year

And fulfil one of the following:

- Have worked prior to starting studies;
- There is a link between previous work and the studies;
- After commencing studies take up employment and have been resident on the first day of the academic year.

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

6. YOUNG WORKERS

Protection of Minors – The Future

In the White Paper on Sport the Commission acknowledged that the protection of minors in sport would also benefit from more effective regulation of the activities of players' agents, better licensing systems for sport clubs, and social dialogue in the sport sector.[46] All three initiatives are at an early stage.

On agent regulation, the Commission launched a study as part of its White Paper Action Plan. The resulting study listed a number of ethical issues associated with the work of agents including problems relating to human trafficking and problems relating to the inadequate protection of minors.[47] Shortcomings of the current system have been acknowledged by the competent authority, FIFA and a new set of proposals are currently being drafted.

Similarly, whilst UEFA has adopted a licensing system for clubs, a more comprehensive system is currently being discussed and the issue of the protection of minors will form part of these discussions. In the White Paper, the Commission committed itself to promote dialogue with sport organisations in order to address the implementation and strengthening of

46 Commission Staff Working Document, 'The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport', COM(2007) 391 final, p51.

47 KEA, CDES & EOSE (2009), 'Study on Sports Agents in the European Union', a study commissioned by the European Commission (Directorate-General for Education and Culture), Part 4. Summary and Recommendations, p.3-4.

self-regulatory licensing systems. Starting with football, the Commission intends to organise a conference with UEFA, EPFL, Fifpro, national associations and national leagues on licensing systems and best practices in this field.[48]

Social dialogue in European football has been taking place since the July 2008 creation of the social dialogue committee in professional football. Chaired by UEFA, the committee comprises members of employer interests (EPFL and the ECA) and employee interests (FIFPro). Negotiations within this committee can lead to an agreement between the parties on matters pertaining to the employment relationship between clubs and players. This could include a wide range of issues, including the status and transfer of players, contractual issues and the protection of minors.[49]

It must also be noted that a range of other measures designed to deter the international transfer of minors could be envisaged but these raise concerns as to their compatibility with EU law. First, a young player could be required to sign their first contract with training club. Clearly this would act as an obstacle to a player's free movement and would require justification based on the grounds discussed above. Second, the training compensation criteria for young players contained in the FIFA Regulations on the Status and Transfer of Players could be increased so as to deter clubs from poaching young players and as a way of ensuring training clubs are rewarded for their investment in youth development. One such increase was approved by FIFA in October 2008. However, in *Bosman* and *Bernard*, the Court of Justice held that training compensation costs should relate to the actual cost incurred by the training club.[50]

In the White Paper, the Commission also committed itself to (1) monitor the implementation of EU legislation, in particular the Directive on the Protection of Young People at Work. In this connection, the Commission launched a study on child labour as a complement to its monitoring of the implementation of the Directive. The issue of young players falling within the scope of the Directive will be taken into account in the study. (2) Propose to Member States and sport organisations to cooperate on the protection of the moral and physical integrity of young people through the dissemination of information on existing legislation, establishment of minimum standards and exchange of best practices.[51]

The Protection of Minors

The European labour market for professional footballers was significantly liberalised following the European Court's judgment in *Bosman*.[52] This led to a debate within football about how best to limit the international transfer of minors in order to protect their health and welfare. The 2010 European Sports Forum held in Madrid discussed a number of issues related to the use of young people in sport including overtraining and exploitation, missed education opportunities, the use of doping substances, and sexual abuse and harassment. Linked to the debate on the transfer of minors is a concern that larger football clubs are attracting young

48 European Commission (2007), 'White Paper on Sport', COM(2007) 391 final, points 46 & 47.

49 T.M.C Asser Institute (2008), 'Study into the identification of themes and issues which can be dealt with in a Social dialogue in the European professional football sector', Report for the European Commission co-authored by the T.M.C Asser Institute, Edge Hill University and the Katholieke Universiteit Leuven, May.

50 Case C415/93 *Bosman*, para. 109 & Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United*, judgment of 16 March 2010.

51 European Commission (2007), 'White Paper on Sport', COM(2007) 391 final, points 42 & 43.

52 Case C-415/93 *Union Royale Belge Sociétés de Football Association and others* v *Bosman and others* [1995] ECR I-4921.

overseas players to their academies and this is undermining the efforts of many smaller clubs to invest in the education and training of young talent. This has a consequential negative impact on competitive balance in European football.

Placing restrictions on the international transfer of minors has the potential to engage the EU's provisions on free movement of workers. However, the EU has long recognised as legitimate the need to protect minors in sport. For example, the 2000 Nice Declaration on Sport expressed 'concern about commercial transactions targeting minors in sport, including those from third countries, inasmuch as they do not comply with existing labour legislation or endanger the health and welfare of young sportsmen and –women'.[53] Similarly, the European Commission's 2007 White Paper on Sport expressed concerns that whilst the movement of minors in sport across frontiers may fall short of the legal definition of trafficking, the exploitation of young players continues to be a problem in the EU.[54] In particular, the Commission cited reports that an international network managed by agents takes very young players to Europe especially from Africa and Latin America. Those children who are not selected for competitions are then abandoned in that foreign country. This heightens the prospects of them falling into positions where they may experience further exploitation. This sentiment is shared by the European Parliament as expressed through recent European Parliamentary Reports such as the Belet and Mavrommatis Reports.[55]

Furthermore, the member states have expressed a political commitment to this matter by agreeing Article 165 of the Treaty on the Functioning of the European Union which grants the EU a supporting competence in the field of sport. Article 165(2) states that 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.* Whilst it is natural to focus on abuses within the system, it must also be recognised that the international transfer of minors can benefit young players, both in terms of their footballing and general education and also their general social development and financial security.[56]

Relevant Legislation

Article 45 TFEU establishes a worker's right to circulate within the territory of the EU linked to the pursuit of specific economic activities. The Court of Justice has adopted a broad definition of who is to be considered a worker. In *Lawrie Blum* the Court found that the 'essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration' and that this work must be 'effective and genuine'.[57] It must therefore

53 Declaration 29 to the Treaty of Amsterdam. Presidency Conclusions, (2000), 'Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies', Nice European Council Meeting, December 2000.

