

Free Movement of Workers in Cyprus and the EU

Nicos Trimikliniotis



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His latest works include An edited and co-authored collective volume *Rethinking the Free Movement of Workers: The European Challenges Ahead*, University of Nijmegen, 2009 (with Paul Minderhoud) and his monograph entitled, *Η Διαλεκτική του Έθνους-Κράτους και το Καθεστώς Εξαίρεσης: Κοινωνιολογικές και Συνταγματικές Μελέτες για την Ευρω-Κυπριακή Συγκυρία [The Nation-State Dialectic and the State of Exception: Sociological and Constitutional Studies on the Eurocyprian Conjuncture]*, Savalas, Athens 2010. E-mail: nicostrim@logos.cy.net

Free Movement of Workers in Cyprus and the EU

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FOREWORD

The PRIO Cyprus Centre has over the years explored a range of opportunities for using research to inform and generate debates and dialogue in Cyprus and abroad on key issues of importance to an eventual settlement of the Cyprus problem. What has become evident throughout this research is that the Cyprus conflict not only affects the life and opportunities of the Greek Cypriot and Turkish Cypriot citizens of Cyprus. The conflict to an equal extent influences international relations and relations within the European Union, the situation for Cypriot minority groups and for those who seek to come to live or work in Cyprus.

With this new report the PCC is therefore taking on a new research and dialogue area that we regard as of outmost importance for Cyprus, for the European Union and, not least, for the many individuals that migrate to Cyprus to seek income opportunities. The report is the first in a new series termed “Critical Studies on Fundamental Rights in Cyprus, the EU and Beyond” to be developed in an academic collaboration with the Centre of the Study of Migration, Inter-ethnic and Labour Relations at the University of Nicosia.

The aim of the series is to unpack concepts and open up new spaces for dialogue and engagement that goes beyond the present ethnic divide in Cyprus by focusing on migrant groups as well. And, moreover, critically address the human rights issue from a new and more universal angle. Thereby to develop the debate from one that primarily has been internally and conflict focused to one that to a larger degree respond to and is tuned to an EU and international rights based discourse.

One starting assumption can be that acknowledging and protecting the rights of migrant workers in Cyprus might contribute to the development of an improved human rights situation for all Cypriots. While neglecting or not defending such basic rights might actually undermine the ability in the longer run to protect basic human rights in Cyprus. While taking a critical look on how issues of individual and collective rights have become part of the political discourse, a debate on securing basic rights for those not present in the negotiation process might actually be of outmost importance to help develop a just and lasting settlement of the Cyprus conflict.

Let us therefore hope that the report and the new series will help generate debate and help to secure universal human and migrant rights regime in both Cyprus, in the EU and beyond.

Arne Strand
Centre Manager
30 September 2009

INTRODUCTION TO THE NEW SERIES

The Series on 'Critical Studies on Fundamental Rights in Cyprus, the EU and Beyond'

This is the first in a new series entitled *Critical Studies on Fundamental Rights in Cyprus, the EU and Beyond*. The first issue is partially funded by the Network of Experts on Free Movement of Workers, which held its Annual Conference on Free Movement of Workers and the National Workshop on the Free Movement of Workers in Cyprus in 2009.¹

The Series is a collaborative project between PRIO Cyprus Centre and the Centre of the Study of Migration, Inter-ethnic and Labour Relations (University of Nicosia, Cyprus); it aims to develop and promote critical perspectives, through socio-legal studies on the current situation of fundamental rights in Cyprus. The Series will target the uses and abuses of the law, legal discourses and practices, political, economic and social constructions and ideologies in a deeply divided society that is trying to overcome and/or cope with its divisions and polarisations. The law has historically served as a tool to shape and perpetuate the conflict, the polarisations and de facto partition of the country, often offering legalistic explanations as apologetics—which, in fact, sought to legitimise ethno-nationalistic, communal or ethno-state projects under the guise of 'universal human rights'. In reality these are particularistic and exclusivist claims rights in the zero-sum game of 'Us versus Them'. Combining a socio-legal approach with critical thinking, the Series will offer a measure of reflexivity so badly needed in a society riddled with contradictions and a legal system suffering from a long-standing tradition of rigid, unintuitive and formalistic thinking.

The Series aims to open up spaces for dialogue and engagement from the perspectives of critical thought, reconciliation and interaction across the ethnic divide. The underlying ideas of the critical studies to be published must be seen as an integral part of societal processes that are already taking place in Cyprus—processes that are challenging the discriminatory landscapes, exploitative and oppressive relationships and ethnocentric thought and praxis. The process of rethinking the foundations of our polarised and divided society requires that new human rights perspectives be developed - ones that challenge the very concepts of human rights as well as its ideological underpinnings.

¹ Held on 8-10 October 2009, at the Atlantica Miramare Beach Hotel in Limassol, Cyprus.

This Series reflects the current state of affairs in Cyprus, which requires that we go beyond what has been falsely assumed to be an almost eternal and unchanging 'intractable conflict'. Accession to the EU of a divided Cyprus has created all sorts of complications, contradictions and difficulties. As the negotiations continue, there is a sense of uncertainty about the future, but also a sense of hope for reunification at last. There are no guarantees of success but the stakes are high. We know, however, that matters never stay the same.

The Series will not focus exclusively on the conflict and the de facto partition; in fact, it aims to look at the issues of rights that go beyond, around and despite the conflict and de facto partition, without of course ignoring it. In this way, by shifting the focus away from the major distortions in the social, political, economic, ideological and cultural arenas, we may discover new insights to the Cyprus problem.²

The Treaty of Lisbon has entered into force and changes the pre-existing EU and Community Treaties in certain areas of law and policy-making; some competences have lost their intergovernmental character (e.g., "Police and Judicial Cooperation in Criminal Matters") and have become part of EU competences; there are others, however, such as the rules on Common and Foreign Security Policy, which have retained their essentially intergovernmental character. The EU is an evolving animal and so is life in Cyprus, including and beyond the so-called Cyprus problem. We hope that a critical engagement with issues relating to fundamental human rights will offer another opening for debate and dialogue, in matters across the divide as well as beyond Cyprus.

The Study on Free Movement of Workers in Cyprus and the EU

The current publication contains three studies on the free movement of workers, drawing on the work of the Network of Experts on Free Movement of Workers which is coordinated by the Centre for Migration Law of Radboud University Nijmegen (The Netherlands).³ It contains studies first presented and discussed during the Network's annual conference and workshop, which were held in Cyprus in October 2009.⁴

² For an argument along these lines for the case of Cyprus, see Arne Strand (2009). 'The Smaller Issues Complicating the Larger Picture', *The Cyprus Review* 21(1): 187–192.

³ This is under the supervision of the European Commission. One of the activities of this Network is the annual production of 27 national reports and one European report on the implementation of EU free movement law in the Member States. Another activity is the organization of a conference to achieve a wider and more comprehensive understanding of the right of free movement of workers.

⁴ Earlier versions of these studies were presented at the conference and workshop. A collective volume containing a state of art debates on the subject was launched at the conference, see Paul Minderhoud and Nicos Trimikliniotis (ed.) *Rethinking the Free Movement of Workers: The European Challenges Ahead*, University of Nijmegen, 2009.

- The first study in this issue examines the current state of affairs regarding the free movement of workers in Cyprus. It draws on the Cyprus Reports on Free Movement of Workers for 2007 and 2008-2009,⁵ conducted by the author as a national expert for the Network of Experts on Free Movement of Workers.⁶ It covers the period from 1.1.2007 up to 20.8.2009.
- The second study is the modified version of a lecture given by Prof. Kees Groenendijk,⁷ a leading expert of the Network on Free Movement of Workers, on *Equal treatment of workers under EC law and remedies against violations by employers*.
- The third study is the *European Report on the Free Movement of Workers in Europe* in 2007, authored by the rapporteurs of the Network of Experts on Free Movement of Workers, Prof. Kees Groenendijk, Prof. Roel Fernhout, Prof. Elspeth Guild, Prof. Pieter Boeles, Dr. Ryszard Cholewinski and Dr. Paul Minderhoud. The Report examines how the Member States have implemented this right in 2007 and offers a comparative perspective across the EU. This is particularly useful for scholars and practitioners studying workers' rights in Cyprus as it enables us to contextualize the Cypriot situation.

