REPORT
on the Free Movement of Workers in the United Kingdom in 2008-2009

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Contents

Introduction

The UK's implementation of free movement of workers in 2008 revealed many continuities, and a few surprises. While the UK authorities place limited obstacles in the way of EU nationals seeking to exercise free movement rights to work in the UK (other than Bulgarians and Romanians), this laisser faire regime applies most successfully when there is no contact between the EU worker and the UK authorities. As soon as the EU national needs the assistance of the UK authorities, the problems start.

On immigration related matters, the UK agency responsible, UKBA,[1] has been restructured, the team responsible for EU matters moved to Liverpool, and delays in dealing with requests for registration certificates (for EU citizens) and residence cards (for their third country national family members) have become quite extraordinary – by March 2009 the average delay between application and receipt was ten to twelve months. Further, UKBA requires renewed evidence of employment when it gets around to looking at a file but often provides the EU national only 14 days to submit it! Regarding admission and departure, the UK authorities have refused admission to a Dutch parliamentarian on the basis of public policy. HM Inspector of Prisons found that 5% of persons detained in UK centres in France were Lithuanian nationals seeking to come to the UK. The Minister announced new measures on expulsion of EU nationals. In the press release, the Minister is quoted: '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'. The sentiment is rather at odds with the spirit of the EC Treaty.

The admission of third country national family members remained a matter of contention. The European Court of Justice (ECJ) decision in *Metock* 26 July 2008 was implemented in mid December 2008. However, now UKBA has increased the documentary burden on applicants substantially. UKBA considers that only direct family members benefit from the *Metock* ruling.

Limiting EU nationals' access to UK social benefits remains a priority for the UK authorities. As the Minister stated in April 2009 when justifying the extension of transitional provisions for EU8 workers in the UK past 1 May 2009: 'Maintaining the restrictions also means A8 nationals will not have full access to benefits until they have been working and paying tax for at least 12 consecutive months.'[2]

Access of EU national employees of service providers to UK sites became a hot political issue at the beginning of 2009 but for the moment the issue seems to have subsided. The entitlement of EU workers to equal treatment in tax advantages in conjunction with the ECJ's recent decisions on equality for EU nationals in treatment by the tax authorities makes this an increasingly challenging area for the UK authorities.

The UK not only announced that it would extend the transitional arrangements in respect of Bulgarian and Romanian workers but also that it would extend the transitional arrangements for EU8 workers. This is disappointing not least as the UK has provided almost complete access to its labour market to EU8 workers subject to a light registration requirement (for which each worker must pay). It is not evident that the continuing application of this arrangement will have

1 United Kingdom Border Agency.
2 http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/Government-keeps-work-restrict.

any effect at all on the domestic labour market, let alone forestall a serious disturbance to the labour market.

Chapter I
Entry, Residence, 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) (Amendment) Regulations 2006
- 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. ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/

1. ENTRY

Admission and Exclusion

In 2008, there have been few changes to admission practices, with the exception of exclusion on public policy grounds. The UK remains outside the Schengen free travel area. Additional powers were given to the authorities to expel and detain EU nationals in the Regulations 2009. As regards the instructions, in comparison with the 2006 ECIs, the current version has been significantly reduced in respect of guidance given to Immigration Officers on the admission of EEA nationals, which now no longer features as a separate Instruction. It is unclear whether this means that there are further instructions which 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 workers.

The Regulations 2006 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. The UK authorities' practices on admission of EEA nationals have revealed two issues recently. The first relates to the report of HM Inspector of Prisons on her inspection of the UK administered places of detention in Pas de Calais, France that 5% of persons detained were Lithuanian nationals (see chapter III). Secondly,

a Dutch national, Geert Wilders, sought to enter the UK in February 2009. He was refused admission and returned to the Netherlands. The UK Immigration Minister, when asked, on 26 February, in Parliament what the grounds were for Mr Wilders' exclusion, stated: 'The Secretary of State considered that in her opinion Mr. Wilders' presence in the UK would pose a genuine, present and sufficiently serious threat to one of the fundamental interests of society. She asked that her view be taken into account if Mr. Wilders sought admission to the UK. When Mr. Wilders attempted to enter the UK on 12 February 2009, the immigration officers who considered his entry were satisfied that his exclusion was justified on grounds of public policy and/or public security, in accordance with regulation 21 of the Immigration (European Economic Area) Regulations 2006. He was therefore refused admission to the UK under regulation 19 of the same regulations.'[3] The matter is being pursued in the House of Lords.[4] There are still problems regarding exercise of free movement rights by Bulgarian and Romanian citizens ('EU2 nationals') who are working in the UK. While the Regulations provide that Immigration Officers may not examine EEA nationals on entry unless they have 'reason to believe' that exclusion may be justified on grounds of public policy, public security or public health, EU2 nationals are asked to produce an Accession Worker Card or Registration Certificate. It is a criminal offence for an EU2 national to take employment without authorisation under Regulation 13 of the Accession (Immigration and Worker Authorisation) Regulations 2006, but no examination of this type should take place at the border and the offence of unauthorised working does not fall with ambit of public policy. The Regulations 2009, now provide wider powers to detain EU nationals – Reg 24 provides that 'if there are reasonable grounds for suspecting that a person is someone who may be removed from the UK... that person may be detained under the authority of an immigration officer'. This purports to permit Immigration Officers to take detention decisions against EU nationals without a court decision, on the basis of their own suspicion.

The continuing application of border controls between the UK and all other Member States except Ireland constitutes an obstacle to free movement of workers. While this obstacle is specifically permitted by protocol to the EC Treaty, the application of the obstacle needs to be kept under review to ensure that the controls do not become unlawful. In 2006, the HM Chief Inspector of Prisons published a Report on the unannounced inspections of three short-term non-residential immigration holding facilities: Calais Seaport, France, Coquelle Freight, France, Coquelles Tourist France. The Report states 'the facilities established under international treaty on French soil by the [UK] Immigration and Nationality Directorate (IND). There are three sites in and around Calais that hold detainees seeking entry into this country, either via the seaport or Eurotunnel. Although detainees are held only for short periods, this can be a time of maximum anxiety and uncertainty for people who may, for example, have previously spent many hours in cramped and dangerous conditions hidden in lorries. Their detention is out of the public gaze, so these reports offer a unique insight into the facilities and identify strengths and weaknesses, as well as reiterating some general issues that have been raised in previous reports.'[5] The facilities are all run by

3 http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090226/text/90226w0018.htm.

4 House of Lords (the UK's Second Chamber): Lord Lester of Herne Hill has submitted a written question (not yet answered) to ask Her Majesty's Government, further to the remarks by Lord West of Spithead on 12 February (HL Deb, cols 1232-36), what factors were taken into account by the Home Secretary in deciding whether the ban on Geert Wilders entering the United Kingdom would be in accordance with the European principle of proportionality.' [HO] HL1561 HL debate: http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90212-0002.htm#09021263000466

5 http://inspectorates.homeoffice.gov.uk/hmiprisons/inspect_reports/STHF-reports/Calaiscoquelles.pdf?view=Binary, p. 5.

SECURICOR G4S, a private company for the UK Border Agency. The HM Inspector's report highlighted a number of problems. Of concern here, however, is the finding on page 19 of the report that 5% of the detainees were Lithuanian nationals. As the European Court of Justice has held, the detention [and deportation of an EU national] based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens impair[s] the very substance of the right of residence directly conferred by Community law and are manifestly disproportionate to the seriousness of the infringement.[6]

2. RESIDENCE

Work seekers

Article 7(1)(a)

Regulation 13 implements the right to reside for three months subject to the public policy, security or health provisos and the 'unreasonable burden on the social assistance system' test. Beyond the three months, Regulation 14 defines those exercising free movement rights as 'qualified' person' including job seekers, workers, the self employed, the self-sufficient and students. The definition of workers and self employed is not dealt with in the Regulations and some very brief guidance is contained in the ECI's Chapter 1 while both self-sufficient persons and students are carefully defined. In practice, work seekers are not subject to specific immigration related obstacles regarding their residence so long as they do not have third country national family members. However, their access to social benefits is limited. The main benefit for job seekers is Job Seekers Allowance which is based on contribution based. For those not eligible, for instance because they have not contributed, the key benefit is income support. But this is only available to persons who fulfil both the habitual residence and the right to reside tests (see chapter 4). However, for working age persons, these benefits are designed to integrate the individual back into the labour market. Thus under the European Court of Justice's doctrine in C-22/08 and 23?08 *Vatsouras* these are benefits which cannot, because of their link to labour market participation be categorised as falling within the remit of Article 14(1). At the moment, however, this does not appear to be the case. For those who no longer work or exercise self employed activities for the reasons set out in Article 7(3)(a) to (d) there is a serious problem with the transposition of (c) as Reg 6(2)(b)(i) states that a person who is no longer working shall not cease to be treated as a worker if '(c) he was employed for one year or more before becoming unemployed'. This is not consistent with the Directive which does not set a 12 month barrier to worker status after termination of a fixed term contract.

There is no limit on how long an EU national can stay without completing formalities. There is no obvious transposition of recital 9 of the Directive. Access to housing is particularly problematic for work seekers. In a 2005 judgment the High Court held that 'The fact that a person is an EU national does not automatically apply [the exclusion]. The exception in 3(b) should always be noted. For a work seeker, as opposed to a worker, in housing and Children Act cases it is likely that there will be no material right which has to be taken into account which overrides the exclusion on paragraph 5. But for a worker, and specifically for a worker who for whatever reason loses his job and thus needs to fall back on some sort of benefit, the situation is different. Indeed,

6 C-215/03 *Oulane* 17 February 2005.

Article 7(2) of 1612/68 explicitly refers to that possible situation.'[7] The main issue is that dealt with above regarding access to benefits which have a work related element. As regards the right of third country national family members to remain after the death or departure of the EU national principal where the children are enrolled in school, the UK authorities interpret this provision as requiring residence but not labour market access (Reg 10). See also on this point in chapter 6.