54 European Commission (2007), 'White Paper on Sport', COM(2007) 391 final.

55 European Parliament (2007), 'Resolution of the European Parliament on the Future of Professional Football in Europe', A6-0036/2007, 29 March, (The Belet Report). European Parliament (2008), 'European Parliament Resolution of May 8 2008 on the White Paper on Sport' 2007/2261(INI), (The Mavrommatis Report).

56 For a discussion see Anderson, C. (2009), 'New FIFA Regulations on the Transfer of Minors', *World Sports Law Report*, 7(11), pp.3-5.

57 Case 66/85 *Lawrie Blum v Land Baden-Württemberg* [1986] ECR 2135, paras.17 & 21.

be acknowledged that young footballers can be considered workers under the framework of EU law.

Nevertheless, the EU has recognised that minors are a particularly vulnerable category of worker and has enacted protective legislation. The objective of Council Directive 94/33/EC of 22 June 1994 on the Protection of Young People at Work is to ensure that the Member States prohibit the work of children. In that connection, Member States must ensure that the minimum working or employment age is not lower than the minimum age at which compulsory full-time schooling as imposed by national law ends or 15 years in any event.[58] Further, the Directive seeks to ensure that the work of adolescents is strictly regulated and protected and that employers guarantee that young people have working conditions suitable for their age.[59] The Directive states that Member States shall ensure that young people are protected against economic exploitation and against any work likely to harm their safety, health or physical, mental, moral or social development or to jeopardize their education. The Directive allows Member States to stipulate, subject to certain conditions, that the ban on the employment of children is not applicable, among others, to children employed for the purposes of cultural, artistic, sports or advertising activities, subject to prior authorisation by the competent authority in each individual case.

As far as the transfer of non-EU nationals is concerned, immigration control remains a matter for the Member States. However, as the White Paper acknowledges, Member States must apply the protective measures for unaccompanied minors envisaged by national legislation, where appropriate in accordance with Council Directive 2004/81/EC of 29 April 2004 on the residence permit. In line with the UN Convention on the Rights of the Child, the best interest of the child must be a primary consideration for Member States when applying national legislation, especially concerning education and social integration.[60] On 16 December 2008, the European Parliament and the Council of the European Union adopted Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.[61] The Directive states that the 'best interests of the child' should be the primary consideration of Member States when implementing the Directive.

In the UK, a young person (minor) is someone aged 16 or 17, while a child is someone under school leaving age. There are various statutory restrictions on the employment of children in certain jobs and on the hours that children may work. The law prohibits the employment of children under the age of 14, and it is not permissible to employ children of any age in an industrial undertaking. There are statutory restrictions in place which limit the number of hours children can work and the timing of children's employment. An employer wishing to employ a child must obtain a permit from the local education authority which may set out certain conditions that must be adhered to. The Children and Young Persons Act 1963 requires a licence to be obtained before a child may take part in a sport, whenever payment is made either to the child directly or to someone else on the child's behalf. Under the Working Time Regulations 1998, restrictions are imposed on the hours of work of young persons under 18 years of age and there are also minimum rest breaks. Young persons have, on the

58 94/33 Article 1(1).
59 94/33 Article 1(2) and 1(3).
60 Commission Staff Working Document, 'The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport', COM(2007) 391 final, p51.
61 OJ L 348 of 24/12/08

whole, the same statutory rights in recruitment and employment as people over the age of 18.[62]

Football

Article 19 of the FIFA Regulations for the Status and Transfer of Players provides that international transfers of players are only permitted if the player is over the age of 18. Three exceptions to this rule apply. First, if the player's parents move to the country in which the new club is located for reasons not linked to football. Second, the transfer takes place within the territory of the EU or EEA and the player is aged between 16 and 18, subject to the new club fulfilling a number of minimum obligations including the provision of education, training and accommodation. Third, the player lives no further than 50km from a national border, and the club for which the player wishes to be registered in the neighbouring Association is also within 50km of that border. The maximum distance between the player's domicile and the club's quarters shall be 100km. In such cases, the player must continue to live at home and the two Associations concerned must give their explicit consent. FIFA has accepted two further exceptions. First where the players concerned could establish without any doubt that the reason for the relocation to another country was related to their studies, and not to their activities as football players. Second, in cases in which the national association of origin and the new club of the players concerned have signed an agreement within the scope of a development programme for young players under strict conditions.[63]

The conditions of Article 19 also apply to any player who has never previously been registered with a club and is not a national of the country in which he wishes to be registered for the first time. In a 2009 amendment to the regulations, a subcommittee appointed by the Players' Status Committee is in charge of the examination and the approval of every international transfer of a minor player, and every first registration of a minor player who is not a national of the country in which he wishes to be registered for the first time. The application for approval shall be submitted by the association that wishes to register the player. This is a departure from the previous system in which national associations were responsible for ensuring compliance with Article 19. One observer has noted that should the new subcommittee be under-resourced and unreasonably delay transfer requests, it could act as a *de facto* prohibition on the international transfer of minors and this could engage the free movement and competition law provisions of the TFEU.[64]

Also part of the 2009 amendment is Article 19bis which provides that clubs that operate an academy with legal, financial or de facto links to the club are obliged to report all minors who attend the academy to the association upon whose territory the academy operates. It continues by stating that each association is obliged to ensure that all academies without legal, financial or de facto links to a club (a) run a club that participates in the relevant national championships; all players shall be reported to the association upon whose territory the academy operates, or registered with the club itself; or (b) report all minors who attend the academy for the purpose of training to the association upon whose territory the academy operates. Each association is to keep a register comprising the names and dates of birth of the minors who have been reported to it by the clubs or academies.