The right to free movement of workers is one of the foundations of the EC treaty that goes back to the Treaty of Rome 1957,⁸ which requires that obstacles to free movement of persons between Member States must be abolished for the purposes of establishing a common market and the promotion of good economic relations between Member States. What was Article 39 of the Treaty of Rome, and is now Article 45 under the Lisbon Treaty,⁹ provides for workers' rights to employment, settlement and freedom from discrimination based on nationality. Non-discrimination covers access to employment, working conditions and all other social and tax advantages that may help workers integrate in the host country. Moreover, article 40 of the Treaty of Rome enshrines this right by requiring that the Council issue Directives or make Regulations to bring about free movement of workers. Secondary legislation has indeed resulted, such as Regulation 1612/68, which provides for freedom of movement for workers working in the Community, and Directive 68/360, which abolished restrictions on movement and residence within the community for workers of Member States and their families. More recently, the most comprehensive Directive 2004/38/EC, on the right of Union citizens and

⁵ See Nicos Trimikliniotis (2008) *Report on Cyprus2007*, NETWORK ON THE FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN UNION, University of Nijmegen Network on the Free Movement of Workers within the European Union, <http://ec.europa.eu/social/keyDocuments.jsp?policyArea=24&subCategory=475&mode=advancedSubmit&langId=en>; and N. Trimikliniotis (2009) *Report on Cyprus 2008-2009*, NETWORK ON THE FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN UNION, organized by the Centre for Migration Law, University of Nijmegen Network on the Free Movement of Workers within the European Union.

⁶ Moreover, it also builds on the Cyprus reports (2004-2006) conducted by Prof. Andreas Kapardis, who was the (Cyprus) national expert for the three previous years.

⁷ Centre for Migration Law, Radboud University, Nijmegen, The Netherlands.

⁸ Under articles 2 and 3(1)(c).

⁹ The restructuring of the Treaties after ratification of the Lisbon Treaty required renumbering of its provisions, which had already been renumbered with the Amsterdam revision.

their family members to move and reside freely within the territory of the Member States, merges into one single instrument all the legislation on the right of entry and residence for Union citizens, consisting of two regulations and nine directives, with the aim of simplification in the exercise of workers' rights. Also, the Directive sets out to reduce to the bare minimum the formalities which Union citizens and their families must complete in order to exercise their right of residence, and was designed to regulate: (a) the conditions in which Union citizens and their families exercise their right to move and reside freely within the Member States; (b) the right of permanent residence; (c) restrictions on the aforementioned rights on grounds of public policy, public security or public health.

The importance of understanding how the principle of free movement of workers actually works is often underestimated in Cyprus—where there is a lack of familiarity with the subject among Cypriot legal practitioners, policy-makers, and journalists despite the fact that a number of cases have gone before the courts. The decision to publish these studies is based on the fact that there is no study on the subject for Cyprus and as such we believe that they will be of interest and use to experts, researchers, law practitioners, policy-makers, academics and journalists working or interested in the field. Also, the subject of free movement of workers is a technical issue of immense practical relevance to thousands of EU citizens seeking access to work in Cyprus and forms an important chapter in Cyprus's regulation of migration and employment, since its accession to the EU in 2004. Moreover, it is a chapter that must be taken into account during the negotiations to resolve the Cyprus problem. The question of the free movement Acquis has already arisen as a hot point of contention between the two community leaders in the recent intensified negotiations.¹⁰ The Turkish-Cypriot leader, Mr. Talat, had included in his non-paper submitted before the talks a provision claiming that the settlement must accord Turkey and Greece equal treatment, including enjoyment of the four freedoms (i.e. the free movement of goods; capital; services; persons) until Turkey becomes an EU member. However, this provision, amongst others, was immediately rejected by the Greek-Cypriot political leadership as being contrary to the Acquis. Of course the complex question of implementation of free movement of workers is a crucial aspect which requires a separate specialised study; nevertheless the analysis contained in the current volume lays the foundations for understanding the key challenges facing Cyprus as regards free movement of workers.¹¹ Moreover, in the absence of a solution, it is a crucial part of the EU Acquis in regulating the operation of the 'Green Line'.¹²

Nicos Trimikliniotis
Series Editor

¹⁰ These took place on 11-13 and 25-27 January 2010.

¹¹ This is beyond the scope of this volume but it is indicative of the importance of this aspect of the Acquis to the settlement.

¹² For a more focused study on this subject in relation to the Cypriot case, see N. Trimikliniotis (2009) "Exceptions, Soft Borders and Free Movement for Workers", Paul Minderhoud and Nicos Trimikliniotis (ed.) *Rethinking the Free Movement of Workers: The European Challenges Ahead*, University of Nijmegen, 2009, pp. 135-154.

THE SITUATION IN CYPRUS REGARDING FREE MOVEMENT OF WORKERS 2007-2009

BASED ON THE CYPRUS REPORTS OF 2007,
2008-2009 FOR THE NETWORK
ON THE FREE MOVEMENT OF WORKERS
WITHIN THE EUROPEAN UNION

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INTRODUCTION

This Report draws on the two Cyprus reports, 2007 and 2008-2009, conducted by the author as a national expert for the Network of Experts on Free Movement of Workers.* It covers the period from 1.1.2007 up to 20.8.2009.

Since Cyprus became a full member of the EU on 1st May 2004, the most important legislation pertinent to the free movement and residence of EU citizens in Republic of Cyprus is: Law 92(1)/2003 on the *Free Movement and Residence of EU Nationals and their Families*; Administrative Directive 460/2004 pertaining to the free movement and stay of citizens of EU member States and their family members. It came into force on 30.4.2004 and introduced the forms to be completed by residence applicants; Law 126(1)/2004 for the *Free Movement and Residence of Citizens of Member States and their Family Members (Amendments)* that amended some provisions of Law 92 (1)/2003; Aliens and Immigration Laws and the Regulations passed by Parliament to implement those laws; and Directives 2004/38 and 2003/109.

One year after the Republic of Cyprus enacted Law 7(1)/2007, which purported to transpose¹ Directive 2004/38, there is a clearer view as to the effects of the new legislation and the practices in relation to the transposition. We have witnessed a steady rise in the number of Union citizens taking up the right of movement of workers to work in Cyprus: there are currently 138,000 non-Cypriots residing in Cyprus,² out of whom over 70,000 are EU citizens. According to the Ministry of Labour and Social Insurance, the number of EU citizens in July 2008 was 49,639 and mean number for 2008 was 42,303 EU citizens,³ in comparison to 57,137 and 55,174, respectively, from third countries.⁴ We can point to a number of improvements in the system that will allow the smoother implementation of the principle of free movement. However, we can also identify a number of important issues related to administrative practices that are not compatible with the freedom of movement principles and the spirit of the above directive.

* From 2008 Nicos Trimikliniotis was the national expert for the Network of Experts. From 2004-2008 Andreas Kapardis was the national expert. This report builds on the Cyprus reports (2004-2006) conducted by Prof. Andreas Kapardis, who was national expert for the three previous years.

¹ This means introducing legislation that would integrate the content of the Directive within the Cypriot legal framework.

² Source: Civil Registry and Migration Department and the Population Data Archives, provided on 3.3.2009. I would like to thank Mr. Andros Ktorides for the help in obtaining the data.

³ See Total Aliens and Europeans Data 2008, 13.10.2008 at <http://www.mlsi.gov.cy/mlsi/sid/sid.nsf/All/3609D4C436EE184AC2257465003967B5?OpenDocument> accessed on 23.3.2009.

⁴ Total Aliens and Europeans Data 2008 13.10.2008/aliens <http://www.mlsi.gov.cy/mlsi/sid/sid.nsf/All/3609D4C436EE184AC2257465003967B5?OpenDocument> accessed on 23.3.2009.

Firstly, despite—and perhaps in part because of—implementation of the new law in November 2007, considerable backlogs have been created: in 2008 the Cyprus Anti-Discrimination Body, which examined 74 complaints of long delays in the issuance of resident cards to EU citizens, identified a backlog of 27,000 pending applications, something disputed by the Government. The long delay in securing an appointment to obtain the registration certificate—currently the wait can be as long as a year— is contrary to the provisions and the spirit of the Directive; this is apparently due to staff shortages. Union nationals who had obtained a permit issued according to the old Law for Free Movement (put in force after the accession of Cyprus to the EU in May 1st 2004), were informed in 2007 that they must reapply under the new 2007 Law to obtain the registration certificate.

The initial information from the Ministry was that Union nationals granted permission to stay under the old law have been informed via the post of their right to apply under the new Directive; however the letter is misleading as it does not fully inform them of their rights: it merely gives them the option either to retain their permission under the old law or reapply under the new law.