Article 8(3): Processing of EEA registration certificates – the problem of unlawful delay
The issuing of residence certificates to EEA nationals is governed by Part 3 of the Immigration (European Economic Area) Regulations 2006. Regulation 16 provides that the UK authorities *must* issue a registration certificate *immediately* on application. By its own admission, the UKBA's transfer of EEA case working from the UKBA office in Croydon to its Liverpool offices in 2008, with the redeployment of significant numbers of experienced caseworkers away from EEA casework, has caused serious delays in processing. No priority appears to be given to EEA applications. Unlike applications under national law, these applications do not requirement payment of a fee. Despite the requirement contained in Article 19(2) of Directive 2004/38 to issue documents certifying permanent residence 'as soon as possible', large numbers of these applications failed to meet the standards imposed by the Directive. As at March 2009, applications were taking between *10-12 months* to be processed. The UKBA websites latest figures in processing were as follows:

> '*Processing times*
> The time it takes to process your application will depend on the type of application you make and how you submit it. If you make your application in person at Croydon public enquiry office, we will usually process your application on the same day. The table below shows the dates of postal applications we are currently processing.

Type of application	*All applications received prior to the date below are now under consideration*
Registration certificate applications	May 2008
Residence card	February 2008
Permanent residence (EEA nationals)	February 2008
Permanent residence (non-EEA nationals)	February 2008
Family member residence stamp	February 2008

> *Transfer of residence card or stamp*
> 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 another 10 – 12 month delay. The UK authorities' delay is clearly incompatible with the Member States' obligations and it a source of great friction between citizens of the Union and the UK authorities.

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

Permanent residence

Articles 17, 18 and 24

The Home Office's interpretation of the provisions of Article 16(1) and 17 of the Directive in respect of EU8 and 2 nationals continues to be restrictive, despite the Commission's provision of its opinion. The case of GN (EEA Regulations: Five Years Residence) Hungary [2007] UKAIT 00073 (referred in the 2007 report) has not been challenged. UKBA requires evidence that every month over the full five year period the individual was exercising a treaty right – for instance monthly wage slips for the full five year period, evidence of continuing residence in the UK etc. When a solicitor suggested that the authorities have such information through their national insurance records, the UKBA stated that it was the obligation of the applicant for permanent residence to prove that he or she fulfils the requirements. Please see Chapter VI for further detail on this. The most adversely affected individuals are those with third country national family members. As regards Article 24 – the right to equal treatment, UK universities accord study grants on evidence of three years residence as established in the *Bidar* decision of the ECJ. While EU nationals do encounter administrative ignorance at universities, as soon as the position is made clear the administrations obey the law.

3. DEPARTURE

The UK Borders Act 2007 provides, at sections 32 and 33, for the automatic expulsion (deportation) of anyone who is: not a British citizen, convicted of an offence and sentenced to a period of imprisonment of at least 12 months or of an offence which has been designated under the Nationality, Immigration and Asylum Act 2002 (serious criminal). There is one excluded category – certain Irish and Commonwealth citizens; and a number of exceptions including where removal would breach the UK's EU obligations. On 8 April 2009 the UK authorities issued a press release stating 'Also today, the Government is delivering on its promise to be tougher on European criminals and remove those that cause harm to our communities. From today the deportation referral threshold for European criminals will be cut from 24 months imprisonment to 12 months for drugs, violent and sexual offences. This means these offenders will be automatically considered for deportation. Mr Woolas said:

> 'We are determined to remove people that harm our communities – wherever they are from. That is why we are making it easier to kick out European criminals and stop them from returning. In 2007 we removed over 500 European nationals. By reducing the threshold for deportation, we will ensure that we can remove even more.' Tough new powers to remove Europeans who are not exercising their Treaty Rights – by working, studying or by being self-sufficient – were also introduced today. This will mean that anyone from Europe who is not playing by the rules will not be allowed to stay.'[8]

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

8 http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/Government-keeps-work-restrict.

Chapter II
Access to Employment

Text(s) in force

- Race Relations Act (RRA) 1976 as amended by The Race Relations Act 1976 (Amendment) Regulations 2003
- The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660)
- SI 2007/2781 The European Communities (Recognition of Professional Qualifications) Regulations 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. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

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 requirement, not equal treatment. The immigration and border agency's website gives detail as to how to apply to work in the UK: http://www.bia.homeoffice.gov.uk/eucitizens/workerregistrationscheme/. It lays down the detailed rules which apply to nationals of the accession states.

http://www.directgov.gov.uk/en/Employment/Jobseekers/index.htm is a government website listing all jobs in, say childcare, for particular regions. There is no limit on the website as to nationality. For those on benefits, Jobcentre Plus provides a personal adviser to help an individual look for work: http://www.jobcentreplus.gov.uk/JCP/index.html. 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://europa.eu.int/eures/home.jsp?lang=en) (EURES). Under the Race Relations Act 1976, JobCentre Plus cannot discriminate on the grounds of nationality of the applicant (see further below), although some of the benefits that it can advise on are subject to residence criteria.

Under s.14 of the Race Relations Act (RRA) 1976 employment agencies cannot discriminate on racial grounds which includes nationality.[9] That said, there has been some recent research for the BBC[10] which found that letting agents and employment agencies are still willing to discriminate against ethnic minority groups. Of 30 temping agencies contacted across the West of England, 25 agreed to a request for a receptionist job to be offered only to white workers. Increasing attention is being paid to the often precarious plight of agency workers: see eg the special publication: http://www.fairtoagencyworkers.org/files/Know%20Your%20Rights.pdf.

9 On nationality, see *BBC Scotland v Souster* [2001] IRLR 150.
10 http://www.bbc.co.uk/pressoffice/pressreleases/stories/2009/01_january/14/inside_out.shtml.

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[11] or the terms on which that employment is granted[12] or by refusing or deliberately omitting to offer employment. Section 1 RRA prohibits both direct and indirect discrimination on racial grounds which are defined in s. 3 as to include 'colour, race, nationality or ethnic or national origins'. The reference to colour and nationality, which was found in the original 1976 Act, shows that the British legislation is broader in scope than the EC Race Directive 2000/43. The 1976 Act has, however, been amended by The Race Relations Act 1976 (Amendment) Regulations 2003 to implement those aspects of the EC Directive not already covered by the 1976 Act. In particular, the Regulations introduced a new definition of indirect discrimination and the prohibition of harassment. However, these changes apply only to those areas falling within the scope of the Directive (ie race, ethnic or national origins but not colour or nationality). The Race Relations Act applies to all those employed at an establishment in Great Britain (s.8). It is not subject to a nationality requirement. In respect of residence it says:

> *8. Meaning of employment at establishment in Great Britain.*
> (1)For the purposes of this Part ('the relevant purposes'), employment is to be regarded as being at an establishment in Great Britain if the employee
> (a) does his work wholly or partly in Great Britain; or
> (b) does his work wholly outside Great Britain and subsection (1A) applies.
>
> (1A) This subsection applies if, in a case involving discrimination on grounds of race or ethnic or national origins, or harassment
> (a) the employer has a place of business at an establishment in Great Britain;
> (b) the work is for the purposes of the business carried on at that establishment; and
> (c) the employee is ordinarily resident in Great Britain:
> (i) at the time when he applies for or is offered the employment, or
> (ii) at any time during the course of the employment.
>
> (3) In the case of employment on board a ship registered at a port of registry in Great Britain (except where the employee does his work wholly outside Great Britain) the ship shall for the relevant purposes be deemed to be the establishment.
>
> (4) Where work is not done at an establishment it shall be treated for the relevant purposes as done at the establishment from which it is done or (where it is not done from any establishment) at the establishment with which it has the closest connection.
>
> (5) In relation to employment concerned with exploration of the sea bed or subsoil or the exploitation of their natural resources, Her Majesty may by Order in Council provide that subsections (1) to (3) shall have effect as if in both subsection (1) and subsection (3) the last reference to Great Britain included any area for the time being designated under section 1(7) of the Continental Shelf Act 1964, except an area or part of an area in which the law of Northern Ireland applies.
> …

In addition, under The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) which implement the religion and belief strand of EC Directive 2000/78 employers cannot discriminate on the grounds of religion and belief. In addition, Reg 18 makes it unlawful

11 *Nagarajan v London Regional Transport* [1999] IRLR 572.
12 *Anya v University of Oxford* [2001] IRLR 377.

for an employment agency to discriminate against a person in the terms on which the agency offers to provide any of its services; by refusing or deliberately not providing any of its services; or in the way it provides any of its services.

2. LANGUAGE REQUIREMENTS

There is no statutory requirement to speak English for specific jobs. However, as the JobCentre Plus website used to point out, 'The official language of the United Kingdom is English and the ability to speak and write it is an important requirement for jobseekers. Welsh is also spoken in parts of Wales and some jobs require you to be able to speak this as well as English.' (http://www.jobcentreplus.gov.uk/JCP/Customers/Workingortrainingineurope/Dev_009861.xml.html).

Chapter III
Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS

1.1. Direct discrimination

2008 was quite a mixed year as regards EU migrant workers in the UK. Regarding direct discrimination, serious problems arose at the end of the year, spilling over into 2009 regarding a series of wildcat strikes at the Lindsey Oil Refinery in North Lincolnshire against posted workers from Italy and Portugal carrying out works at the refinery. Approximately 2,000 workers took part in the strikes which were opposed by the unions. The refinery, owned by Total, had contracted with an intermediary to provide the work through an open tender process. The tender had been awarded to a company which employed Italian and Portuguese workers to carry out the activities. Local anger about unemployment in the community spilled over into industrial action against the EU workers. The wildcat strike spread to the Staythorpe power station and Longannet Power State (Scotland). By February 2009, negotiations between the strikers, the union and the company brought the strike to an end. The company confirmed that no foreigner workers would lose their jobs at the refinery. A 'further 102 new jobs for British workers' would be opened, according to the BBC (2009/02/05). On 21 June 2009, 650 strikers were dismissed from their jobs at the refiner and permitted to reapply for their own jobs. Further industrial action is possible.