62 McDonald, L, 'Employing Young People and Children', XpertHR guide, www.xperthr.co.uk

63 See para 7.3.3 CAS 2008/A/1485 *Midtjylland v FIFA*.

64 Anderson, C. (2009), 'New FIFA Regulations on the Transfer of Minors', *World Sports Law Report*, 7(11), p. 4.

In determining whether the application of the FIFA regulations conflicts with any EU laws, notably those regulating the free movement of workers within the EU, account must be taken of a number of issues. First, an EU minor who is considered a 'worker' can seek the relevant protections offered by Article 45 TFEU. Second, whilst the FIFA regulations fall short of an outright ban on the transfer of minors, they still amount to a restriction insofar as they place limitations on a minor's free movement. Third, restrictions must be justified on the basis that they pursue, in a proportionate manner, a legitimate objective. On this point, it is clear from numerous political statements detailed above that the protection of minors is considered by the EU a legitimate objective. In this connection, the regulations appear to represent a proportionate pursuit of this objective in that they permit cross border movement subject to minimum standards being observed.[65]

However, this assessment, particularly that concerning proportionality, depends on how the measures are practically implemented. For instance, in March 2009 the Court of Arbitration for Sport (CAS) heard the appeal of Danish club FC Midtjylland against sanctions imposed upon them by FIFA for breaches of Article 19 of the FIFA Regulations concerning the protection of minors.[66] Midtjylland registered as amateurs a number of young Nigerian players previously registered to a Nigerian club. These players were granted a residence permit by the Danish immigration service allowing a short term stay as students. The players were provided with education in Denmark. On receipt of a complaint from the international football players union, FIFPro, FIFA issued a negative decision ('strong warning') against Midtjylland and the Danish Football Association. Midtjylland lodged an appeal before the CAS. Four issues were considered.

First, the club argued that Article 19 of the FIFA Regulations was applicable only to professional and not amateur minor players. The CAS found that Article 19 was applicable to both. If it were not, the intended objective of the provision which is the protection of minors, could be circumvented. Second, the CAS found that the exceptions to the prohibition on the international transfer of minors contained in Article 19 did not apply to the case. In particular, the club could produce no evidence that the relocation of the players to Denmark was not football related. Indeed, the club made claims on its website suggesting that its link with the Nigerian club was for the purpose of attracting new talent. Third, Midtjylland claimed that a strict application of Article 19 would contravene EU legislation, particularly the Cotonou Agreement. As has been established by the Court of Justice, non-EU nationals covered by such association agreements who are legally employed within a member state of the EU can claim non-discrimination rights in relation to employment conditions.[67] The CAS considered that as the players have no employment contract and are not therefore employed in Denmark, and given that the Danish immigration service defined the players as students and not workers, the relevant provisions of the Cotonou Agreement cannot be relied upon as the Agreement does not extend to the regulation of access to the employment market. Finally, the club argued that FIFA were inconsistent in the application of the rules contained in Article 19 and that they allowed one of the larger European clubs, Bayern Munich, to register a non-EU

65 This was broadly the opinion of the Court of Arbitration for Sport in CAS 2005/A 955 *Càdiz C.F., SAD v FIFA and Asociación Paraguaya de Fútbol*, CAS 2005/A/956 *Carlos Javier Acuña Caballero v FIFA and Asociación Paraguaya de Fútbol*.

66 CAS 2008/A/1485 *Midtjylland v FIFA*.

67 Case C-438/00 *Deutscher Handballbund v Kolpak* [2003] ECR I-4135 and Case C-265/03 *Simutenkov* [2005] ECR I-2579.

minor without sanction. The CAS found no evidence that it was the constant practice of FIFA to accept the registration of minor players from outside the EU. Based on the above arguments, the CAS dismissed Midtjylland's appeal.

Furthermore, one also needs to consider the application of the social advantage principle to situations involving young footballers who might not be considered workers. The principle of equal treatment in respect of social advantages stems from Article 7(2) of Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers and family members within the Community. As the White Paper on Sport acknowledges, the Court's case law has extended the right to equal treatment in the granting of social advantages to students and non-active persons who are lawfully resident in the host Member State. The Court has recognised the right of citizens of the Union who are lawfully resident in the territory of the host Member State to avail themselves of Article 18 TFEU (non-discrimination on the grounds of nationality) when they are in a situation which is identical to that of nationals.

Home-Grown Players

Since the introduction of UEFA's home-grown player, concern has been expressed that the measure may give rise to an increase in the number of minors moving internationally. The new eligibility criteria were incorporated into the 2006/07 UEFA regulations and these rules must be observed by all clubs entering European club competitions. The 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 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.[68]

English 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. Since the 2009/10 season the Football League (those clubs not participating in the English Premier

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

League) have operated a home-grown player rule requiring at least four players from clubs' sixteen man match day squads to be registered domestically, for a minimum of three seasons, prior to their 21st birthday.[69] In June 2010, the Football League announced that from the 2010/11 season, clubs will have to name 10 home-grown players in a squad restricted to 25 players aged over 21.[70]

The Commission has recently formed the opinion that UEFA's home-grown player rule is potentially compatible with EU law as although the measure may lead to indirect nationality discrimination, it pursues the legitimate objectives of promoting training for young players and consolidating the balance of competitions.[71] However, in order to be able to assess the implications of the rule in terms of the principle of free movement of workers, the Commission has committed itself to closely monitor its implementation and undertake a further analysis of its consequences by 2012. One such possible consequence has been expressed by the European Parliament. In the Belet Report on the Future of Professional Football, the Parliament stated that it is 'convinced that additional arrangements are necessary to ensure that the home-grown players initiative does not lead to child trafficking, with some clubs giving contracts to very young children (below 16 years of age)' and that 'young players must be given the opportunity for general education and vocational training, in parallel with their club and training activities, and that the clubs should ensure that young players from third countries return safely home if their career does not take off in Europe.'