The second issue arises from the legal implementation of the Directive. Concerns have been raised as to the effect of the law on the rights of Union citizens working or visiting Cyprus, their partners and family members. Questions about worker rights and equal treatment of Union citizens and their partners and families have emerged. As recorded in the 2007 Report, the situation in 2008 continues to be the same: despite official assurances that the system operates smoothly with no problems or complaints of discrimination, trade unions see flaws in the application procedures that result in many daily problems for workers who are EU citizens. Trade unions argue that such procedural delays create various discrepancies, discrimination and disruption in labour relations, as well as non-compliance with collective agreements and labour standards.

The third issue relates to equal treatment and human rights violations of Lesbian/ Gay, Bisexual and Transsexual persons in the exercise of free movement, arising from the failure to regulate same-sex marriages and registered relations in Cyprus. This lack of regulation results in various forms of discrimination against EU, LGBT citizens; this in turn creates effective obstacles to free movement and contradicts the principle of equality and non-discrimination on the ground of sexual orientation in all the fields provided by Directive 43/2000/EC. The Cypriot Equality Body has found that the failure to regulate the subject results in various forms of discrimination and undermines the Community principle of freedom of movement.

The fourth issue is discrimination against third country nationals who are family members of Cypriot citizens resident in Cyprus. These persons cannot benefit from the freedom of movement available to all other Union citizens with regard to their resident rights in Cyprus: instead, they are subject to the more stringent procedures of the Aliens and Immigration Law, the outcome of which rests entirely upon the discretion of the Immigration Officer. Article 2 of the 2007 Law stipulates that an EU citizen is every person who is a citizen of the EU other than the Republic of Cyprus; this provision is also included in Article 3 'Beneficiaries' of the

Directive. Various Supreme Court decisions deal with the issue of reverse discrimination differently: some stress that it is *sine qua non* that Cypriots would enjoy every right that EU citizens do, while others take the opposite view. It is noted that the Ministerial Committee for the Employment of Aliens decided on 28.8.2009 that all matters of entry and stay in the Republic of family members of Cypriots will be decided on the basis of the respective conditions for family members of other EU citizens as provided in Law 7(1)/2007.

Another relevant issue concerns the territorial application of the implementation of the Directive given the *de facto* division of Cyprus. The references that restrict the force of the law to the territory in which the Republic of Cyprus operates as “the area under the control of the Republic” reflects the status quo, which does not allow for the implementation of the *Acquis* in the northern territories. This is due to the fact that the implementation of the *Acquis Communautaire* in the areas of the Republic which are not under the effective control of the Republic of Cyprus Government has been suspended according to the Accession Treaty under which Cyprus joined the EU on May 1st 2004. However, this provision has resulted in problems in the implementation of the principle of free movement, given the accession to the EU of a divided Cyprus. In place we have a special regulation, referred to as the “Green Line Regulation,” which regulates problems deriving from the *de facto* partition of Cyprus. The reference in Law 7(1) to the issue of effective control of the territory, allows the authorities to exercise discretion as to whether EU citizens living the northern (occupied) territories may exercise their rights under the Directive. They may exercise this discretion by refusing to grant registration certificates. In my view this is likely to be improper transposition of the Directive and may result in unlawful discrimination. References to the territory under the Government’s effective control may result in practices that undermine the principle of free movement as “fundamental status” stipulated in the preamble of Directive 2004/38/2004 and may create obstacles to the exercise of this right contrary to the Directive. It may be justified as regards specific benefits, providing that it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary; however, it is difficult to see how it can be justified for refusal to grant access to any rights under the principles of free movement.

Finally, the Republic has enacted legislation purporting to transpose Directives 36/2005 and 100/2006, Law 31(I)/2008, which introduced a unified law abolishing the old laws and allows for recognition of professional qualifications. However, the laws covering each of the regulated professions are yet to be amended. The complaints before the Cypriot Equality Body indicate that there are still some obstacles to the free movement of Union citizens who wish to exercise their professions; the professional bodies in charge claim that they are considering amending their regulations to meet the requirements of the EU Directives, but this is yet to materialise in many instances (e.g., architects, civil engineers, building contractors, nurses, etc.). Moreover, a number of obstacles are apparent as regards the language requirements in the private and particularly in the public sector, as well as administrative and bureaucratic barriers to the benefits and exercise of certain rights for European citizens (e.g., obtaining driving licences and other official documents).

ENTRY, RESIDENCE, DEPARTURE

A. Entry

General Implementation of the Directive

Directive 2004/38/EC, Article 5(1)/ of Law 7(1)/2007 states that, applying the provisions regarding travel documents of Regulation 562/2006, every national of a member State has the right to move freely and to reside in the Republic of Cyprus upon the presentation of a passport or identity card. The passport/identity card requirement does not apply if the EU citizen is in possession of a Residence Form issued in another EU country, Art. (5)(3)(b).

On 9 February 2007, the Republic of Cyprus enacted Law 7(1)/2007, which purported to transpose Directive 2004/38.⁵ However, Ministry officials inform the author of this report that due to technical problems with adapting the computer systems, there was a significant delay in the implementation of the law, which was not implemented until November 2007; until then the authorities continued to operate under the old law.⁶ Even in 2008 there were long waits for an appointment to obtain the registration certificate, which has replaced the old visa system for Union citizens. The deadline for registration is four months,⁷ as it is stipulated in Article 8.3 of the Directive that “a registration certificate shall be issued immediately.” Nevertheless, the waiting list for appointments to obtain the certificate is considerably longer, stretching for up to one year and longer in some cases, something that is contrary to the provisions and the spirit of the Directive.⁸ Ministry officials recognise that this is a serious problem but point out that this is due to staff shortages;⁹ the regional office of Nicosia, for example, which receives more than half the applications from Union citizens to exercise their right under the Directive, has scheduled appointments until 2009.¹⁰

⁵ For an introduction the basic provisions of this law see Andreas Kapardis (2007) *Network on the Free Movement of Workers within the European Union, Cyprus Report 2006*, pp.2-4.

⁶ Interview with officer of Ministry of Interior 21.3.2008.

⁷ Under of Law 7(1)/2007, art. 10(1). art. 8(2) of the Directive allows for a minimum of three months as a deadline for registration.

⁸ Information given by the head of the Nicosia District Department 21.3.2008.

⁹ Interview with officer of Ministry of Interior 21.3.2008.

¹⁰ Information given by the head of the Nicosia District Department, 21.3.2008. The current capacity of the District Office is to give only 10 interviews per day. However, we are informed that there is a kind of ‘fast rack system’ that deals with cases where there is pressing need; for example, in the case where documentation is required for the purpose of hospital treatment, or the land registry office, permits or customs.

The official position of the Republic of Cyprus is that the transposition and implementation of Directive 2004/38 in 2007 did not retrogressively affect Union citizens and their family members. Officials from the Ministry of Labour and the Ministry of Interior¹¹ claim that the Directive did not result in treatment less favourable than under the previous Community rules on free movement. Ministry officials further (note that jobseekers can seek employment via EURES and various private agencies; hence, they have “no complaint about such barriers to the authorities” and as a consequence there has been a steady increase in the number of Union citizens working in Cyprus over the recent years: in 2008 the mean number of EU citizens was 20,542, whereas for 2007 it was 31,345.¹² Trade unions however, have a different view of affairs, as elaborated in Chapter III. Concerns have been raised by NGOs, trade unions and international/national expert reports as to the effect of the law on the rights of Union citizens working or visiting Cyprus, their partners and family members: a major concern of human rights NGOs throughout 2007 was the continued practice of deportation/expulsion of European citizens.¹³

Despite some improvement there are a number of issues still pending in Cyprus. The issue of the delays is serious, due to problems of adapting the technical computer systems which resulted in non-implementation of the law until November 2007: until then the authorities continued to operate under the old law. However, the most pressing problem for the current situation is the long delay in appointments to obtain the registration certificate, which has replaced the old visa system for Union citizens. Given that the deadline for registration is four months,¹⁴ it was noted that the long waiting list for appointments to obtain the certificate went up to one year and more in some cases is contrary to the provisions and the spirit of the Directive. In July 2008, the Cyprus Anti-Discrimination Body¹⁵ examined 74 complaints of long delays in the granting of residence cards to EU citizens.¹⁶ According to the same report of the Anti-Discrimination Body, there was a backlog of 27,000 pending applications. The Anti-Discrimination Body, whilst recognising the difficulties resulting from staff shortages, stated that this is no justification for the delays as these long delays affect many rights and benefits of EU citizens. The Ministry of Interior disputes that there can be such an estimation:

¹¹ Interview with officer of Ministry of Interior 21.3.2008.