The disturbance with its grave implications for free movement of workers has something of a history. A slogan, British jobs for British workers, was used by the Prime Minister in 2007 (Times 31 January 2009). While the objective of the term was to focus attention on the need to find employment for those out of work in the UK, it appears to have been misinterpreted in some quarters as a licence to discriminate against workers who are not British. In the wake of the wildcat strikes at power stations, the Business Secretary, Lord Mandelson stated

> 'We are determined to see robust enforcement of the employment rights legislated by Parliament, and fair and proper application of the European rules which govern the operation of companies throughout the EU and the mobility of labour which has always been an intrinsic part of membership of the EU and supported by successive British Governments' (Department for Business, Enterprise and Regulatory Reform 2 February 2009).

The prompt and clear statement from the Government assisted in defusing the situation. The unwavering position of the main trade unions which rounded and repeated condemned discrimination against workers from other Member States, was critical in the matter. The agreement which settled the Lincolnshire dispute includes 102 jobs for British workers – it has not been possible to obtain specific information on recruitment practices for these new jobs.

A problem arose in Belfast around 18 June 2009 when over 100 Romanians resident in a Loyalist (ie Protestant) part of the city were forced to leave their homes following racist attacks. They were moved to secret locations under police escort.[13] The political establishment in North-

13 'Belfast Romanians in hiding as attacks continue', *The Guardian* 18 June 2009.

ern Ireland has denounced the racist attacks, the Lord Mayor called them a 'stain of shame over Belfast'.

S 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.

1.2. Indirect discrimination

The adoption of the EU directive designed to protect temporary agency workers was hailed by UK trade unions as important step for all workers in the UK, including EU migrant workers. Agencies provide the first step into the labour market for many EU nationals seeking work in the UK making them disproportionately vulnerable to the practices of those agencies (TUC 10 June 2008). The TUC[14] also commenced a campaign to protect the employment rights of vulnerable workers in the UK noting that newly arrived migrant workers form a disproportionately large proportion of the workers most affected (TUC 2 May 2008).

The TUC has also developed its website of information for EU migrant workers advising them of their rights, a help line and information on rights in Hungarian, Czech, Lithuanian, Slovak, Polish and Portuguese. These are the main languages of union members in respect of whom the union is particularly concerned about access to information on employment rights (www.worksmart.org.uk/rights/). Further, agreements were entered into with the Polish trade unions and the two largest Bulgarian trade unions to ensure that the rights of their workers in the UK are protected.

Agreement on the temporary workers directive was received in the UK as a measure which would assist in the protection of EU migrant workers. The distribution of EU migrant workers in the UK has been the subject of study. The IPPR, a UK based think tank analysed available data which indicates a very wide distribution of EU nationals in the UK. Clusters of substantial numbers are found in Lincolnshire, Norfolk and Scotland. While about 1 million workers came to the UK after 2004, half of them have left (BBC 2008/04/03).

2. SOCIAL AND TAX ADVANTAGES

2.1. Housing

The Building and Social Housing Foundation (a UK charitable body) prepared a detailed report on migrant workers' housing. A key group they identified as facing difficulties were EU nationals

14 Trade Union Congress.

– in particular nationals of the EU 8 and EU 2 (BSHF *Home from Home* June 2008). The problems which were identified include: overcrowding and substandard accommodation, illegally high rents and lack of knowledge about rights. According to the report, EU 8 workers tends to find housing in the low cost private sector or with friends. Illegal finders' fees are a common problem. Accommodation provided by employers is also highlighted as a source of concern which is common in sectors where substantial numbers of EU 8 workers are employed – hospitality and agriculture. The report also indicates that access to social housing tends to be limited and confusion about eligibility is rife among the relevant authorities. Less than 1% of social housing lettings were to EU 8 nationals. Homelessness and access to assistance in cases of homelessness are also a problem. According to the report 20% of 'rough sleepers' in London are EU 8 or EU 2 nationals. However, between May 2004 and March 2008 on 0.4% of acceptances by local authorities under their homelessness duties were in respect of EU 8 nationals. The report states that among the problems is the uneven application of the right of EU 8 workers to full free movement rights and equality after 12 months employment.

2.2. Tax advantages

The central legislation on income tax is contained in the Finance Acts, the most recent being 2008. It is estimated that migrant workers in the UK make a considerable tax contribution to the UK which surpasses, per individual, that of British workers (IPPR 2007). The UK tax authorities have developed their website to provide information to EU migrant workers on tax matters (www.hmrc.gov.uk/cnr/). It is available in Bulgarian, Czech, Latvian, Lithuanian, Polish, Portuguese, Romanian and Slovak (as well as English and a number of non EU languages). Following an extensive consultation launched in December 2007,[15] in 2008, the UK Treasury proposed a substantial change to the way non-UK domiciled workers are taxed, a group which includes many EU nationals in the UK.[16] Under the new regime, the individual who has lived in the UK for seven out of the preceding ten years has to choose between being taxed on a remittance basis (ie money made or brought into the UK), lose his or her personal allowance and pay a supplementary flat tax sum (£30,000) or pay tax on an 'arising basis' which would include all income worldwide.[17] The change, now in place, has been accompanied by a provision under which a migrant worker who has £2,000 or less of income abroad which is not remitted to the UK is exempt from the new scheme (ie does not have to choose between loss of personal allowance or the £30,000 tax charge). Further, a migrant worker is not normally required to file a tax return if his or her untaxed income from employment in the UK does not exceed £2,500. The changes, which were fairly controversial, are being implemented from April 2009. The journal, Accountancy Age, quoted the shadow Treasury Minister saying 'the original legislation on this was ill thought out and has caused a great deal of uncertainty even among advisers. I am still not convinced that the government knows how unrepresented taxpayers will be able to comply.' As migrant workers contribute to the treasury at a higher rate than British citizens, the problem seems to be overpayment of tax rather than under payment. The Association of Labour Providers raised the problem of the change to the domicile rules in 2008 in particular as they affect low paid workers (Press

15 http://www.hm-treasury.gov.uk/d/consult_residenceanddomicile061207.pdf.
16 http://www.hm-treasury.gov.uk/d/bud08_completereport.pdf.
17 Though the choice is not open to all non-domiciled workers.

Release Association of Labour Providers 9 March 2008). In January 2008, the Low Incomes Tax Reform Group analysed the proposals and concluded that migrant workers who come to the UK for shorter periods of work risked encountering a disproportionate effect when compared to British workers (www.litrg.org.uk/news/latest.cfm?id=485 1 January 2008).

According to some agencies, EU migrant workers are poorly informed of their right to tax based benefits in the form of child benefits, tax credits and others. This point is picked up by the Audit Commission in their information – they are particularly aware of the complexity of tax issues and the relative dearth of sources of expert advice available to migrant workers on their rights in this area.

The problem of opening bank accounts, a necessary corollary of working in the UK, continues to be a problem. The Audit Commission highlighted the problem of banks refusing to open accounts on the basis that the personal documentation of the migrant worker was inadequate (www.audit-commission.gov.uk/migrantworkers/concerns.asp). Further the Audit Commission noted that Polish workers in the UK suffered discrimination in tax between 2004 – 2006 as they were required to pay tax both in the UK and Poland on the same income. This problem has been resolved through a double taxation agreement between the countries.

3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS

See Chapter 1 on entry regarding the continued application of border controls which constitute an obstacle. In February 2009 the Independent newspaper claimed that more than 200 Romanian workers who had been engaged on the 2012 Olympic site in London were classified as workers rather than self-employed (as they claimed) by the UK Border Agency and required to cease work (Independent 2 February 2009). Further information on the fate of these EU nationals has not been available.

4. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES) SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

4.1. Frontier workers

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

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

4.2. Sportsmen/women

Sport in the UK is organised through clubs which may, but are not required to be limited companies. It is for each club to affiliate should it so wish with a European or international governing body. If it does so affiliate then it is bound to respect the rules of the international body or risk expulsion. The governing body of a sport in the UK derives its powers from its legal status (a limited, company, an unincorporated association, a partnership or a body created by charter- this is rare), its members and/or shareholders. It is not regulated by the state nor does it receive specific powers from the state.

Football: only players registered with the Football Association may play professional or amateur football in accordance with the FA rules. There is currently no nationality quota. Players may only be registered with one club at a time and no more than three over the year. There are two windows pr annum for transfers of players. These last one month each. During these windows players may registered with another club. In professional football there are players with written contracts and those without written contracts. The two classes are dealt with differently under the 207/8 FA Rules (http://www.thefa.com/NR/rdonlyres/C78670E4-FC3D-4AF2-A526-59DEA094982E/148789/FIFATransfers0809.pdf). The contracts, which are agreed between players and clubs during these windows, are specific to the parties.

Basketball: The England Basketball Equal Opportunities and Equality Policy states that there is no discrimination on the basis of nationality.

Volleyball: there is no mention of nationality requirements in the Rules of the Volleyball Association.

Handball: The British Handball Association is a member of the International Handball Association while the European Handball Association has as affiliates in the UK the English and Scottish Handball Associations.

Rugby: According to the rules of the main rugby association, the Rugby Football Union, permitted players are defined as those players who are registered. Foreign players are defined as those who hold a nationality beyond the EU (and EEA). These persons cannot register unless their immigration status permits them to participate in the game. Overseas players are any players who play for a team other than the RFU (so would include nationals of other Member States) Contracted overseas players must have been resident in the UK (including the Channel Islands and Isle of Mann) for 180 days before they can register prior to the start of the season or will have

done so by the end of the waiting period (period of time between the Registration Date and when the player is Effectively Registered pursuant to the Registration Regulations). Clearly these rules of a greater impact on players from other Member States than British players.