For the sake of completeness, it must also be noted that 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.[72] On 28th May 2008, the 58th FIFA congress in Sydney adopted a resolution supporting the aims of the 6+5 rule. In the same opinion on the UEFA rule, the Commission considered the 6+5 rule incompatible with EU law on the grounds that it gives rise to direct nationality discrimination. In June 2010 it was reported that FIFA had abandoned the proposal.[73]

69 The Football League Press Release, 'League clubs vote to introduce 'home-grown players' rule', 18/12/08.
70 Football League AGM Report, 08/06/10, www.football-league.co.uk
71 Commission Press Release IP/08/807, 'UEFA rule on home-grown players: compatibility with the principles of free movement of persons', 28/05/08.
72 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.
73 'FIFA scrap plans for home-grown player rule', www.bbc.co.uk, 10/06/10.

Chapter VII: Application of Transitional Measures

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES

The implementing legislation with respect to the EU-8 is the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004 No 1219). There were no amendments to this legislation in 2010.

Regulations 4 and 5 of the 2004 Regulations have the effect that EU-8 nationals who are looking for work do not have a right to reside in the United Kingdom. One effect is that EU-8 nationals who have lawfully worked in the United Kingdom, but who remain subject to the need to register their employment, are denied access to social benefits subject to a 'right to reside' test. The Commission has taken the view that that legal position is contrary to the provision in Article 7(3) of Directive 2004/ 38 for the continued right of residence of EU nationals who have previously been employed in a given member state. In particular, it takes the view that derogation from Article 7(3) is not necessary for the application of the Worker Registration Scheme, which controls access to the United Kingdom labour market by A8 nationals. On 28 October 2010, the Commission delivered a Reasoned Opinion on this subject to the United Kingdom authorities. The response of the United Kingdom is not known at the time of writing.

There were no reported decisions of the Immigration and Asylum Chamber of the Upper Tribunal concerning EU-8 nationals in 2010.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

The implementing legislation with respect to the EU-2 is the Accession (Immigration and Worker Authorisation) Regulations 2006 (SI 2006 No. 3317). There were no amendments to this legislation in 2010.

There were no reported decisions of the Immigration and Asylum Chamber of the Upper Tribunal concerning EU-2 nationals during 2010.

The legal position of EU-2 nationals was however central to the case of *Tilianu*, decided by the High Court ([2010] EWHC 213) and Court of Appeal ([2010] EWCA Civ 1397) during 2010. The question posed in this litigation was whether an EU citizen, who was recently self-employed and involuntarily out of work in another member state, benefitted from the right of residence provided for in Article 7(3) (b) and (c) of the Directive 2004/ 38. The case concerned a Romanian national who had worked in the construction industry, and who could not have been lawfully employed in the United Kingdom without specific authorisation.

The High Court and Court of Appeal each held that these provisions applied only to those who had previously been *employees*. In the words of Sedley LJ in the Court of Appeal, 'on their face the two provisions relate only to persons who have been workers within the autonomous meaning of that word' (para 11). This conclusion was not altered by a thorough examination of the language used in Article 7, or by the provision made in Article 17 for the right of permanent residence for persons who ceased self-employment.

Chapter VIII: Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 883/04 AND ART 45 TFUE AND REGULATION 1612/68

Art 45 TFEU

Art 45 TFUE provides for freedom of movement for workers within the European Union and specifies that this entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Specifically this entails the right, subject to limitations justified on grounds of public policy, public security or public health: to accept offers of employment actually made; to move freely within the territory of Member States for this purpose; to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; and to remain in the territory of a Member State after having been employed in that State, subject to conditions set out in regulations drawn up by the Commission. These provisions do not apply to employment in the public service.

These rights have been recognized by the European Court of Justice (ECJ) as having direct effect, which allows individuals to claim their application before national courts, while secondary legislation - Regulation 1612/68 and Directive 2004/38/EC - has been introduced to consolidate and specify those rights.

The principle of free movement of workers applies to all nationals of EU Member States. The only exception concerns nationals of new Member States who might be subject to a transitory period during which they may not be granted all the rights attached to the status of EU citizens. However, this restriction only covers *access* to the labour market. This implies that once nationals of the new Member States have found work in a Member State, they must be accorded the same rights as other EU workers on the basis of the principle of non discrimination on the grounds of nationality.

Regulation 1612/68

According to Article 7(2) of Regulation 1612/68, a worker who is a national of a Member State shall enjoy the same social and tax advantages as national workers. The concept of 'social advantages', which is not defined by the Regulation, has been given a broad definition by the ECJ:

> 'the advantages which this regulation extends to workers who are nationals of other Member States are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community'(Case 207/78, Even).

Entitlement to social advantages is not subject to a condition of residence on the territory where the advantage is required (See section 2 below for frontier workers). The Court of Justice has, however, found that a residence condition may be justified, For example, it may be regarded as legitimate for a Member State to require that a genuine link exists between

the person seeking work and the employment market of that State in order to be entitled to a benefit such as Jobseeker's Allowance (Case C-138/02, *Collins*). However, such a residence condition is considered with direct reference to Article 45 TFUE. In the case of a worker who has ceased to pursue her or his occupation but continues to be entitled to social advantages by virtue of their previous employment the principle of equal treatment requires that she may enjoy those advantages without any requirement to reside in the territory of the competent Member State (Case C-43/99, *Leclere and Deaconescu*).