¹² Interview with by head of section on migrant workers and of the Cyprus EURES, Ministry of Labour 14.3.2008.

¹³ For more details see Cyprus National Data Collection Report, RAXEN, 2007.

¹⁴ The requirement contained in Art. 8.3 of the Directive that “a registration certificate shall be issued immediately.”

¹⁵ The ombudsman was designated as the specialised equality body in relevant legislation that transposes the anti-discrimination acquis, setting up two authorities internally: the Equality Authority and the Anti-Discrimination Body.

¹⁶ A.K.P.: 65/2007, 86/2007, 107/2007, 108/2007,123/2007, 17/2008, 22/2008, 25/2008, 26/2008, 27/2008, 28/2008, 29/2008, 30/2008, 31/2008, 32/2008, 36/2008, 37/2008, 39/2008, 40/2008, 41/2008, 42/2008, 43/2008, 44/2008, 45/2008, 47/2008, 48/2008, 49/2008, 50/2008, 51/2008, 52/2008, 53/2008, 54/2008, 55/2008, 56/2008, 57/2008, 58/2008, 59/2008, 60/2008, 61/2008, 62/2008, 63/2008, 64/2008, 66/2008, 72/2008,74/2008, 78/2008, 102/2008, 105/2008, 106/2008, 107/2008, 108/2008, 109/2008, 110/1008, 111/1008, 112/2008, 113/2008, 114/2008,115/2008, 116/2008, 117/2008, 118/2008, 119/2008, 120/2008, 121/2008, 122/2008, 123/2008, 124/2008, 125/2008, 126/2008, 127/2008, 128/2008, 129/2008, 130/2008, και 145/2008. These complaints were addressed with one report by the Anti-discrimination Body date 31.7.2009.

these extracts do not use quote marks, and are usually set in a smaller type size

There cannot be an estimation of the actual backlog as the pending cases include applications of people who filed them according to the old Law and afterwards reapplied under the new Law. Furthermore, due to the fact that EU nationals move frequently from country to country, instructions were given by the Director of the Civil Registry Department that these applications were not to be processed unless the EU citizen refers again to the Department for acquiring his/her documents.

Moreover, it contends that “since the new Legislation does not allow delays in issuing the registration certificate for EU citizens, measures have been taken and since the beginning of 2009 all registration certificates are issued to EU nationals on the spot the same day as they submit the application.”¹⁷

Since the passage of Law 7(1) of 2007 (9.2.2007), a ‘Residence Permit’ is no longer required; instead, a ‘*Residence Registration Confirmation Document*’ is issued when EU citizens or their family members register with the Population Archive. Article 8(1) stipulates that EU citizens have the right to reside in the Republic of Cyprus for no more than three months without having to satisfy any condition other than to be in possession of a valid passport or identity card. EU citizens in paid or unpaid employment, Art. 9 (1) (a), or who have taken out health insurance in the Republic of Cyprus and during their residence have substantial enough financial means for themselves and their family members so as not to be a burden on the State social welfare system, Art. 9(1)(b), have the right to residency for more than three months.

Discrimination against LGBT Persons

As noted in the Cyprus Report of 2007,¹⁸ there are human rights issues for workers who are Lesbian/ Gay, Bisexual and Transsexual (LGBT) because there are no legal provisions in Cyprus to regulate same-sex marriages and registered relations. In 2008 this issue was given media coverage, which highlighted various forms of discrimination against EU, LGBT citizens that are effective obstacles to free movement,¹⁹ when compared with heterosexual couples. This goes against the equality and non-discrimination principle as well as the law, which mandates the Anti-Discrimination Authority to investigate discrimination on the grounds of sexual orientation²⁰ in all areas stipulated in Directive 43/2000/EC. The Cypriot Equality Body

¹⁷ Communication to the author from the Ministry of Interior, 9.9.2009.

¹⁸ Nicos Trimikliniotis (2008) *Cyprus Report on Free Movement of Workers 2007*, Network of experts organized by the Centre for Migration Law of the University of Nijmegen Network on the Free Movement of Workers within the European Union, <http://ec.europa.eu/social/keyDocuments.jsp?policyArea=24&subCategory=475&mode=advancedSubmit&langId=en>

¹⁹ See Nicola Rogers and Rick Scannell (2005) *Free Movement of Persons in an Enlarged Europe*, Sweet and Maxwell, London, 10-49 to 10-53, pp.159-160.

²⁰ See Nicos Trimikliniotis and Corina Demetriou (2008) *Thematic Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation*, Cyprus, February 2008, FRALEX.

decision that the failure to regulate same-sex marriages and registered relations in Cyprus is discriminatory against EU, LGBT citizens vindicates NGO concerns on the subject: there is unlawful discrimination against LGBT persons on the grounds of sexual orientation and this contradicts the principle of freedom of movement (File No AKP 68/2008). The finding of the Equality Body is based on the fact that although in the Directive it is left to Member States to decide whether and how to recognise same-sex marriages and registered relationships, Cyprus is bound by the Anti-Discrimination Acquis, international conventions and fundamental human rights, all of which require that discretion be exercised in line with the anti-discrimination principle (p.9). Further, it has given the immigration authorities and the Ministry of Interior two months to negotiate with the complainants to resolve the issue. The Equality Body recognises the complexity of regulating the issue, as it is a multidimensional matter that affects various other areas such as inheritance, taxation, insurance, retirement, property and employment. However, failure to address these complex matters impacts adversely on the daily lives of persons with alternative sexual orientation as it results in “difficulties that unfortunately lead to the social marginalisation and perpetuate the existing inequalities and unacceptable discrimination” (p. 12).

The position of the Ministry of Interior is that regarding “marriages between same sex persons, these are not recognized under Cypriot legislation, regardless of the nationality of the persons or the place where the marriage has taken place” and that “the same applies for the persons of same sex who have a registered relationship.” It claims that, nonetheless, according to Article 4(2) of Law 7(I)/2007, the entry and residence of a partner of an EU national will be facilitated by the Cypriot Authorities, where such relationship is durable and duly attested: Under the aforementioned Law, same sex partners do fall under the definition of “partner.” Additionally, the existence of documents issued by the Authorities of another State, stating that these persons have contracted a marriage or have registered their relationship in that State, is valid for the purposes of proving a durable and duly attested relationship. Furthermore, it must be noted that in cases where neither marriage, nor a registered relationship exists, the documents requested by the persons (partners) for proving a durable and duly attested relationship are the same both for same sex partners and for partners of different sexes. Under Cypriot Legislation, where such relationship has been proven, the entrance and residence of the partner is facilitated under the provisions of the Aliens and Immigration Law.²¹

The position of the Ministry of Interior is determined by the opinion of the Legal Services of the Republic which cites: (a) there is relevant ECHR case law which does make the contracting parties to legislate to enable marriage of the same sex (not sure what this phrase means); (b) the ECHR itself safeguards in Article 12 the right to marry between men and

²¹ Communication to the author from the Ministry of Interior, 9.9.2009.

women; (c) the 2007 Law provides for the rights of LGTB partners of EU citizens, despite the fact that s/he is not considered to be a 'family member'; and it facilitates entry and stay in accordance with the Aliens and Immigration Law, as long as it is established that there is a permanent and duly proven relationship, as with heterosexual partners of EU citizens. However, the Ministry of Interior's position misses the point regarding discrimination on the basis of sexual orientation: although Member States have the right to not recognize same sex marriage, this does not give them the right to discriminate against homosexual partners when compared with heterosexual partners of EU citizens who are entitled to family reunion.

B. Residence

Since 2007, a number of changes have been introduced:

- The right to residence also applies to family members who are third country nationals, art. 8 (2), and who are also entitled to permanent residence for a period of 10 years that is automatically renewable, Art. 18(1).
- The spouse and dependent children of EU citizens in Cyprus pursuing studies or undertaking professional training have residency rights, Art. 9(3).
- EU citizens are only required to register themselves with the Population Archive Office within four months of their arrival, Art. 10(1).
- An Employer's Confirmation Certificate is no longer required in order to register with the Population Archive Office.
- Article 11(2)(b) stipulates that failure to apply for residency within four months and to obtain Residence Authorisation carries a maximum penalty of 1,500 Cyprus pounds (i.e., approx. 2,550 Euros). This is half of the penalty that applied before Law 7(1) of 2007 was enacted.
- Family members of an EU citizen are entitled to permanent residency if they have resided in the Republic of Cyprus for a continuous and uninterrupted period of five years, Art. 14(2). The term "continuous and uninterrupted residence" is defined in Article 14(3).
- Certain categories of persons described in Article 15 can be granted permanent residency in less than five years of continuous and uninterrupted residence.
- The right to residency and permanent residency provisions of Law 7(1) of 2007 apply to the free areas of Cyprus that are under the control of the Republic of Cyprus (Art. 20).
- A police person on duty or the appropriate Authority can require an EU citizen or their family members to produce his/her passport or identity card or the Residence Registration Confirmation Document, Art. 24(2); failure to do so carries a maximum penalty of 1,000 CYP£ (1,724 Euros).