Ice Hockey: Under the International Ice Hockey Federation rules players must be citizens of the country he or she represents in championships. The British Ice Hockey Association does not apply quotas but the requirements to obtain a work permit for a player who is not an EEA national (or otherwise has the right to work in the UK) are onerous

4.3. The Maritime sector

In 2007 there was a consultation about both the application of UK minimum wage rules to UK registered ships and the Race Relations Act which would make discrimination on the basis of race 9and other grounds) unlawful on UK registered ships. One trade union promoted the extension of UK minimum wage legislation's extension to the maritime sector in the Employment Act 2008. While the proposal was picked up by members of the House of Lords it did not succeed. UK minimum wage legislation still does not apply. Further, the union recommended the extension of the prohibition on discrimination on race and other grounds in the maritime sector to be included in the Employment Act 2008 but this too did not happen. Thus for the moment, the nationality discrimination which was highlighted in the 2007 report has still not been remedied.

4.4. Researchers/artists

The proposed changes to tax rules would have a substantial consequence for artists who often have income arising in a number of different Member States. They risk being taxed on their world wide income even when their UK arising income is not significant (see above under tax advantages).

4.5. Access to study grants

All EEA nationals who have been living in the UK for three years before their course of study starts are treated as home students and pay the same tuition fees as British citizen students who are settled in the UK. The decision on tuition fees for EEA students is taken by devolved governments. Thus in Scotland the decision was taken not to apply tuition fees to Scottish student thus these are not applicable to EEA students either. As regards financial support, EEA nationals who have been living in the UK for three years before commencing their studies are normally eligible for a loan to help pay tuition fees and living costs on the same basis as British students who are settled in the UK. The loan is repayable after the students are completed and the former student is earning in excess of £15,000 per annum. The three year requirement applies to everyone – workers, children etc on the basis of non-discrimination with British citizens.

Chapter IV
Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68

The Right to Reside Test

The right to reside test, which was introduced by the Social Security (Habitual Residence) Amendment Regulations 2004 became effective on May 1st 2004. Since then, a claimant for the means-tested benefits: Income Support, Pension Credit, Income Based Job-seeker's Allowance, Housing Benefit and Council Tax Benefit, as well as being present and habitually resident as required by the 1994 test, also has to have a 'right to reside' in the UK under UK or EU law. The right to reside test became effective on the same day as the Worker Registration Scheme which granted conditional access to UK labour markets to workers from the EU8 countries – Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. Nationals of these countries are able to take up employment in the UK, providing they are authorised under the Scheme. The effect of the 2004 amendments is that an EU8 national who is required to register with the Worker Registration Scheme is treated as habitually resident in the UK, but only if he or she has a right to reside. Job-seekers and those who are economically inactive – such as students, pensioners, or lone parents – have a right to reside provided they have sufficient resources to avoid becoming a 'burden' on the social assistance system. The right to reside test continues to give rise to legal challenges in the UK concerning who may rely on Article 7 of Regulation 1612/68; whether the residence test can be objectively justified and is proportionate to the objective pursued, and whether it goes further than what is required to achieve a legitimate objective pursued by national legislation (see *Hendrix* case C-287-05).

Zalewska v Department for Social Development[18]

The case of *Zalewska v Department for Social Development* (C6/05-06(IS)), whose progress through the courts has been discussed in previous reports, concerns whether an EU8 national who has worked in the UK for over 12 months, not all of which was registered, is a 'worker' and is therefore entitled not to be discriminated against under Article 7(2) of Regulation 1612/68 in claiming benefits. Ms Zalewska, a Polish national, initially worked in Northern Ireland under the Worker Registration Scheme but failed to notify the Home Office when she changed jobs. She subsequently claimed Income Support but was refused on the grounds that she did not have the right to reside and was therefore not habitually resident and so had no entitlement. The Social Security Appeal Tribunal allowed her appeal but the Social Security Commissioner reversed that decision and that decision was upheld by the Court of Appeal. Ms Zalewska appealed to the House of Lords. The central issue is whether the registration requirements in Regulation 7 of the 2004 Regulations on which the Ms Zalewska's right to reside in the UK under the Worker Registration Scheme depends are compatible with Community law.

18 See also chapter VIII on aspects of this case.

The House of Lords gave its Judgment on 12th November 2008. It rejected the argument of the Department for Social Development that EU law did not apply to national measures in respect of the Worker Registration Scheme. However, the House of Lords rejected by a majority of three to two the claimant's argument that as an EU worker she was entitled not to be discriminated against under Article 7(2) of Regulation 1612/68 and held that the effects of the Worker Registration Scheme in denying entitlement to benefit to those who had not worked for an uninterrupted period of 12 months in employment registered with the Home Office was not incompatible with Community law.

Ms Zalewska presented two arguments. One, that she could rely directly on Article 39EC and Article 7(2) of Regulation 1612/68 to gain the same social and tax advantages as workers who are UK nationals. The second, that the right to reside test, which is linked to the requirement to register the initial employment and to re-register all subsequent changes during the first 12 months, is unnecessary and disproportionate.

The Department for Social Development argued that the effect of the derogation under Part 2, Paragraph 2 of Annex XII of the Treaty of Accession, which provides for transitional provisions in respect of the application of Article 39 EC and Articles 1 to 6 of Regulation 1612/68, is that the question whether national rules are disproportionate restrictions on a Community right of access to the labour market does not arise because this is not a right that is derived from Community law. Alternatively, the Department argued that the Worker Registration Scheme performed a legitimate aim and was a proportionate way of ensuring that the UK has timely and accurate information about the impact of EU8 nationals on the UK labour market.

The House of Lords did not accept the first point made by the Department that the national measures that the UK selects have nothing to do with Community law reasoning that it is not possible to detach the opportunity that is given to the Member States to apply national measures to accession country nationals from its Community law background. Thus any national measures that Member States introduce under the authority of Part 2, Paragraph 2 of Annex XII must be compatible with the Community law principle of proportionality.

Therefore, the Court went on to consider the second point of whether the measures introduced were proportionate. The majority opinion of the House of Lords was that the Accession Treaty gives Member States the right to regulate access to the labour market during the accession period and carries with it the right to ensure that the terms on which access is given are adhered to. Therefore, regulation and monitoring of the right of access are appropriate and necessary consequences of making that right available and that the consequences for Ms Zalewska's entitlement to Income Support, when examined in their whole context, are neither unreasonable or disproportionate.

The dissenting judges cited the Department for Work and Pensions' Explanatory Memorandum to the Social Security Advisory Committee which they said made it clear that the aim of the Worker Registration Scheme was not specifically to avoid 'benefit tourism' or prevent 'undue burden' on the resources of the social security system but was limited to monitoring, which, the judges suggested, makes it difficult to see how the future denial of benefits to a person who has worked in the UK for at least 12 months is a necessary aim or for that matter even a *suitable* means of achieving it. The judges suggested that it would be more effective to target sanctions against employers and employment agencies than against employees as employers should be fully aware of what needs to be done if an accession worker is employed.

Case CPC/1072/2006

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

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

In Case *CPC/1072/2006*, the Commissioner followed *Abdirahman* which he said

> 'helpfully makes clear ... that the arguments fall to be raised under Article 18 first. Whether or not the claimant has a right of residence in the host Member State then determines whether or not he or she is entitled to be treated in the same way as nationals of the Member State in relation to social assistance.'

The Commissioner reasoned that the fact that, in many other contexts, the ECJ has said that unequal treatment must be justified on grounds independent of nationality, does not lead to the conclusion that nationality must always be a totally irrelevant consideration where social assistance is concerned. This, the Commissioner reasoned, followed from the principle that Member States have greater obligations to their own citizens than to nationals of other Member States which is evidenced by the fact that persons who depend on social assistance will be taken care of in their own Member State. Therefore, while the Commissioner accepted that Article 3 of Regulation1408/71 might preclude the imposition of a condition of a right of residence in the host member country in respect of a social security benefit within the scope of the Regulation, he did not accept that it precludes the imposition of such a condition in respect of a special non-contributory benefit, at least in the case of a benefit that is income-related and had particularly strong characteristics of social assistance.

Case *CIS/1224/2007*, which concerns whether Article 10a EC Regulation 1408/71 means that an EU national who is habitually resident in the UK has a right to receive special non-

contributory benefits; and whether an EU national who is unable to work due to his/her partner's illness, retains a right of residence has been stayed pending the outcome of the Court of Appeal's decision in Case CPC/1072/2006, described above.

Case C-299/05 Commission of the European Communities v European Parliament and Council of the European Union

Following the Judgement on 18 October 2007 that Disability Living Allowance (care component), Carer's Allowance and Attendance Allowance, were exportable to other member countries (Case *C-299/05*) the Minister reported to the House of Commons that she had published details of the new eligibility criteria for payment of these benefits within the EEA and Switzerland. However, she also reported that the UK was continuing discussions with the European Commission on the eligibility of people already living in another member country who wished to claim from abroad (Hansard 3 April, 2008).

On 24th February 2009 the Parliamentary Under-Secretary of State for Work and Pensions told the House of Commons that having now carefully considered the full terms of the Judgment and the provisions of European legislation which coordinates social security systems, details of the eligibility criteria for payments of the disability benefits have been posted on the Government's website (Hansard: 24 Feb 2009: Column 22WS0).

The detailed guidance issued by the Department for Work and Pensions states that a person claiming from abroad must still meet the usual entitlement conditions with the exception that they no longer have to be normally resident or present in the UK. In addition a person must have spent at least 26 of the previous 52 weeks in the UK at the date on which entitlement to the benefit can be established, unless they are: a posted or frontier worker; a family member of a worker in the UK, including posted or frontier workers; claiming Disability Living Allowance (care component) or Attendance Allowance, or under the special rules for terminally ill people.

There are several cases in the legal pipeline that look at how the decision in C-299-05 – *Commission of the European Communities v European Parliament and Council* – is being applied in the UK, including the status of the mobility component of DLA, which is still listed as a special non-contributory benefit. A decision is awaited on Cases CDLA/2864/2007, joined with CDLA/2002/2006, CDLA/2106/2006, CDLA/496/2006 were heard on 18th and 19th December 2008 (http://www.cpag.org.uk/).

Chapter V
Employment in the Public Sector

Texts in force

- Aliens' Employment Act 1955
- SI 2007/617 The European Communities (Employment in the Civil Service) Order 2007
- Civil Service Nationality Rules November 2007
- Race Relations Act 1976

There have been no new texts in 2008.