The main limitation to the broad scope of social advantages concerns jobseekers. The ECJ has ruled that Member State nationals who move in search of employment, qualify for equal treatment only as regards access to employment in accordance with Article 45 TFEU, but not with regard to social advantages within the meaning of Article 7(2) of Regulation 1612/68 (Case 316/85, *Lebon*). However, the right to equal treatment in these circumstances is directly covered by the Treaty.

Directive 2004/38/EC

Article 6 of Directive 2004/38/EC provides the right of residence for up to three months, while Article 7 provides the right of residence for more than three months:

Article 7 provides that all Union citizens have the right of residence on the territory of another Member State for a period of longer than three months if they are workers or self-employed persons in the host Member State; or have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State. This right of residence extends to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State.

A Union citizen who is no longer a worker or self-employed person retains the status of worker or self-employed person if he or she is temporarily unable to work as the result of an illness or accident; is involuntarily unemployed after having been employed for more than one year and has registered as a job-seeker with the relevant employment office, or, for no less than six months, if he or she is involuntarily unemployed after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office and under certain conditions if embarking on vocational training.

Regulation 883/04

Article 48 TFEU provides that the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) Aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
(b) Payment of benefits to persons resident in the territories of Member States.

The current measures in force are Regulations 883/04 and its implementing regulation, 987/09.

Regulation 883/04 coordinates social security benefits for people who exercise their Treaty right to free movement in the territory of the European Union. A benefit is regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 3.1 of Regulation 883/04. This is a closed list. Unless otherwise provided for in Annex XI, the Regulation applies to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or ship-owner. This includes obligations on the employer to continue to pay wages in the case of sickness or maternity leave. However, the Regulation does not apply to social and medical assistance or to benefit schemes for victims of war or its consequences.

In some specific circumstances ECJ case law permits the same benefit to be classified as a as a social security benefit under Regulation 883/04 and as a social advantage under Regulation 1612/68 (Case C-111/91, *Commission v. Luxembourg*). This simultaneous classification may be useful when a person does not fall within the personal or material scope of Regulation 883/04 (Case 249/283, *Hoeckx*).

The Right to Reside Test

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 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.

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.

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 Right to Reside Test now applies to benefits that are social security benefits and fall within the scope of Regulation 883/04 (Income Support, State Pension Credit, Income based Jobseeker's Allowance, and Income related Employment and Support Allowance, Child Benefit and Child Tax Credit and Heath in Pregnancy Grant) and benefits that are not covered by Regulation 883/04 but are social advantages under Regulation 1612/68 (Housing Benefit, Council Tax Benefit, Social Fund Crisis Loans and housing assistance from local authorities).

Jobseekers who have registered with Jobcentre Plus and have claimed Jobseeker's Allowance will have a Right to Reside for an initial period of six months, and for longer if they are genuinely seeking work, and have a reasonable chance of being engaged. (Directive 2004/38/EC, Art 14(4)(b); Case C-292/89, Antonissen; Imm (EEA) Regs, reg 6(1)(a), reg 6(4) & reg 14).

A person who is a jobseeker will not satisfy the Right to Reside aspect of the Habitual Residence Test for Income Support, Employment and Support Allowance(Income Related) and State Pension Credit, but will satisfy the test for Income Based Jobseeker's Allowance. Family members of persons who have a Right to Reside as a jobseeker will not have a Right to Reside for Income Support, Employment and Support Allowance (Income Related) or State Pension Credit purposes.

The European Commission considers the Right to Reside Test to be in breach of the transitional arrangements on free movement of workers, as well as the obligation to ensure equal treatment on the basis of nationality and has issued a 'reasoned opinion' under EU infringement procedures.

Cases

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 have come before UK Tribunals/Courts:

This report has previously reported the case of *Patmalniece v Secretary of State for Work and Pensions*. Since last year's report this case has been heard by the Supreme Court, which is now the highest UK national court (*Patmalniece (FC) (Appellant) v Secretary of State for Work and Pensions (Respondent)* [2011] UKSC 11).

The issue at stake is whether the conditions of entitlement to State Pension Credit are compatible with the prohibition of discrimination of grounds of nationality between Member State citizens.

Mrs Patmalniece is a Latvian pensioner who claimed asylum when she came to the UK in June 2000. Although her claim for asylum was not successful she was not removed from the UK. She has never worked in the UK. Latvia joined the EU on 1 May 2004. In August 2005, Mrs Patmalniece claimed State Pension Credit. However, her claim was refused on the ground that she was not in Great Britain because she did not have a right to reside in the UK. She appealed against the refusal of State Pension Credit, arguing that the requirement that she must have a right to reside in the UK was directly discriminatory on the grounds of her nationality, which was contrary to Article 3 of Regulation 1408/71which prohibits both direct discrimination and indirect discrimination.

The Social Security Appeal Tribunal allowed Mrs Patmalniece's appeal. However, the Secretary of State in turn appealed to the Social Security Commissioner who allowed that appeal. The Commissioners held that while the Right to Reside Test is indirectly discriminatory this discrimination is nevertheless justified. Mrs Patmalniece took her case to the Court of Appeal which upheld the Commissioners' decision. Mrs Patmalniece then appealed to the Supreme Court.