Under the law, EU citizens who wish to stay in Cyprus for more than three months must either be in paid or unpaid employment, Art. 9 (1); or have sufficient financial means so as not to become a burden on the social security system of the country, Art.9 (1) (a); have a comprehensive medical insurance cover in the Republic of Cyprus, 9 (1) (b); or be enrolled in a private or educational institution approved by or registered with the Government to undertake

studies or specialist training courses and have full medical insurance and sufficient financial means so that they and their family members will not become a burden on the social security system of the country, Art. 9 (1) (c); or, finally, be family members accompanying/ joining an EU citizen who satisfies the above-mentioned criteria.

Article 9(4) of Law 7/2007 provides that a national of a Member State cannot be deprived of his/her status as a worker in paid or unpaid employment simply because he/she is no longer employed because: he/she is temporarily unable to work as a result of illness or accident (para. a); or has been registered as involuntarily unemployed after being employed for more than 12 months and is classified as a person in search of employment with the Department of Labour (para. b). If a worker has been registered as involuntarily unemployed on the basis of a contract for less than one year, or became unemployed within the first 12 months (on the basis of testimony to that effect by the Department of Labour), he/she retains the status of a worker for not more than six months. The status of a worker in paid or unpaid employment is retained if a worker has become involuntarily unemployed and is pursuing a professional education course of study that is relevant to his/her previous employment, Art. 9(4)(d). The law provides that it is the Department of Labour that will decide whether a worker has been made “involuntarily unemployed” and is “in search of employment,” Art. 9(5). However, it should be noted here that it is by no means clear how the phrase “involuntarily unemployed” is to be interpreted.

Text(s) in Force

Law 7(I)/2007, Law on the ‘Right of EU Citizens and their Family Members to Move and Reside Freely in the Territory of the Republic of Cyprus’ Concerning the Free Movement and Residence of Citizens of EU Member States and their Family Members.

C. Departure

The legal situation in 2007 as regards departure is regulated by Articles 6 and 7 of Law 7(I)/2007. Expulsion/deportation is regulated by Article 35, which is part of the restrictions to the right of entry and stay for reasons of public order, public security and public health (Art. 29-35). Article 6 of the law provides that in line with Regulation 562/2006 (15.3.2006) of the Community Code regarding the right of free movement of persons under Schengen, the right of departure is from the territories of the Republic of Cyprus to travel to other EU Member States. To be allowed departure from Cyprus, a national of a Member State need only show his/her passport or identity card. For family members who are not EU nationals a passport is required. Upon leaving Cyprus, all persons qualifying under Art.6 need no visa or anything equivalent (Art. 7).

In certain cases of emergency--due to reasons of public order, public security or public health--the authorities may impose restrictions to the right of freedom of movement and residence of Union citizens and their family members irrespective of nationality, Art.29(1).

They may not impose restrictions for economic reasons, Art. 29(2). Moreover, any such measure must comply with the principle of proportionality and must be based on the personal behaviour of the person concerned, which must be real, current and a sufficiently serious threat to the fundamental interest of society, Art.29(3)(a). It specifically prohibits reference to reasons not connected with the specific individual case or general reasons of precaution and notes that previous criminal convictions per se are not sufficient reasons for taking such measures, Art.29(3)(b).

Before taking a decision to deport/expel for reason of public order or public security, the competent authority takes into account the person's length of residence, age, health, family and financial conditions, his/her social and cultural integration in the Republic and the extent of the person's ties with the country of origin, Art. 30(1). Any decision to refuse entry, to deny the issue or renewal of a residence permit, or to expel a person may be appealed in court.

Text(s) in Force

Law 7(I)/2007 Law on the 'Right of EU Citizens and their Family Members to Move and Reside Freely in the Territory of the Republic of Cyprus' Concerning the Free Movement and Residence of Citizens of EU Member States and their Family Members.

1. Transposition of provisions specific for workers:

Cypriot Law 7(I)/2007 transposed verbatim the relevant provisions of the Directive for the following categories of workers: art. 7(1a) of the Directive is art. 9(1) of the said law; art. 7 (3 a-d) is art. 9(4)(a-d); art. 8(3a) is art. 10(4); art.14 (4 a-b) is art. 27 (4a-b), art.17 is art. 15, art. 24 (2) is art. 22(2).

Cypriot Law 7(I)2007 art. 27(1) stipulates that persons exercising their right of residence should not become an "unreasonable burden" on the social assistance system of the country during an initial period of residence. In practical terms what is required is set out in the circular issued by the Civil Registry and Migration Department,²² which requires that a number of formalities are provided to ensure that the applicant is in possession of "the appropriate means." According to article 4.1(b)(5) of Law 7(I)/2007, the Social Welfare Services are the designated authority to make determinations of what constitutes "unreasonable burden on the social assistance system of Cyprus."

The documents that must accompany the applications are set out in the 2007 Law.

These include the following:

- If the EU citizen is in employment already, then he must provide a letter from his/her employer which stipulates the income earned provides sufficient means of subsistence.

²² File No. 30/2004/IV, 29.9.2008.

The Civil Registry and Migration Department has the right to ask the employer for a certificate proving the contributions are paid to the Social Insurance Fund for the specific EU national.

- In case of an application from a third country national married to a Union citizen, then both the Union citizen and the spouse must appear with their travel documents and the following documents: (a) marriage certificate; (b) bank guarantee (only until the end of 2008. From the beginning of 2009 and onwards this is no longer required); (c) statement of harmonious cohabitation; (d) rental agreement; (e) completed form M64 from the employer, if the spouse is working (until the end of 2008; from the beginning of 2009, a declaration of employment completed by the applicant together with the employer is required); and (f) if the person was an Asylum seeker, a confirmation by the Asylum Service that (s)he has withdrawn any asylum applications.

In cases where the Union citizen is working in the Republic and the company base is abroad, the following documents are required: a copy of the employment contract; bank account and statements proving that the income is paid from abroad and is deposited into a Cyprus bank account; a certificate of health insurance; a rental agreement or a contract of sales.

The Civil Registry and Migration Department²³ issued guidelines on what constitutes sufficient means for EU nationals who are not employed but who have stated that they have sufficient means. These guidelines were given to the ministry officers (and stipulated the following amounts:

- 600 euro for himself;²⁴
- 400 euro for his wife;
- 300 euro for each child over 12 years old;
- 200 euro for each child under 12 years old.

The Ministry of Interior states categorically that meeting these amounts is not prerequisite to the application for a certificate of registration. In correspondence with the author of this report,²⁵ the Ministry stated:

“The letter included indicative amounts. The accompanying instructions stipulated that: if the stated means of the EU citizen met the indicative amounts, the application was examined at the place of submission; if the stated means did not meet the indicative amounts then the application was sent to the Central Offices of Civil Registry and Migration Department in Nicosia. The application was then sent to the Social Welfare Services, which is the competent Authority, and no application was rejected without the Authority’s approval.”

For pensioners and the elderly, there are the following conditions: they must have a bank account and statements proving that the pension is provided from abroad and is deposited into a Cypriot bank account (or statements that they withdraw money from their bank account

²³ File No. 30/2004/IV, 29.9.2008.

²⁴ This is the language used in the letter, which is certainly not gender neutral and may be discriminatory on the ground of gender.

²⁵ Communication to the author from the Ministry of Interior, 9.9.2009.

abroad through their cards); they must submit a certificate of health insurance and a rental agreement or a contract of sales. The guidelines for this category of persons stipulates that sufficient means refers to the minimum pension from abroad, which must be 600 euro.

EU citizens who are students and who are also employed on a part-time basis will not be considered as workers; their applications will be processed on the basis of criteria for students. The guidelines suggest an income of not less than 600 euro as sufficient means.

The language of the letter is indicative of the policy assumptions about the gender of the applicants and the family structure. This may itself be grounds for (a) gender discrimination and (b) discrimination on the ground of sexual orientation in the case of same sex applicants. Moreover, it confirms the concerns raised in the 2007 Report on Cyprus regarding discrimination against LGBTs.

2. Situation of jobseekers

There has been no case law on the status of Union citizens who are jobseekers in Cyprus, as well as those requiring public assistance.