1. ACCESS TO THE PUBLIC SECTOR

1.1.Nationality condition for access to positions in the public sector

EC law requires equal access to employment for EEA nationals, subject to the Article 39(4) EC exemption for the 'public service'. The concept of 'public service' has been give a restrictive interpretation by the Court of Justice, to exclude only posts which involve both 'direct or indirect participation in the exercise of powers conferred by public law' and 'duties designed to safeguard the general interests of the state or of other public authorities'.[19]

Last year, the report described in detail the significant changes to UK law made by SI 2007/617 The European Communities (Employment in the Civil Service) Order 2007. These amend the Aliens Employment Act 1955 and list those eligible to work for the civil service.[20] The exceptions are for those in 'reserved posts'. These are defined in the Order in the following terms:[21]

> (6) In subsection (1)(c) 'a reserved post' means
> (a) a post in the security and intelligence services; or

19 Case 149/79 *Commission v Belgium (No 2)* [1982] ECR 1845, para 10.

20 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.

21 The Order makes equivalent amendments for Northern Ireland.

(b) a post falling within subsection (7) or (8) which the responsible Minister considers needs to be held otherwise than by a relevant European.
(7) The posts falling within this subsection are
(a) a post in Her Majesty's Diplomatic Service and posts in the Foreign and Commonwealth Office; and
(b) posts in the Defence Intelligence Staff.
(8)The posts falling within this subsection are posts whose functions are concerned with—
(a) access to intelligence information received directly or indirectly from the security and intelligence services;
(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,[22] refer you back to this report. The Regulations and Guidance have not been changed since.

There is now a new website: http://beta.civilservice.gov.uk/jobs/Nationality-Requirements/Nationality-Requirements.aspx.

1.2. Language requirement

There is no information on the language requirement for access to the civil service. However, for immigration purposes for third country nationals a language test is being implemented for the acquisition of permanent residence as well as for naturalisation.

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.

1.3. Recognition of professional experience for access to the public sector

As we have seen in chapter II, 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 relevant professional experience which the individual has obtained.[23] In any event, recruitment processes must permit an applicant's professional qualifications and experience obtained in other Member States to be taken into account.[24]

22 http://beta.civilservice.gov.uk/Assets/November_2007_Guidance_tcm6-2456.pdf.
23 This requirement is derived from Articles 39 and 43 EC: see Case C-340/89 *Vlassopoulou* [1991] ECR I-2357.
24 Case C-285/01 *Burbaud* [2003] ECR I-8219 (in relation to Directive 89/48).

As was pointed out last year, 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,[25] 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. 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. 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 Race Relations Act, as its section 75(5) of the 1976 Act does not protect such a practice.[26]

2. WORKING CONDITIONS

EC law requires equal treatment on grounds of nationality in conditions of employment. This requirement is set out in Article 7(1) of Regulation 1612/ 68, and has been held to follow from the provision for free movement of workers in Article 39(2) EC.[27] The requirement of equal treatment applies to both the exempt and the non-exempt public service.[28]

In the United Kingdom, the remedy for a breach of this principle is a claim of nationality discrimination under the Race Relations Act 1976. Such a claim would not be ruled out by section 75(5).

25 *Ibid*, para 40.

26 S.75(5) provides:
(5) Nothing in this Act shall—
(a) invalidate any rules (whether made before or after the passing of this Act) restricting employment in the service of the Crown or by any public body prescribed for the purposes of this subsection by regulations made by the Minister for the Civil Service to persons of particular birth, nationality, descent or residence; or
(b) render unlawful the publication, display or implementation of any such rules, or the publication of advertisements stating the gist of any such rules.
In this subsection 'employment' includes service of any kind , and 'public body' means a body of persons, whether corporate or unincorporate, carrying on a service or undertaking of a public nature .

27 Case C-281/98 *Angonese* [2000] ECR I-4139.

28 Case 152/73 *Sotgiu* [1974] ECR 153.

Chapter VI
Members of the Worker's Family and Treatment of Third Country Family Members

Texts in force

- Immigration Act 1971
- Immigration Act 1988
- Immigration and Asylum Act 1999
- Nationality, Immigration and Asylum Act 2002
- The Asylum and Immigration (treatment of claimants etc.) Act 2004
- Immigration, Asylum and Nationality Bill 2005
- The Immigration Rules (HC395) as amended
- The Immigration (European Economic Area) Regulations 2006

The Immigration (EEA) Regulations 2006

At the end of 2008, these remain un-amended. Many of the issues and problems therefore set out in former reports remain the same in 2008.

Family members

In the first half of 2008, the distinction between third country family members applying to join an EEA national who are inside the EEA and those who are outside, and therefore had to comply with the UK national immigration rules, remained problematic. This was particularly so, as set out in former reports, for those categories of third country nationals who had rights under the Citizens' Directive but who were unable to bring themselves within a category under UK immigration law (for example, children over 18, grandchildren, etc).

After the case of *Metock*, the Home Office was unacceptably slow to provide guidance for entry clearance posts. Clearly, the government felt that in the context of this development, that there were considerable concerns about abuse and misuse (see note from the United Kingdom Delegation to the Permanent Representatives Committee 15903/08 dated 18 November 2008). Further, although the government amended the EEA Regulations 2006 by the Immigration (European Economic Area) (Amendment) Regulations 2009 which came into force on 1 June 2009, inserting new provisions on expulsion and detention of EEA nationals, it failed to amend Regulation 12(1)(b) which is directly contrary to the ECJ's judgment in *Metock* as it requires family members to meet the national immigration rules rather than the family reunification rules of the Directive. This is a particularly sad example of failure to comply with the good faith obligation in Article 10 EC. The result is that the law still indicates that national immigration rules apply to family reunification of EU nationals exercising treaty rights in the UK even though the immigration guidance notes indicate that this is not the case.

In the period following the judgment, cases were either refused or put on hold. Guidance was finally issued to Entry Clearance Officers during the week of 8 December 2008. In that, it stated that the Entry Clearance Guidance which is the guidance which Entry Clearance Officers would be referring to and the European Casework Instructions which Home Office officials refer to

would be updated in due course.[29] As yet, the Immigration (European Economic Area) Regulations 2006 have not been amended although the government has stated in their guidance that these will be amended to reflect the changes.

How the implementation is likely to take place is difficult to assess. The guidance though is clear and fully implements *Metock*. It does however put significant emphasis on the fact that a marriage or civil partnership must not be for reasons of convenience and stresses the three reasons allowed for refusing an application (public policy, security or health). It also reiterates the importance of checking the authenticity of documents and the right of the government to take appropriate measures to guard against the abuse of rights or laws.

1.1. Family members of job seekers

Reg 13 of the 2006 Regulations provides for an initial right of residence up to three months and Reg 14 for the period after three months. It states that an EU 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 (ie including job seekers are entitled to remain with them).

Extended family members

The distinction drawn between those third country nationals who have resided with their EEA national family member inside the EEA and those coming from outside the EEA is maintained in relation to extended family members. The United Kingdom government has maintained its position that the right of admission is discretionary. In particular, it has stated that the *Metock* judgment only applies to Article 2 of the Citizens' Directive for direct family members and does not deal with applications for extended family members as defined in Regulation 8 EEA Regulations 2006. Their position remains that these should be dealt with as before.

The position at the end of 2008 remained as in *KG (Sri Lanka) and AK (Sri Lanka) [2008WCA Civ 13]* i.e. that *Akrich* does allow entry into the free movement area to be governed by national immigration law. Only after that lawful entry does community law apply to movement within the EEA. This case was further underlined by the case *SM (Sri Lanka) [2008] UKAIT 00075*. In that case, it was argued that *Metock* had no direct relevance to the interpretation of Article 3 (2) i.e. for extended or other family members. The case of *KG (Sri Lanka)* was stated to be 'good law' and within the meaning of Article 3(2) and therefore Regulation 8 of the Immigration (European Economic Area) Regulations 2006. It also went on to state that *Metock* does not overrule the whole of *Akrich* as the ECJ had only concluded that paragraphs 50 and 51 of *Akrich* needed to be reconsidered.

In relation to durable relationships, the Home Office position remains unchanged, namely that the couple have to have resided together for two years before their relationship can be said to be durable. As yet, a comprehensive case of what is to be considered as durable has not reached the courts. Also unclear is the position that durable partners find themselves in once they have made an application to the Home Office. Unlike spouses who are given a letter of application showing that they can work, this was not the case during most of 2008 for unmarried partners who were unable to work. However, more recently, the letters have been drafted as allowing people who

29 This occurred in January 2009.

have made durable relationship applications to work until a decision is taken in their case. This seems to suggest that the Home Office is unsure whether they are able to maintain their position that a person in a durable relationship must be granted a right to remain (rather than having a right per se).

Marriage/civil partnership

The Immigration (European Economic Area) Regulations 2006 specifically exclude from the meaning of spouse/civil partner anybody who has entered into a marriage of convenience or a civil partnership of convenience. Throughout the last year, there has been an increased emphasis on tackling this method of abuse by the Home Office in, for example, its guidance to Immigration Officers and entry clearance posts.

Although fiancé(e)s or proposed civil partners are not specifically recognised under European law, the United Kingdom government does allow partners of EEA nationals to apply as if they were British nationals or people with permanent residence in the United Kingdom.

The position in relation to people entering into marriage or civil partnership who are subject to immigration control remains very much the same as in the last report. These people have to obtain written permission from the Secretary of State in the form of a certificate of approval from the Home Office. Once the notice has been accepted by the Registrar in the designated office, the couple can marry or enter their civil partnership at any Register Office. Although the Home Office has stated that if somebody was in the United Kingdom irregularly and applied for a certificate of approval, they reserved their right to take enforcement action against that individual it appears that EEA nationals have been able to marry their third country national partners and then obtain a residence card from within the United Kingdom as the family member of an EEA national.

The position in relation to *Baumbast* remains very much the same. The Home Office is taking a strict line on interpreting *Baumbast* type situations and refusing them if they do not fall exactly within the *Baumbast* criteria.