State Pension Credit is a means tested non-contributory benefit. Section 1(2)(a) of the State Pension Credit Act 2002 requires that a claimant is entitled to State Pension Credit if he or she is 'in Great Britain'. The State Pension Credit Regulations 2002 ('the Regulations') provide the conditions for when someone is or is not to be treated as being 'in Great Britain'. Who is and who is not in Great Britain for the purpose of relevant benefits, including the State Pension Credit is determined by the Habitual Residence Test under which a person is treated as not being in Great Britain if he or she is not 'habitually resident' in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland ('the Common Travel Area'). Since 2004 to satisfy the Habitual Residence Test a person must also satisfy the conditions of the Right to Reside Test as a person cannot be treated as being habitually resident in the Common Travel Area if they do not have a right to reside in the Common Travel Area.

Regulation 1408/71 (EC) now replaced by Regulation 883/04 applies to State Pension Credit. The dispute in this case relates to the effect of Article 3 which provides that:

> 'persons to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as nationals of that State'.

The Supreme Court, by a majority, dismissed Mrs Patmalniece's appeal. The Court found unanimously that the conditions of entitlement to State Pension Credit are indirectly discriminatory. But the majority held that this discrimination is justified because the regulations are

a proportionate response to the legitimate aim of protecting the UK public purse and that this justification is independent of the claimant's nationality. The Court also held unanimously that the different treatment afforded to Irish nationals is protected by the Protocol on the Common Travel Area.

In coming to this judgement the court considered three issues:

- Do the conditions of entitlement to State Pension Credit give rise to direct discrimination?
- If they give rise only to indirect discrimination, is that discrimination justified?
- Is that conclusion undermined by the favourable treatment that the Regulation gives to Irish nationals?

With respect to the first question: Do the conditions of entitlement to State Pension Credit give rise to direct discrimination? The court reasoned that all UK nationals would automatically satisfy the 'right to reside' element of the test, whereas nationals of other Member States would not automatically do so. However, UK nationals still had to satisfy the requirement of 'habitual residence'. The result is that the 'in Great Britain' test would be satisfied by some, but not all, UK nationals, and some, but not all, nationals of other Member States. It was more likely to be satisfied by UK nationals than nationals of other Member States. The Court considered the question with reference to the decision of the Grand Chamber of the European Court of Justice in *Bressol v Gouvernement de la Communauté Française* (Case C-73/08). In *Bressol* the ECJ had considered a Belgian law which set down eligibility criteria to study in Belgium which were similarly structured to the entitlement conditions for State Pension Credit. Although Advocate General Sharpston in *Bressol* had proposed that the ECJ treat the provisions of the Belgian law as directly discriminatory on the grounds of nationality, the ECJ did not follow her approach. Although the reasons for the ECJ's position were not fully explained in its Judgment, the Supreme Court nevertheless decided that it should follow its conclusion and hold that the entitlement conditions for State Pension Credit were only indirectly discriminatory.

Having decided that the conditions of entitlement only give rise to indirect discrimination, the Supreme Court went on to consider the second question, i.e., is that discrimination justified?

The Court reasoned that a difference in treatment which amounts to indirect discrimination can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to a legitimate aim. The parties agreed that the measures were proportionate. The issues were whether the conditions pursued a legitimate aim and whether it was 'independent of the nationality' of the persons affected. The majority held that both tests are satisfied. The aim was to ensure that claimants were economically or socially integrated in the UK, or elsewhere in the Common Travel Area, thereby protecting the social security system against the risk of 'benefit' or 'social' tourism. This justification was independent of nationality. One of the judges noted, additionally, that the Government's aims in introducing the Right to Reside Test were consistent with the aims of Regulation 1408/71 and that it is logical that if a person does not have a right under EU law to reside in a particular state, that state should not have the responsibility under EU law for ensuring their minimum level of subsistence. However, one judge dissented on the issue of justification. His view was that the provisions were probably aimed at discriminating against economically inactive foreign nationals on the grounds of their nationality.

With respect to the third question: Is that conclusion undermined by the favourable treatment that the Regulation gives to Irish nationals? The Appellant argued that, as entitlement to State Pension Credit was extended to Irish nationals, it was discriminatory not to extend it to nationals of other Member States. The Court rejected that argument, citing Article 2 of the Protocol on the Common Travel Area, which provides that the UK and Ireland 'may continue to make arrangements between themselves relating to the movement of persons between their territories'.

The dissenting Supreme Court judge, Lord Walker said:

'Having said all that, I recognise that this Court must follow the judgment of the Court of Justice of the EU in Bressol, even if some of us do not fully understand its reasoning. This case must be treated as one of indirect discrimination. But the correlation between British nationality and the right to reside in Great Britain is so strong that the issue of justification must in my view be scrutinised with some rigour' (para 73)

In my opinion the provisions of Regulation 2(2) are probably aimed at discriminating against economically inactive foreign nationals on the grounds of nationality. Whether or not that was the intention of those who framed them, they have that effect. That can, I think, be simply demonstrated. If the appellant (who is now aged 72) had been a British national who had gone to Latvia 50 years ago, but was in all other respects in the same position – that is, had come to England in 2000 with no family, friends or other human or financial resources here – she would not be excluded, and the only reason for that difference is her nationality. That difference of treatment is something to which the appellant's nationality was central, intrinsic or (in the sense in which Advocate General Jacobs used it in Schnorbus) direct. Even though classified as indirect discrimination, it is not capable of justification because the proposed justification, once examined, is founded on nationality.' (para 79).

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

The Court of Appeal asked the Court of Justice whether Article 16 Directive 2004/38/EC should 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 five years ending prior to 30/4/06?

Judgment was given on 7th October 2010. The Court considered that EU nationals who have lived in the UK lawfully for 5 years have a permanent right of residence in the UK under Article 16 of Directive 2004/38/EC which they only lose if they leave the country for 2 years.

However, the Lassal case concerned whether 5 years' lawful residence prior to the implementation date could count for the purposes of Article 16. Thus the Court was also asked to decide whether temporary absences which occurred before 30/4/06 after a continuous period of 5 years' residence prevented the claimant from acquiring a permanent right of residence.