The question is whether the Social Welfare Service consistently interprets the various references to the notion of “unreasonable burden on the social assistance system of Cyprus”, as it is the Social Welfare Services that are responsible for such determination.²⁶ The Social Welfare Service is currently trying to define what the term “unreasonable burden” means, seeking advice and guidance from practical and conceptual frames in other EU countries on the subject so that criteria are developed that define this ambiguous term.²⁷ There are three potential sources of benefits for jobseekers in general: (a) unemployment benefit, which is based on contributions; (b) social assistance; (c) other benefits available from the Service of Grants and Allowances under the Ministry of Finance, analysed further down.

(a) Unemployment benefit

The Social Insurance Law (N. 41/80)²⁸ has not been amended to cover Union citizens; presumably, due to accession to the EU, this law as well as Law 7(I)/2007 would convert ‘Cypriot citizens’ to ‘Union citizens.’ The social insurance system is based on contributions and has objective criteria, therefore race/ethnicity and nationality do not figure in the determination of entitlements.

²⁶ (According to the law who are in charge to make such determinations according to article 4.1(b)(5) of law 7(I)/2007. this sentence not clear/ not meaningful) I have not yet received a reply from the Social Welfare Service to my request that they inform me as a matter of practice what they actually do-- i.e., how they interpret article 4.1(b)(5) of law 7(I)/2007, verbatim copying art. 14.1 of 2004/38/EC, that the union citizens must be “unreasonable burden on the social assistance system” and how many applications they have received. I am hoping to get a reply before the final draft of this report.

²⁷ The author was referred to academic articles on the current debates, including a paper by Koen Lenaerts and Tinne Heremans (2006) “Contours of a European Social Union in the Case-Law of the European Court of Justice” (*European Constitutional Law Review* 2006, 2:1:101-115), which examines the tensions between national welfare systems and the social rights of the citizens of the Union. Information was kindly provided by the officer in charge of public assistance in the Social Welfare Service 22.4.2009.

²⁸ As amended up to 2007 and the relevant regulations.

Unemployment benefit²⁹ is payable to employed persons and voluntary contributors working abroad in the service of a Cypriot employer. Insured persons under the age of 16 or over the age of 63 are not entitled to unemployment benefit. The age of 63 is extended up to the age of 65 if the insured person is not entitled to an old age pension.³⁰ The conditions for entitlement to unemployment benefit are: (a) The insured person has been insured for at least 26 weeks and has paid, up to the date of unemployment, contributions on insurable earnings not lower than 26 times the weekly amount of the basic insurable earnings; and (b) The insured person has paid³¹ or been credited³² with contributions in the previous contribution year³³ on insurable earnings not lower than 20 times the weekly amount of the basic insurable earnings. It is noted that for the purposes of the above conditions the contributions of a self-employed person are not taken into account, whilst the contributions of a voluntarily insured person are taken into account only in the case of work abroad in the service of a Cypriot employer on insurable earnings not lower than 20 times the weekly amount of the basic insurable earnings. In terms of the procedure to be followed, it is required that the insured person should visit the nearest Social Insurance Office and sign the unemployed register. The claimant should sign the register at regular intervals determined by the Social Insurance Office.

(b) Social/public assistance

Public assistance is provided under Law 95(I)/2006³⁴ to all those residing in the territories under the effective control of the Republic of Cyprus (i.e., not the territories under the unrecognized TRNC)³⁵ but there are conditions specific to Union citizens. A “Union citizen who

²⁹ See Social Insurance Law (N. 41/80). Unemployment benefit is composed of the basic and the supplementary benefit. The weekly rate of the basic benefit is equal to 60% of the weekly average of the basic insurable earnings of the beneficiary in the previous year, increased by 1/3 for a dependent spouse and by 1/6 for dependent children or other dependents (maximum two dependents). The increase for the dependent spouse is payable only if his/her earnings from his employment or the rate of the benefit he/she may receive from the Social Insurance Fund, are not higher than the amount of increase for dependents. In the case where both spouses are entitled to a benefit for the same period, the increase for dependents is payable only to the spouse who is entitled to increase of benefit at a higher rate. The weekly rate of 3 supplementary benefits is equal to 50% of the weekly average of insurable earnings of the beneficiary in excess of the basic insurable earnings but in no case is the supplementary benefit higher than the weekly amount of the basic insurable earnings.

³⁰ For the Ministry of Labour and Social Insurance Guide to unemployment benefit see [http://www.mlsi.gov.cy/mlsi/sid/sid.nsf/All/E89112D31399E626C2256E3900394587/\\$file/Guide-Unemployment%20Benefit%20Y2008.pdf](http://www.mlsi.gov.cy/mlsi/sid/sid.nsf/All/E89112D31399E626C2256E3900394587/$file/Guide-Unemployment%20Benefit%20Y2008.pdf)

³¹ Insurable earnings on which contributions have been paid.

³² Every insured person can be credited with insurable earnings for any period of full-time education after the age of 16 years, for periods of serving in the National Guard, for periods of sickness, unemployment, maternity, injury benefits, or invalidity pension out of the Social Insurance Fund and for the period of parental leave or period of leave on grounds of force majeure. This is not really very clear

³³ For the first semester of each year this is the calendar year before the last, and for the second semester this is the last calendar year-- e.g., for the first semester of 2008, the previous contribution year is the year 2006, whereas for the second semester of 2008 it is the year 2007.

³⁴ Ο περί Δημόσιων Βοηθημάτων και Υπηρεσιών Νόμος του 2006, Αρ. 4085, dated 28.4.2006.

³⁵ In the definitions of the law the territorial and residential read as follows: «ελεγχόμενες από την κυβέρνηση της Δημοκρατίας περιοχές» σημαίνει τις περιοχές της Κυπριακής Δημοκρατίας στις οποίες η κυβέρνηση της Δημοκρατίας ασκεί αποτελεσματικό έλεγχο». Moreover, there is reference to the “abnormal situation”: «έκρυθμη κατάσταση» σημαίνει την κατάσταση που δημιουργήθηκε ως συνέπεια της τουρκικής εισβολής και η οποία εξακολουθεί να υφίσταται μέχρις ότου το Υπουργικό Συμβούλιο, με γνωστοποίηση που θα δημοσιευθεί στην Επίσημη Εφημερίδα της Δημοκρατίας, ορίσει ημερομηνία λήξης της κατάστασης αυτής.»

maintains his/her status of an employee or self-employed person” is defined as “a Union citizen who has exercised his/her right to reside in the Republic for the exercise of employed or self-employed activity and is no longer employed or self-employed in the following situations: (a) is temporarily incapacitated due to sickness or accident; (b) is duly registered as involuntarily unemployed, having carried out professional activity for over one year and has registered as a person seeking employment in the appropriate Employment Bureau (according to residence); (c) is duly registered as involuntarily unemployed after the expiry of a fixed-term contract of employment of duration less than a year or after becoming involuntarily unemployed during the 12 months has registered with the appropriate Employment Bureau (according to residence); had been employed for at least 6 months; (d) is attending a vocational course.

Unless a person is willingly unemployed, then the continuation of his identity as a working person presupposes the existence of a relation between his previous professional activity and his vocation.

Public benefit is paid to every Union citizen residing in the Republic-controlled territories and having the right of permanent residence there and whose income and other financial means are not sufficient for his basic and special needs. The aforesaid entitlement to public benefit extends also to EU citizens who exercise their right to reside in the Republic for the exercise of paid or unpaid activity or who is an employee or is self-employed, subject again to residing in the Republic-controlled areas and to having insufficient income. EU citizens who are not employed or self-employed and are residing in Cyprus for the purpose of finding work are not entitled to public benefit.

Public benefit is also paid to those EU citizens residing in the Republic for over 3 months who acquired the right of stay in the Republic because of having proved sufficient means for themselves and their families or because of studying or receiving vocational training whilst proving that they have sufficient means, and who subsequently lost the said means and their other financial sources are not sufficient for their needs.

Third country nationals who have the status of a long-term migrant in the Republic or in another Member State but have an immigration permit for the Republic are entitled to public benefit provided they reside in the Republic and their financial means are not sufficient for their needs and their housing.

Recognised refugees residing in the Republic whose income and other means are not sufficient for their basic needs are entitled to public benefit.³⁶

There is a decision of the Cypriot Equality Body (the Anti-Discrimination Authority)³⁷ that addresses the receipt of public assistance for health reasons, which is illuminating as to the

³⁶ Law 95(I)/2006, articles 4-7.