In relation to retained rights of residence after divorce, the Home Office is requiring the couple to have been married for three years as set out in the Citizens Directive but for the one year that they have spent in the United Kingdom, they are requesting that the couple show that they have cohabited throughout the period. The Home Office also requires the applicant to show that the EEA national was exercising Treaty rights throughout the duration of the marriage and even if initial evidence is provided, the Home Office is unwilling to then review their own records to show that somebody has indeed been working. Given the nature of these cases they are naturally difficult to document. The Home Office is also taking a very strict line in stating that a divorce needs to have been finalised. Unfortunately, the family courts in the United Kingdom are currently experiencing severe delays in issuing decree absolutes and this can cause significant problems.

1.2. Application of Metock judgment

Family permit

Family permits do appear to be given priority over other applications and after the issuing of the guidance after *Metock*, most cases were dealt with swiftly. It also appears that there is an understanding that no fee should be charged. Swiss nationals benefit from the same rules as other EEA nationals.

Family permits are granted for six months giving the applicant this window of space to travel to the United Kingdom. This does cause problems in relation to the ability of the third country national to work once in the United Kingdom. In reality, given the strict employer sanctions in force now in the United Kingdom, a third country national has to obtain a five year residence card for which they have to apply to the Home Office before being able to work. The problems relating to this can be seen below.

Residence cards

These were taking at least six months to be dealt with which is highly problematic for various reasons. The Home Office is regularly in breach of their duty to deal with these applications within six months. This affects a third country national's ability to document their right to work. Although certificates of application are generally sent out quickly, employers are in our experience more and more reluctant to accept them. In particular, if a residence card is not then granted within the six months, employers are unwilling to continue their employment relationship with third country nationals.

In addition, third country nationals are being asked for documents by the Home Office which they should not have to provide. So far example, they are being asked for evidence of cohabitation since their marriage or civil partnership and civil partnership ceremony photographs. In addition, as these applications are outstanding for so long, the Home Office is then writing to ask for updated information about e.g. the EEA national working. Also, the procedures for retrieving passports is difficult and haphazard.

Situation of family members of job seekers

There is no clear picture about the situation of family members of job seekers. Job seekers are recognised by the Home Office as exercising Treaty rights but increasing lengths of time as a job seeker do lead the Home Office to ask for more documentation to prove their position.

1.3. How the problems of abuse of rights (marriages of convenience) are tackled

In terms of the abuse of rights, the Home Office has put in force guidance to ensure that every Entry Clearance Officer and worker at the Home Office considers this when looking at applications. In terms of marriages of convenience, we are not aware, there has been any increase in house raids although there have been some requests for interviews of married couples. What is becoming apparent is the introduction of long questionnaires on every application for family

permits regarding the personal circumstances of the family members. UKBA appears to be justifying intrusive measures regarding personal circumstances on the basis of addressing the problem of abuse.

Equal treatment

In terms of equal treatment there appear not to be any specific problems in 2008. Many of the concerns about EU8 Europeans coming to the United Kingdom in 2007 are no longer so relevant as numbers have been declining. No specific problems that we are aware of have arisen in terms of access to the labour market (other than those set out above), to education or health services.

2. ACCESS TO WORK

Problems have arisen for third country national family members in terms of their access to the labour market, through difficulties of not being able to document the right to work while an application is outstanding. This is particularly problematic in light of legislation in the UK 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. Although letters confirming applications are sent out and employers can rely on them to employ somebody, they state that they are only valid for 6 months despite the fact that the Home Office is currently taking significantly longer than that to deal with applications and give a final decision.

Chapter VII
Relevance/Influence/Follow-up of recent Court of Justice Judgments

C-287/05 Hendrix

Please see Chapter IV where the UK implications of this case are set out.

C-527/06 Renneberg

The first finding in this case that a EU national who has always worked in his or her Member State or origin and only lives in another Member State is still a worker for the purposes of Article 39 EC is important for the UK. Such a situation arises not infrequently in Northern Ireland. The second finding regarding the right to deduct losses on immovable property in the Member State of residence from taxable income in the Member State of employment is also of interest in the UK. The ECJ found that the inability, under national tax rules to deduct this negative property related income from income tax in the state of employment constituted an obstacle (rather than discrimination) to free movement of workers. It considered whether the obstacle could be justified and noted that no justification had been put forward. Taken on its very specific facts, mortgage tax relief, the judgment is not relevant to the UK as such a tax relief was abolished more than ten years ago. However, the wider principle regarding treatment of losses on immovable property in one Member State and the possibility to set these off against income earned in the UK cannot be dismissed so clearly are irrelevant.

10% of the British population lives abroad (approximately 5.5 million) the majority in other EU Member States, according to the think tank IPPR. Many of these persons, particularly in the EU are self employed, carrying out economic activities in their state of residence and also in the UK, often related to rental of property. While they may have income from investments of pensions in the UK and remain primarily taxed in the UK their income and losses from property rental in another Member State will come within their UK tax return.

According to the UK's Inland Revenue from 2006 'Rent and other receipts from properties outside the UK continue to be taxed separately as foreign income. The profits or losses are computed using trading principles just like those of a UK rental business.' However, the IR continues 'Profits or losses of an overseas property business are not combined with the profits or losses of a UK rental business; they are taxed separately and losses on one can't be set against profits on the other.' (http://www.hmrc.gov.uk/manuals/pimmanual/PIM4703.htm).

The Inland Revenue further specifies:

> 'Losses
> As part of the changes made by FA95, the taxable profits and losses of overseas let property were ring fenced for IT purposes. The effect was that:
> - losses of an overseas property business cannot, for IT purposes, be set against profits of a UK property business carried on by the same individual,
> - similarly, losses of UK property business cannot for IT purposes be set against profits of an overseas property business carried on by the same individual.

The ring fencing of overseas property losses has been carried through to the new rules for companies but the ring fencing of overseas property profits has not. The effect is as follows:

- Losses of an overseas property business can only be set against future profits from that overseas property business and cannot be set against profits of a UK property business or any other profits of the company whatsoever – ICTEU88/S392B (1)(a) and (b) as amended.

but

- Losses of a UK property business (which broadly fall to be relieved in the same way as management expenses under ICTEU88/S75) can be set against profits of an overseas property business – ICTEU88/S392A (1) as amended.

Two other features of the loss provisions should be noted:

- Previously, there was no statutory authority for allowing losses on overseas property to be carried forward. Loss relief was given by ESC/B25. Any relief for losses due under ESC/B25 which is unused at 1 April 1998 may be carried forward and set against profits of the overseas property business.
- CT Schedule A losses of an overseas property business may only be carried forward where a company carries on a Schedule A business,
  on a commercial basis,

or

  in the exercise of statutory functions as defined at ICTEU88/S392A (7).

See ICTEU88/S392A (5) as applied by ICTEU88/S392B (2).

Credit for foreign tax

If the overseas income has suffered foreign tax and a claim to tax credit relief is made, it will be necessary, for the purposes of the source by source rule (see INTM161210) to identify the amount of UK tax attributable to income from each particular property. Where, therefore, tax credit relief is claimed separate computations of profits and losses for each property will be required. For the purposes of calculating tax credit relief, losses should be deducted in the order most favourable to the company's claim. Normally this will mean that losses should be allocated first against the source which has suffered at the lowest rate of foreign tax.' http://www.hmrc.gov.uk/manuals/pimmanual/pim4705.htm.

This appears to indicate that the kind of problem which arose in *Renneberg* could arise in the UK though not in respect of mortgage tax relief. As appears from the judgment, the situation as regards double taxation agreements must also be taken into account.

C-94/07 Raccanelli

In this case the problem was the discriminatory treatment of doctoral students from other Member States in Germany as regards their status as students rather than workers in comparison with the treatment of German students. The prohibition on discrimination applies equally to private law institutions as public ones. The main finding is that where a doctoral student prepares a thesis on the basis of a grant in the circumstances where the activities are performed for a certain period of time under the direction of the institution and in return the student receives remuneration then the student is entitled to be treated as a worker for the purposes of EU law.

In the UK doctoral students receive funding in a wide variety of different forms and from a wide variety of different sources. Often funding comes in the form of a bursary from the university where the student is studying, often from some other grant awarding institution. The treatment of doctoral students is very varied in UK institutions (almost all of which are public law institutions). Some are employees where they are on contract to carry out specific activities, oth-

ers are treated as students. In 2004, the National Postgraduate Council, a UK association for postgraduate students, examined whether PhD students in the UK could claim worker status and if so whether this would be to their advantage. Certainly their conclusion at that time is that it is a very mixed question – some students might benefit from worker status while others would be disadvantaged (http://www.npc.org.uk/page/1101153773). Their report finishes with two questions which are of interest to students in the UK 'Financial matters are not the only issue, can it be reasonable to consider a supervisor as an employer, who has the right to direct the students' work and withhold intellectual property? Academic freedom for PhD graduates could be severely restrained in such cases or on the other hand can employment charters be implemented to maintain the rights of researchers?' The question raised in *Raccanelli* is certainly relevant to the UK but the extent to which postgraduate students may wish to challenge their classification is less clear as the benefits for them are less apparent than in the German case.

Chapter VIII
Transitional Measures

POLICY AND LEGISLATIVE DEVELOPMENTS

EU8 nationals

There were no changes during 2008 to the policy or governing legislation applicable to EU8 nationals subject to transitional labour market measures. Unless exempt, EU8 nationals continue to be subject to a requirement to register each employment within one month: see the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004 No 1219) as amended.

On 8 April 2009, the UK Government announced that it would be extending the Worker Registration Scheme. According to the Press Release the reason for the extension of the Scheme into the exceptional final two year period is 'The Worker Registration Scheme enables the Government to monitor the work A8 nationals do, and where in the country they do it – and so better plan for local services and ensure migration is working for the British labour market and the country as a whole. Maintaining the restrictions also means A8 nationals will not have full access to benefits until they have been working and paying tax for at least 12 consecutive months.' (The full press release is reproduced at the end of this chapter).