The Child Poverty Action Group (CPAG) who took over this case when the claimant did not have representation state that in some cases people who had worked for long periods and had lived in the UK 'lawfully' for 5 years before Directive 2004/38/EC came into force were being denied benefits. This, CPAG argued, particularly affected women who worked for long periods but then became economically inactive when they were bringing up families. They suggest that they may have been resident in the UK for many years, but were denied the right to claim benefits.

CPAG considers that this Judgment means that an EU national who has resided in the UK 'lawfully' for a continuous period of 5 years prior to 30/4/06 has a permanent right of residence in the UK provided they have not subsequently left the UK for a continuous period of 2 years.

CPAG argue that the Judgment means that Article 16 Directive 2004/38/EC has been transposed into UK law incorrectly, and the Immigration (EEA) Regulations 2006 should be amended to take this into account. In CPAG's view the law also needs reform in other areas, in particular to ensure that women retain a right of residence in the UK while they are unable to work due to pregnancy.

Secretary of State for the Home Department v Maria Dias (Case C-325/09)
The Court of Appeal has referred the following questions to the Court of Justice in *Secretary of State for the Home Department v Maria Dias* (Case C-325/09):

1. If a European Union citizen, present in a Member State of which she is not a national, was, prior to the transposition of Directive 2004/38/EC, the holder of a residence permit validly issued pursuant to Article 4(2) of Directive 68/360/EEC, but was for a period of time during the currency of the permit voluntarily unemployed, not self-sufficient and outside the qualifications for the issue of such a permit, did that person by reason only of her possession of the permit, remain during that time someone who 'resided legally' in the host Member State for the purpose of later acquiring a permanent right of residence under Article 16(1) of Directive 2004/38/EC?

2. If five years' continuous residence as a worker prior to 30 April 2006 does not qualify to give rise to the permanent right of residence created by Article 16(1) of Directive 2004/38/EC, does such continuous residence as a worker give rise to a permanent right of residence directly pursuant to Article 18(1) of the EU Treaty on the grounds that there is a lacuna in the Directive?

Shirley McCarthy v Secretary of State for the Home Department (Case C-434/09)
The Supreme Court has referred the following questions to the Court of Justice in Shirley McCarthy v Secretary of State for the Home Department (Case C-434/09)

1. Is a person of dual Irish and United Kingdom nationality who has resided in the United Kingdom for her entire life a 'beneficiary' within the meaning of Article 3 of Directive 2004/38/EC of the European Parliament and of the Council ('the Directive')?

Cases CIS/647/2009, CIS/2357/2009 joined with CIS/1465/2009
CIS/2357/2009 and CIS/1465/2009 concern whether a previously self employed carer of children in education has a right to reside in the UK following the ECJ's decisions in Ibrahim C-310/08 and Teixeira C-480/08. CIS/647/2009 is about whether an A8 national who has worked in the UK for less than 12 months has a right to reside in the UK as the primary carer of a child in education following the decisions in Ibrahim and Teixeira.

The cases were heard on 16th September 2010. The appeal in CIS/647/2009 has been successful. CPAG suggests that this means that A8 nationals who have worked in the UK for less than 12 months can have a right of residence in the UK as the primary carer of a child of a worker in education.

Case CIS/339/2009: The issue in this case is whether a woman who becomes temporarily unable to work due to pregnancy and childbirth and has no continuing employment rights has a right of residence in the UK. The appeal was dismissed by the Upper Tribunal. Permission to appeal to the Court of Appeal has been granted and an appeal has been lodged.

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

As noted in section 1 above, social advantages are not subject to a condition of residence on the territory where the advantage is required. The Court of Justice ruled that frontier workers are entitled to social advantages of the State where they work and France was in breach of Article 7 of Regulation 1612/68 by excluding frontier workers residing in Belgium from qualifying for supplementary retirement pension points after being placed in early retirement (Case C-35/97, *Commission v. France*). Furthermore, the ECJ has found that a national of a Member State who, while maintaining her or his employment in that State, has transferred residence to another Member State and has since then carried on their occupation as a frontier worker, can claim the status of migrant worker (Case C-212/05, *Hartmann*).

Existing policies with impact on free movement of workers

The UK is in the process of changing dramatically the system of labour migration. With the change of government following the 2010 elections, a cap was placed on the issue of work permits, though there have been a series of legal challenges which have hampered the implementation of the new scheme. A new interim limit was placed on general highly skilled labour migration in April 2011. The points based highly skilled migrant scheme was closed to new applicants. The entrepreneur category was much enlarged to include third country nationals coming to the UK to establish businesses which will employ a specified number of persons (normally two full time) and invest at least £200,000 (with exceptions for some categories) in the country. The post study work scheme was closed as well.

The UK is moving to a system of e-borders where entry and exit from the UK is tracked by electronic means. The system is not yet operational for most passengers nor is the infrastructure in place. A third country national (including third country national family members of EU nationals) are required to provide their biometric features (numeric photograph and finger prints) which are stored in the UKBA database.

Consular services have been closed for visa issuing purposes in many parts of the world and most of the EU. Third country nationals who need visas are directed to service agencies in their country which take charge of the application and the individual's documents, including passport, and ensure that it is delivered to the UK visa issuing post designated for the purpose. For instance all applications for UK visas made in countries in South America are processed at the UK consulate in Mexico City. Visa applications are required to be made on line and lead automatically to fee payment sections. The application is not valid until the fee has been paid. This has impacts for third country national family members of EU nationals who are not required to pay fees but may need visas.

The private agents which act as an interface in the visa process are entitled to charge fees for the purpose. The UKBA has raised fees in all categories of admission substantially. From April 2011 fees for a settlement visa for a dependent relative increased from £1,680 to £1,814. An entrepreneur application carries a fee of £800 which fees must also be paid for every dependent. The transfer of a vignette from one passport to another (usually necessary on renewal of the passport) costs £100.