³⁷ The Cypriot Equality Body consists of two authorities: the Anti-Discrimination Authority and the Equality Authority.

situation of the Union citizens requiring public assistance, including jobseekers' allowance.³⁸ A complaint was registered by an 18-year-old Greek citizen suffering from severe leukaemia against the Social Welfare Service, which had decided to discontinue the claimant's social assistance benefit for treatment received until May 2007. The Union citizen had been resident in Cyprus with his parents since 2002 and had been granted a 'visitor' indefinite leave to remain and was in receipt of public assistance since 2005 for humanitarian reasons, despite initial rejection due to his 'visitor' status. In October 2006, the complainant and his mother's residence status was changed to that of a family member of a Union citizen based on the law on free movement of workers. The Social Welfare Service decided to discontinue the public assistance on the grounds that he was not allowed assistance as his residence status was that of a dependent of his mother, who is a Union citizen with a residence permit for reasons of employment activity.³⁹ According to the report of the Cyprus Equality Body the relevant circular, which has wider application in similar purposes, distinguishes between Union and Cypriot citizens based on Law 7(I)/2007 and the law on Public Assistance 95(I)/2006: "the provision of law on Public Assistance 95(I)/2006, makes a distinction between the rights of Union citizens and citizens of the Republic of Cyprus and article 12(1)(a) of the law for exemption from the responsibility for the maintenance of a disabled child is not applied in the cases of Union citizens."⁴⁰ The reasoning is based on the logic that the granting of residence is premised on the proof that the complainant's mother is in possession of "sufficient means for the maintenance of her family." The Director of the Social Welfare Service erroneously suggested that a precondition for granting the free movement rights under article 9(1)(b) of Law 7(I)/2007 is that they are not considered to be "unreasonable burden on the social assistance system of Cyprus" (AKP 70/2007, p. 4). Moreover, the Director went on, again erroneously, to comment that the right of residence is dependent on being in possession of sufficient means." The Cypriot Equality Body, after analysing the relevant legal framework, determined that the Director of the Social Welfare Service had wrongly interpreted and applied the law on the following grounds:

- The Directive and the respective Cypriot law transposing the Directive do not make the exercise of the primary right of free movement, residence and work dependent upon sufficient means to avoid burdening the national social welfare system.

The Directive explicitly sets out the principle of non-discrimination on the grounds of nationality;

- The right to free movement is a right adjacent to the exercise of a professional/ economic activity in the EU that has been settled at treaty level. This is done in a manner that is broad in scope, lucid and direct and the exercise of this right is a condition precedent to the exercise of any professional activity in the host country (AKP 70/2007, p. 12).

³⁸ AKP 70/2007, issued on 24 March 2008.

³⁹ Letter to the complainant from the Paphos District Social Welfare Service, dated 5.6.2007.

Central to the finding of the Cypriot Equality Body is the principle of equal treatment under sec. 22 of Law 7(I)/2007, considering the discrimination by the Social Welfare Service as unreasonable. The Equality Body referred to the broad principles of paragraphs 16, 20 and 21 of the Directive preamble as well as to a number of cases before the Court of the European Communities, such as *Martinez Sala C-85/96*, *Rudy Grzelczyk C-184/99* as well as *D'Hoop C-224/98*. The Equality Body went further to clarify two legal issues that also have a bearing on the residence rights of jobseekers:

- All administrative formalities for the exercise of free movement and residence of Union citizens and their families for a period more than three months are set out exhaustively in the law and the Directive. It is clear that their primary residence stay is not dependent on the existence of sufficient means, as is the case with students or pensioners, for instance.
- It must be clarified that the competent authority for such issues is the Civil Registry and Migration Department and not the Social Welfare Service; however in the case of Union citizens, such as the one above, the granting of the permit provided has but an identification and evidential value.
- As for the right of Union citizens to public assistance, the non-discrimination principle as set out in article 22 of the law is of paramount importance and recommends that the authorities restore the public assistance benefit to the complainant and withdraw the relevant circular issued. The Social Welfare Service has complied with the recommendation.⁴¹

On the basis of the above case, by analogy the same principles must apply to jobseekers; however the author has not been given any indication of the current practice of the Social Welfare Service. It is not clear how long jobseekers may stay without complying with formalities; presumably indefinitely so long as they do not seek recourse to public funds. There has been no case law to test whether the *Ioannidis/Collins* type of social assistance benefits would be allowed.

(c) Other benefits available from the Service of Grants and Allowances under the Ministry of Finance

These benefits include child benefits under Regulation 1408/71 as well as other social allowances deriving from the public assistance system in Cyprus, such as student grants, grants to families with 3 children or more to buy a car; maternity benefit to mothers of 4 children or more; special provision for the blind; grants to persons with disabilities to buy a car; mobility benefit for persons with severe disabilities; special grant to buy or to build house.⁴²

⁴⁰ The Circular by the Director of the Social Welfare Service 7.3.2007 is quoted AKP 70/2007, p.3.

⁴¹ In other instances there is no compliance. For instance, in the past there have been cases regarding the provision of public assistance to Union citizens, where there has not been compliance with recommendations of the Cypriot Equality Body (AKR 33/2004, dated 10.1.2005).

⁴² See http://www.mof.gov.cy/mof/mof.nsf/DMLallowance_gr/DMLallowance_gr?OpenDocument

A student grant is paid to families lawfully residing in the Republic with one child over 17 years who attends full-time education of at least one year's duration at a recognised tertiary educational establishment. The grant is paid for the normal time required to complete just one course. The grant amounts to €1708.60 for all students completing one academic year plus 50% of fees if the student's family pays fees of a maximum of €854.30, plus €854.30 to families with three or four children for every child-student.

A child benefit is paid to all families irrespective of income who ordinarily reside in the Republic and whose unmarried children cohabit with them and fall under one of the following categories:

They are aged under 18;

They are aged between 18-25 and are serving in the army;

They are aged between 18-23 and are attending full-time education/training;

They are males aged between 23-25 attending full-time education/training of same duration as their army service;

They permanently lack the ability to support themselves, irrespective of age.

Text(s) in Force

Law 7(I)/2007 on the 'Right of EU Citizens and their Family Members to Move and Reside Freely in the Territory of the Republic of Cyprus' Concerning the Free Movement and Residence of Citizens of EU Member States and their Family Members.

- Law 95(I)/2006 on Public Assistance
- Law 41/80 on Social Insurance

Recent legal literature: Department of Labour (2008) *Ελεύθερη διακίνηση και διαμονή Ευρωπαϊών Πολιτών και Μελών των Οικογενειών τους*.⁴³ This is a guide (in Greek) on Law No. 7 (I)/2007 on the Right of EU Citizens and their Family Members to Move and Reside Freely in the Territory of the Republic of Cyprus' Concerning the Free Movement and Residence of Citizens of EU Member States and their Family Members

⁴³ This translates as Free Movement and Residence of European Citizens and Members of their Family.

ACCESS TO EMPLOYMENT

1. Equal treatment in access to employment

Article 22(1) of Law 7(1) 2007, Concerning the Right of EU Citizens and their Family Members to Move and Reside Freely in the Territory of the Republic of Cyprus, states that all citizens of EU Member States, their family members who are also EU citizens, as well as their family members who are third country nationals, residing in the Republic of Cyprus and who have a right to residence and permanent residence, are treated in the same way as Cypriot citizens in all areas covered under the Treaty.

Regarding the competent bodies, these are the following: The *National Coordinator* who is designated by the Council of Ministers and coordinates the administrative authorities in order to promote the better application of the legislation. In addition, the National Coordinator *inter alia*, provides to the Commission every two years, a report on the application of the provisions of the Laws, which contains a table of the decisions taken and a description of the main problems arising from the application of the Laws. The *National Focal Point* for the application of the relevant laws has been designated to be the Labour Department of the Ministry of Labour and Social Insurance. It provides information regarding the regulated professions and the “competent body” to nationals of Member States who wish to pursue a regulated profession in the Republic of Cyprus.⁴⁴

The Labour Department considers that the overall situation is positive, and that there are no serious barriers to access to employment by Union citizens.

The issue of employment agencies has not received much attention, yet an area of concern is the fact that public employment agencies in Cyprus do not provide services in any language other than Greek which may be a barrier to many Union citizens who are non-Greek speakers. Given that almost all civil servants and the vast majority of people are fluent in English it would not be difficult to make such services available in English.

Officials from the Department of Labour⁴⁵ claim that the system is operating smoothly and jobseekers can look for work via EURES and various private agencies.