EU2 nationals

There were no changes during 2008 to the legislation applicable to EU2 nationals subject to transitional labour market measures. Unless exempt, EU2 nationals continue to be subject to authorisation requirements: see the Accession (Immigration and Worker Authorisation) Regulations 2006 (SI 2006 No 3317), as amended.

It was announced on 18 December 2008 that the transitional measures applicable to EU2 nationals would continue into 2009.[30] The number of places on the Seasonal Agricultural Workers Scheme was increased from 16250 in 2008 to 21250 in 2009. The 3500 places on the sectors-based scheme for food processing would continue, while being open to a 'wider range of occupations within the sector'.[31] These adjustments were presented as part of a 'policy of gradual opening of the labour market'. The arrangements are to be reviewed again during 2009.

During 2008, the United Kingdom has reformed much of its policy applicable to the employment of non-EEA/ Swiss nationals, through the introduction a 'points-based system' (PBS). Tier 1 of the PBS came into effect on 30 June 2008, and concerns highly skilled workers, including the former highly skilled migrant programme and post-study work schemes. Tier 2 of the PBS came into effect on 27 November 2008, and concerns skilled workers, including the former work permit scheme. Tier 5 of the PBS also came into effect on 27 November 2008, and provides a

30 Written statement by Immigration Minister Phil Woolas, House of Commons, 18 December 2008, col 130WS.

31 A list of the occupations previously covered can be found at paragraph 15 of *Sectors Based Scheme (Bulgarian And Romanian Nationals Only): Guidance for Employers From 1 April 2008*, http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/workpermits/sbs/sbsguide0408.pdf. It is not yet apparent which occupations will be added to the list.

series of temporary labour migration schemes, including a youth mobility scheme based on reciprocity. It should be noted that the United Kingdom has not so reflect these changes to its system of labour migration in the specific legislation applicable to EU2 nationals.

STATISTICS

EU8 nationals

The most recent information on registration for employment by EU8 nationals shows that a total of 925,825 EU8 nationals had done so at some point between 1 May 2004 and 31 December 2008.[32] The most recent statistics also show a decline in the rate of new registrations during 2008, with the annual figure of 156,295 down 26% on 2007 (210,800), and down 31% on the peak in 2006 (227,875). Moreover, the number of new registrations in the fourth quarter of 2008 (26,815) was 47% down on that for the fourth quarter of 2007 (50,820).

EU2 nationals

The most recent information on the admission of Bulgarian and Romanian nationals to the UK labour market shows the following.[33]

	2007	2008
Accession worker cards (permission for a specific employment)	3800	2765
Registration certificates (no requirement for specific permission)	29730	18040
SBS	1405	1570
SAWS	8060	16470
Total	42995	38845

CASE LAW

EU8 nationals

On 12 November 2008, the House of Lords decided the case of *Zalewska v Department for Social Development* [2008] UKHL 67 (the Court of Appeal decision was discussed in the report for 2007).[34] The case concerned an EU8 national who had worked for more than 12 months in the United Kingdom, bit who had failed to re-register under the Workers Registration Scheme when she changed employer. As a result of that failure, her most recent period of employment was unlawful, and she did not accumulate the 12 months' continuous lawful employment necessary to have a right of residence under UK law when she ceased employment. In consequence of the lack

32 UK Border Agency, *Accession Monitoring Report: May 2004-December 2008*, Table 1.
33 UK Border Agency, *Bulgarian and Romanian Accession Statistics: October-December 2008*, Annex A.
34 See also Chapter IV on the social security aspects of this case.

of a right of residence, she was precluded from claiming equality of treatment in relation to income support, the main form of social benefit in the United Kingdom.

One question in *Zalewska* was whether the denial of a social benefit in these circumstances was contrary to Article 7(2) of Regulation 1612/ 68, given that the Accession Annexes permit a derogation only from Articles 1 to 6 of that Regulation. Lord Hope, who delivered the lead judgment in the House of Lords, concluded that Article 7 was not applicable, since the rights it conferred required compliance with national measures as regards labour market access (here, the registration scheme).

The second question *Zalewska* was whether the requirement to re-register after taking a new employment was a proportionate one, given that (i) the purpose of monitoring flows of EU8 nationals into employment was essentially met by registration of the first employment, and (ii) that it had the significant consequence of denying access to all benefits. On this point, Lord Hope concluded that the requirement to re-register was not disproportionate, as it was necessary in order to make the system of gathering up-date statistics effective.

These points may be made by way of comment.

Other examples of failure to re-register leading to a loss of social benefits may be seen in the decision of the Social Security Commissioner in Case CIS/3232/2006 on on 2 March 2008.

Zalewska does not resolve the question of whether it is contrary to Article 7(2) of Regulation 1612/68 to deny social benefits to an EU8 worker who has *complied* with registration requirements, but been employed for less than 12 months.

There is no discussion of the possibility of a preliminary ruling in *Zalewska,* even though the House of Lords was under a duty to make reference on questions that were not *acte clair*.

Government keeps work restrictions for eastern Europeans
08 April 2009
Strict working restrictions for Eastern Europeans will not be scrapped, the Government announced today.
The Worker Registration Scheme enables the Government to monitor the work A8 nationals do, and where in the country they do it – and so better plan for local services and ensure migration is working for the British labour market and the country as a whole. Maintaining the restrictions also means A8 nationals will not have full access to benefits until they have been working and paying tax for at least 12 consecutive months.
The decision comes following independent, expert advice from the Migration Advisory Committee (MAC) on the benefits of the scheme to the British labour market. Border and Immigration Minister Phil Woolas said:
'Migration only works if it benefits the British people, and we are determined to make sure that is what happens. That is why I am delighted to announce that we are keeping in place restrictions which mean we can continue to count how many people are coming here, and which limit Eastern Europeans' access to benefits.'
The number of Eastern Europeans coming here to work has fallen dramatically. In the three months to December last year there were 29,000 applications from workers from these countries – down from 53,000 in the same period in 2007. Nevertheless, the Government is determined to do everything it can to ensure migration is controlled and works for the country as a whole. According to Home Office figures, the majority of workers coming from the A8 countries in 2008 were young – 78 per cent were aged between 18 and 34 – and only 11 per cent stated they had dependants living with them in the UK when they registered. Also today, the Government is delivering on its promise to be tougher on European criminals and remove those that cause harm to our communities.'

Chapter IX
Miscellaneous

In general, 2008 has been a very busy year for UK immigration policies and practices. First, the administration of immigration controls in the UK was transferred to an agency, the UK Border Agency, following an announcement by the Secretary of State on 11 March 2008. The UK Border Agency was a shadow agency of the Home Office until 1 April 2009 when it achieved full agency status.[35] According to the Agency itself, 'the Agency was formed in April 2008 to improve the United Kingdoms's security through stronger border protection whilst welcoming legitimate travellers and trade.'

The Agency sets out its ojectives to provide as follows:

- a sharper focus on delivery, better meeting the public's expectations in maintaining secure borders, finding and removing illegal immigrants and tackling those who facilitate them coming here;
- clearer accountability, not only to the public, but also to our customers, to our partners and to ministers;
- greater operational freedom to respond to the challenges we face and to manage its people and resources more effectively;
- the ability to reinvest savings into improving our business delivery;
- an opportunity to forge new ways of working and new relationships with the agency's partners; and
- a new identity to bring its staff together under a clear, single brand with unified clarity of purpose.

According to its website it brings together the work previously carried out by the Border and Immigration Agency, Customs detection work at the border from Her Majesty's Revenue and Customs (HMRC) and UK Visa Services from the Foreign and Commonwealth Office (FCO). It describes itself as a global organisation with 25,000 staff, including more than 9,000 warranted officers, operating in local communities, at UK borders and across 135 countries worldwide (http://www.bia.homeoffice.gov.uk/aboutus/) However, the legislative basis for the Agency and new powers for it were only published in a bill in the Autumn of 2008 (Lords Hansard 11 March 2008 Column WS138). This legislative basis is included in the Immigration Bill 2008. This is the first time that one agency has been given responsibility for the different aspects of immigration controls – within the UK, at the borders and at consulates abroad. In practice, the newly created UKBA inherited the staff of the UK Border and Immigration Agency as well as its website. The UK Visa Service was made subordinate to it. From the perspective of the UK constitution, the main issue is that of ultimate responsibility of ministers for the actions of the UKBA. Once the UKBA achieved executive agency status on 1 April 2009, it finalised a Framework Agreement, which is a technical document setting out the terms of the relationship between the UK Border Agency and the Home Office, including the respective roles of Ministers, the Permanent Secretary and the Chief Executive. It also covers out the relationship with HM Revenue & Customs and the Chancellor of the Exchequer.

35 Shadow status is a transitional period of operation which the agency is undergoing before becoming a full executive agency.

In February 2008, the new Points Based System on primary immigration control came into effect in the UK and has been a very high priority of the administration. The PBS replaces most of the pre-existing work related categories for entry into the UK. It is intended to make the management of migration more transparent and simpler to administer. Under the PBS, a prospective immigrant to the UK is assessed on the basis of the number of points which he or she accumulates according to rules which are set out. For instance, points are awarded for knowledge of the language, educational attainment previous employment etc. The PBS system is divided into five tiers, each tier subject to different rules. In all categories except the self employed, the third country national must have a sponsor (which can be, for instance an employer or an educational institution if the individual is a student). Sponsors are under duties of information to UKBA regarding the third country nationals they sponsor – for instance if they do not come to work or for students if they miss a specified number of contact hours. All sponsors must be registered with the UKBA and are rated.

It is not yet clear whether the PBS objectives are being achieved. One difficulty which is already apparent is that the rapid change of PBS rules, one of the virtues from the perspective of the administration to respond to the changing work environment in the UK, is creating problems of lack of clarity for individuals who prepare their applications on the basis of the published rules at any given moment but may have their assessed on the basis of different rules on account of the rapidity of the changes which are announced.