Integration measures

On 29 November 2010 the UK introduced new rules requiring anyone wishing to come to the UK as a partner (spouse or civil partner etc) to demonstrate basic English at A1 level, the same level required for skilled workers admitted under Tier 2 of the points-based system. This rule now applies to anyone coming as the husband, wife, civil partner, unmarried partner, same-sex partner, fiancé(e) or prospective civil partner of a UK citizen or a person settled in this country. They are compulsory for people applying from within the UK as well as visa applicants from overseas.

The UK introduced an integration test for third country nationals seeking indefinite leave to remain and citizenship. An extensive programme of earned citizenship was proposed in 2009 but following the elections in 2010 this has been abandoned. However from 6 April 2011 there is a reform of the English language requirement**.** Migrants in Tier 1, Tier 2 and their precursor routes highly skilled labour migrants and entrepreneurs) must pass the Life in the UK test rather than an ESOL with citizenship course.

None of these integration requirements apply to EU nationals.

Immigration policies for third country nationals and the Union preference

It remains unclear exactly what the impact of the changes to the UK's general immigration system will have for the EU preference. The UK authorities have retained the work permit scheme exclusively for Bulgarian and Romanian nationals in compliance with the EU obligation not to impair access to the labour market for nationals of these countries from the position as at 1 January 2007. The work permit scheme is only now open for nationals of these two countries. There is some effort to ensure that Turkish workers benefit from at least the most well defined of the rights in Decision 1/80. For instance, Turkish workers are exempt from the high fees.

Return of nationals to new EU Member States

In the first half of 2010, the UK Border Agency began a pilot scheme to remove homeless EEA nationals - in practice, likely to be either EU-8 or EU-2 nationals – who could not prove they were working, students or self-sufficient. It appears that this policy was aimed in particular at the city of Peterborough, where there was a concentration of unemployed and homeless EU nationals.[74] By 17 June 2010, 116 EEA nationals had been issued with 'minded to remove' notices, and 13 persons had actually been removed from the United Kingdom.[75]

The legal basis for this scheme is Regulation 19(3)(a) of the Immigration (European Economic Area) Regulations 2006 (SI 2006 No 1003), which allows the removal of persons who do not have a right to residence in the United Kingdom. The operation of this scheme was the subject of a number of criticisms by AIRE (Advice on Individual Rights in Europe) in 2010. Chief among these were that Directive 2004/ 38 does not expressly provide for the

74 'No job, only a tent to live in and too proud to go home', *Times*, 14 August 2010.

75 See Adam Weiss, 'Unqualified Persons: The Lawfulnes of Expelling Homeless EEA Nationals from the UK' (2010) *Journal of Immigration, Asylum and Nationality Law* 246, 247.

possibility of expulsion in such circumstances, and that homeless persons who do not have recourse to social assistance may be self-sufficient.[76]

There appears to be no public information as to the whether the scheme continued into the winter months of 2010-2011, or as to whether it is likely to be applied in the summer period of 2011.

National organizations or non-judicial bodies

There are a number of organisations which provide advice and assistance to EU nationals seeking to exercise their rights in the UK. The UK has a highly developed non-governmental sector which includes many agencies which provide advice and assistance in a wide variety of areas.

Regarding general advice, there are over 3,500 locations where the Citizen's Advice Bureaux offer assistance across the UK. It is a free service staffed by some professionals aided by trained volunteers offering advice to help people resolve their problems with debt, benefits, employment, housing, discrimination, and many more issues. The CAB is often a first stop for people with problems who are then referred on to more specialist agencies. Community Legal Advice provides assistance on a wide variety of issues including housing, employment and social benefits. For employment related issues the Trade Union Congress provides advice and assistance. There are a myriad of national, regional and local agencies which provide assistance on a wide range of problems free of charge.

Special mention must be made to two organisations: the Advice and Information on Rights in Europe (AIRE) Centre which specialises in providing advice and assistance to people with EU and ECHR related problems, and the Child Poverty Action Group which provides expert advice and assistance where benefits questions arise. Both agencies have been interveners in CJEU litigation.

SEMINARS, REPORTS AND ARTICLES

The main sources of training for lawyers and practitioners on EU free movement of workers law is the Immigration Law Practitioners Association which held over 10 courses in 2010-11 on aspects of EU free movement law. The Joint Council for the Welfare of Immigrants also provided specialist training on the subject. Commercial training centres also provide course on EU law, these can accessed through CPDforlawyers – a website which provides information about training opportunities for lawyers.

The main journal for practitioners on immigration and asylum law in the UK is the Journal of Immigration, Asylum and Nationality Law. Among the EU related articles published in 2010 are:

V. Mitsilegas, 'The Transformation of Border Controls in an Era of Security: UK and EU Systems Converging?', *JIA&NL*, Vol. 24, No. 3, pp. 223-245

A. Weiss, 'Unqualified Persons: The Lawfulness of Expelling HomelesEEA Nationals from the UK', *JIA&NL*, Vol. 24, No. 3, pp. 246-256

76 These points are developed in Weiss, 2010, p. 251-256.

J. McCarthy, 'Overarching Policies? The Continuing Implementation of the Citizen's Directive', *JIA&NL*, Vol. 23, No. 4, pp. 371-376

A. Kubal, 'Why Semi-Legal? Polish post-2004 EU Enlargement Migrants in the United Kingdom', *JIA&NL*, Vol. 23, No. 2, pp. 148-164

S. Peers, 'Turkish Visitors and Turkish Students: New Rights from the European Court of Justice', *JIA&NL*, Vol. 23, No. 2, pp. 197-203.