Regarding the preference for EU nationals, the UKBA website makes it clear that EU nationals (including EEA nationals) are not subject to the PBS. Transitional arrangements have been made for Bulgarian and Romanian workers so that their position does not suffer as a result of the change to the UK system (http://www.bia.homeoffice.gov.uk/eucitizens/).

There have been a number of courses and seminars for practitioners in the UK on EU free movement of persons. One was sponsored by the Network Free Movement of Persons and took place in June 2008. The Immigration Law Practitioners' Association has run a number of course in 2008 to teach practitioners about aspects of EU migration law as it applies in the UK. As regards national organisations and bodies where citizens can launch complaints for violations of community law on free movement, the first source of assistance is often the Community Advice Bureaux, a network of free advice centres across the country which have access to more specialised advice when problems occur which are beyond the advisers' immediately abilities. There are a number of other sources of assistance – community law centres exist in many parts of the country which held individuals with the legal problems, including relating to Community law. Further, the AIRE Centre provides assistance and advice not only to individuals but also to first level advisers on EU issues with a strong reference to free movement of workers problems.

UK response to the report on the Free Movement of Workers in the United Kingdom and the consolidated report on the Free Movement of Workers in Europe in 2008-2009

Thank you for sending us the Report on the Free Movement of Workers in the UK and the consolidated report on the Free Movement of Workers in Europe in 2008-2009. We are sorry that the tone of the UK national report, in particular, is rather negative and contains various factual inaccuracies. We are also sorry that these inaccuracies will not be corrected and published in an amended report, but instead will be published alongside the original report. However, we note that the reports have been written for the Commission by independent experts who express their own views and that they do not necessarily reflect the views of the Commission.

The United Kingdom remains committed to its obligations under Directive 2004/38/EC to facilitate the freedom of movement of workers. The right of free movement of people is one of the main achievements of the European Union. EU enlargement is a shared gain for all current EU Member states. It allows all Europeans to share wealth and security, to be confident in the application of their human rights, to travel and trade with fewer restrictions and to work together against crime and terrorism. Notwithstanding this, the right of free movement brings with it the responsibility for those who wish to benefit from it to obey the laws of their host country. That is why the UK has welcomed the Commission guidelines on better transposition and application of Directive 2004/38/EC published on 2 July 2009.

Our comments on the national report are as follows:

Page 3 - It is noted that the introduction to the report states that the United Kingdom Border Agency (UKBA) has increased the documentary burden on European applications. This assertion is not accepted, UK authorities are not aware of any increased documentary demands; nor is there anything contained in caseworking guidance (European Casework Instructions) that points to caseworkers needing to request increased documentation.

Page 3 - This page of the report contains a reference to Lithuanians forming 5% of those held in UK-run detention facilities in Calais (cited as an obstacle to free movement of workers). This figure is taken from Her Majesty's Chief Inspector of Prisons' August 2005 inspection report for the holding rooms at Calais and Coquelles, which provided a breakdown by nationality of the 661 people held in the holding room at Calais Seaport during the period May-July 2005, 33 of whom were Lithuanian. The reference to this number in the Free Movement Report is potentially misleading, as it is not made clear that the statistic is taken from a 2005 report. The UK would like to make it clear that this is not a current figure, nor a reflection of the present situation.

Pages 5-7 - The UK report refers to the 2009 changes to the Immigration (European Economic Area) Regulations 2006 (known as the EEA Regulations), which transpose Directive 2004/38/ EC. The power to refuse admission if a person's exclusion is justified on the grounds of public policy,

public health or public security has existed since the EEA Regulations came into force on 30 April 2006. Regulation 19 of the EEA Regulations meant that the power to exclude could be exercised by an immigration officer who encounters the person on arrival at port. The 2009 amendment to the Regulations that came into force on 1June 2009 now enables the Secretary of State to make an exclusion order where he considers the person's exclusion is justifiable on grounds as set out above. The essential difference between this amendment and the original provision is that the Secretary of State may now make an exclusion order while the person is outside the UK, prohibiting that person from entering. Any decision to make an exclusion order must still be taken in accordance with Regulation 21 of the EEA Regulations. UKBA will ensure through the publication of guidance that a fair and consistent application of this power will be applied.

The decision taken on 12 February 2009 to refuse Geert Wilders admission to the UK on grounds of public policy/public security was based on the specific circumstances pertaining at that time. Mr Wilders has since been successful in his appeal to the Asylum and Immigration Tribunal (AIT) against that decision. The UK has accepted that judgment and will not be contesting that decision.

Pages 7- 8 - It is wrongly asserted that that "*the definition of workers and the self employed is not dealt with in the EEA regulations*". This is not the case. Workers and self-employed persons are in fact defined in regulation 4(1)(a) and (b) respectively.

The UK authorities would also differ from the rapporteurs in their interpretation of the retention of worker status as set out at the end of the first paragraph in this section. The rapporteurs suggest that the UK authorities have incorrectly transposed Article 7 (3) (a) – (d) in the EEA regulations relating to when a worker who is no longer in employment can still retain their worker status. The rapporteurs do not agree that in order to retain such status a worker "*must have been employed for one year or more before becoming unemployed*" and claim this is not consistent with the Directive.

The UK authorities consider that Article 3(b) of the Directive makes provision for someone to retain their worker status if *"s/he is in duly recorded involuntary unemployment <u>after having been employed for more than one year</u> and has registered as a job-seeker with the relevant employment office".* (Emphasis added.)

It is not correct that recital 9 of the Directive has not been transposed. Recital 9 provides that Union citizens have an initial right of residence in a host Member State without being subject to any conditions or formalities except the holding of a valid EEA passport or ID card. This provision has been transposed in the form of regulation 13 of the EEA regulations, which does not impose any formalities or conditions on this initial right of residence other than those permissible under the Directive, that is that an EEA national should possess a valid passport/ID card, should not be an unreasonable burden on

the host state and that his/her conduct should not be contrary to public policy, public security, or public health.

Page 9 - It is asserted that when an individual applies for a document certifying permanent residence, the UK authorities require evidence that the person was exercising a treaty right *"for every month*" over the full five year period. Regulation 3 of the EEA regulations provides that continuity of residence can be broken for up to six months in one year without affecting a person's entitlement to permanent residence. Consequently, UKBA does not always require a person to provide evidence for every single month of each of the five years.

Page 16 - Gibraltar is compliant with all its EU Social Security requirements. The long-standing dispute regarding social security pensions for former Spanish workers in Gibraltar was resolved to the satisfaction of the UK, Spain and Gibraltar Governments, and the affected people represented by ALPEG.

Recently, ASCTEG has raised a new issue, totally unconnected with the social security pensions issue, in which they are requesting that Spanish workers employed in Gibraltar enjoy the same level of benefit as their own nationals who are in employment and contributing in Spain, because some Spanish benefits are higher than the corresponding Gibraltar benefits and the ASCTEG claim is for the Government of Gibraltar to pay Spaniards residing in Spain at the Spanish rates in preference to the lower Gibraltar rates.

It is untrue to say that frontier workers are treated less advantageously than Gibraltar residents for social security purposes: both are paid at exactly the same rate.

Page 18 of the UK National Report (and **Page 26** of the European report). The paragraphs 4.3 in both reports give the impression that the national minimum wage does not apply to seafarers, which is not the case. It does apply in certain circumstances; the debate has been about whether it is possible to extend those circumstances.

Page 18 - The 2007 consultation referred to in paragraph 4.3 was a Department for Transport consultation about section 9 of the Race Relations Act. It was not about the national minimum wage.

Page 18 – There is an inaccuracy in the first two sentences of paragraph 4.5. EC nationals do not have to be resident in the UK for 3 years prior to the course to be eligible to pay home fees/get a tuition fee loan. The requirement is that they are resident in the territory comprising the EEA and Switzerland for 3 years.

Second sentence – It is not the case that Devolved Administrations simply "decide" what to charge in fees for EC students – they are legally required to offer the same tuition fee support to EC nationals as they offer to home students. This explains why in Scotland EC nationals do not pay fees.

Second last sentence – should read “after their studies are completed” and not students.

Page 26 - The UK is administratively compliant with the Metock judgment and applicants are not therefore being disadvantaged in any way. It is noted that the rapporteurs acknowledge that “*the guidance is clear and fully implements Metock.”*

Pages 27-28 - The report records incorrectly that Certificates of Application state that those applying as unmarried partners of EEA nationals can work while their application is pending. This is not an accurate reflection of the position. For clarity, the Certificate of Application states that extended family members “can only work while their applications are pending if they have valid permission to do so under the Immigration Rules”.

The rapporteurs comment on the UK‘s approach in considering retained rights of residence cases where the third country national applicant has divorced the EEA national sponsor. It is alleged that the UK authorities “*are unwilling to review their own records”* to ascertain whether the EEA national was still working up to the point of divorce. The UK authorities would make the observation that comprehensive information is not held in the format suggested by the rapporteurs and in order to establish if the EEA national was working up to the point of divorce, investigations with a number of other government departments would be necessary. The onus is on the applicant to demonstrate that they have a right of residence as claimed.

The report observes that employers are unwilling to continue an employment relationship with a Third Country National family member whose Certificate of Application is more than six months old. The UK authorities would highlight that the UKBA provides an employers’ checking service for employers in this situation. This allows an employer to check the status of a residence card application and therefore verify the applicant’s right to work.

It is not disputed that there have been some instances where some caseworkers new to European casework have asked third country national family members for evidence which they should not have to provide, such as evidence of cohabitation and wedding photos. This issue has now been addressed through training. Notwithstanding this UKBA can request further documentation where there are grounds to suspect a marriage of convenience has taken place.

It is asserted that the process for retrieving a passport which has been submitted as part of an application “*is difficult and haphazard*”. UKBA has provided members of ILPA (Immigration Law Practitioners' Association) with the contact details of relevant staff in UKBA if they require the passport to be returned urgently. This has helped prevent delays to them being returned.

The UK is grateful to the Commission for the opportunity to comment on the reports and remains open to discussion with Commission colleagues on the issue of implementation of the Free Movement Directive.