Further, they claim that there have been no complaints about barriers to the authorities, and there is, in fact, a steady increase in the numbers of Union citizens working in Cyprus in

⁴⁴ Recent legal literature: Facilitating EU worker movement to Cyprus, leaflet provided by the Ministry of Labour.

⁴⁵ Interview with officers at the Department of Labour, Ministry of Labour and Social Insurance, 23.2.2009.

recent years. However, the officials do recognise that there may be some problems in specific areas, particularly in the private sector. From the number of cases that have gone before the Cyprus Equality Authority (which deals with employment-related discrimination), it is apparent that there are some barriers to access in specific sectors. Moreover, trade unions dispute that in practice the worker rights and equal treatment of Union citizens and their partners and families is properly observed. Despite assurances that there have been no problems or complaints of discrimination by Union citizens exercising the right to free movement of workers,⁴⁶ trade unions claim that there are problems every day regarding the procedures of considering applications. These result in various discrepancies, discrimination and disruption in labour relations, as this allows the employers to ignore collective agreements and standard practices in Cyprus.⁴⁷

The recognition of diplomas (including academic diplomas) is crucial to access to employment. A new law was recently enacted, the *Law that provides for the recognition of professional qualifications and related matters* 31(I)/2008, purporting to transpose Directives 36/2005 and 100/2006. This law provides a unified law that abolishes the old laws⁴⁸ and allows for recognition of professional qualifications.⁴⁹ Up until June 2008, Cyprus was still operating with an earlier text in force aimed at transposing the Directive on the General System for the Recognition of Professional Qualifications (Directives 89/48/EEC, 92/51/EEC and 99/42/EC),⁵⁰ which was abolished with the passage of the new legislation. However, the legislation covering both the *Sectoral Directives*, which cover one profession each, such as doctors, nurses, dentists, veterinarians, midwives, architects, lawyers and pharmacists, will be amended with subsequent legislation and changes to the relevant regulations in the cases of self-governing provisions for the exercise of certain professions.⁵¹ Government officials are of the view there are only minor barriers in the registration of the professions, which are of transitional nature and will be resolved shortly; as for the amendments to the legislation covering both the *Sectoral Directives*, the law covers extensively the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor, as provided in the Directive.

⁴⁶ Interview with officers of the Department of Labour, 23.2.2009.

⁴⁷ Information provided by Andreas Matsas PEO, 13.3.2009. Similar comments by trade unionists from other trade unions; also see Memorandum to the Minister of Interior, PEO (Pancyprian Labour Federation), February 2008.

⁴⁸ These are the following laws: Οι περί Γενικού Συστήματος Αναγνώρισης των Επαγγελματικών Προσόντων Νόμοι 179(I)/ 2002 and 129(I)/ 2003 (transposing 89/48/EEC), οι περί του Δευτέρου Γενικού Συστήματος Αναγνώρισης των Επαγγελματικών Προσόντων Νόμοι 121(I)/2003 and 36(I)/2005 (transposing 92/51/EEC); and ο περί του Τρίτου Συστήματος Αναγνώρισης των Επαγγελματικών Προσόντων Νόμος 157(I)/2004 (transposing 99/42/EEC).

⁴⁹ The title of the law is «Νόμος που προνοεί για την αναγνώριση των επαγγελματικών διπλωμάτων και για συναφή θέματα», enacted on 6.6.2008 with immediate effect on enforcement.

⁵⁰ See *Guide for the General System for the General Recognition of Professional Qualifications*, Ministry of Labour and Social Insurance, Department of Labour, Republic of Cyprus, Nicosia, Cyprus.

⁵¹ Information provided by officer of the Labour Department

2. Language requirement

In the private sector there are areas where the language requirement of professional associations amounts to barriers and in practice acts as a barrier to entry. A number of complaints have gone before the Cypriot Equality Body, which has ruled on the language requirement and has made recommendations to the competent authorities to remove these barriers; although many of these recommendations have been honoured, some have not.

The Equality Body issued a report regarding the requirement of knowledge of Greek as necessary for EU nationals to acquire an estate agent's license, which indicates the kind of barriers to acquiring the right to exercise a profession due to language obstacles.⁵² Two complaints on the same issue were submitted to the Equality Body by two EU citizens who alleged that article 11 of the Estate Agents Law, which requires good knowledge of Greek or Turkish as a prerequisite for the acquisition of a licence, amounts to discrimination on the ground of language and by extension on the ground of ethnic origin in the field of access to the profession of the estate agent. Meanwhile, the European Commission had already warned the Republic of Cyprus that the said law violates articles 43 and 49 of the European Communities Treaty, and as a result a bill was prepared for discussion in Parliament. The Equality Body criticised the fact that laws containing the Greek language requirement were still in place, noting that this constitutes discrimination prohibited by the anti-discrimination legislative framework. Since a bill to amend this law was already going through Parliament, the Equality Body requested that its views be taken into consideration whilst discussing this bill. The Equality Body did not impose any sanction, as measures were already in process in order to amend the law, following instructions to that effect from the European Commission towards the Cypriot Government. The Equality Body had previously also referred laws and regulations to the office of the Attorney General for revision in order to comply with the new anti-discrimination legislative framework introduced in 2004; however no action was taken towards revising any of these.

Similarly, the Equality Body found that the language requirement in the documents required for registration of foreign nationals in the registry of building contractors was discriminatory.⁵³ A complaint was submitted to the Equality Body by a foreign national whose application to the Registration Council of Building Contractors was not processed because his certificates attesting to his qualification as a building contractor were in English. An investigation undertaken by the Equality Body showed that the said Council would readily examine applications by Cypriot citizens whose certificates were in English, but requested non-Cypriots to have their certificates translated into Greek. The Equality Body found that the differential treatment of Cypriots and non-Cypriot applicants, deriving from the fact that the former can submit documents in English whilst the latter cannot, amounts to unlawful discrimination. The

⁵² File No. AKR 70/2005 & 73/2005, dated 23.02.2007.

⁵³ File No. AKR 36/2006, dated 23.02.2007

Authority also found that requirement for translating into Greek documents composed in a language known to the competent body, English in this case, amounts to a violation of the principle of bona fides and should be reconsidered.

In another case the Equality Body decided on a complaint submitted by an EU national regarding a requirement by the semi-governmental Cyprus Tourist Organisation, that in order for permits to operate a tourist office be granted, a Greek-speaking manager must be hired.⁵⁴

The decision criticised the practice of requiring knowledge of the national language, which constitutes discrimination on the grounds of language amounting at the same time to indirect discrimination on the grounds of race/ethnic origin.⁵⁵

These findings show continuity with earlier practices by professional bodies of the Republic which amount to obstacles for free movement of workers (see Chapter IV).

As mentioned above, the Equality Body recommendations regarding the requirement of knowledge of Greek in order for EU nationals to acquire an estate agent's license, which is an effective barrier to acquire the right to exercise a profession,⁵⁶ have only been partly complied with. Further complaints on the same issue have been submitted to the Cypriot Equality Body. Another instance where there seems to be continued non-compliance concerns a Union citizen who applied to sit the exams in English to become insurance broker: there was a new complaint in 2008, even though the Equality Body had ruled on the matter in 2005, in another case saying that the Insurance Institute of Cyprus ought to revise its relevant rules on the matter.⁵⁷

There had been requirements—and thus barriers—for the excellent use of Greek for professions such as medical doctors, but the Medical Doctor's Association has complied with the recommendation of the Cypriot Equality Body, following the complaint of a general practitioner who wanted to register.⁵⁸ Today doctors can register without the language restrictions.⁵⁹ However, there are still language barriers to the nursing profession, which continues to require stringent language tests: very good knowledge of Greek or English, despite the relevant decision of the Equality Body dated 19.3.2007. The Equality Body is currently reviewing a number of complaints from nurses who have good knowledge of other official EU languages such as French and German.⁶⁰

⁵⁴ Decision dated 01.08.2006. The Equality Body concluded that it could not make any concrete recommendations, because there are third-party rights involved (referring to the person hired for the post in question) and because an appeal is in progress before the Supreme Court, filed by the complainant.

⁵⁵ Law on Equal Treatment in Employment and Occupation (2004), article 16(1). The decision also referred to Regulation 1612/68/EEC, which sets as a target for the EU the elimination of all forms of discrimination as a result of nationality in the field of employment, as well as to the law transposing Directive 2000/78/EC, which prohibits direct or indirect discrimination on the grounds of race or ethnic origin in employment, occupation and self-employment. The decision further instructs that this regulation be abolished, in accordance with the law transposing Directive 2000/78/EC, which provides that all laws and regulations contravening the said law must be abolished.

⁵⁶ File No. AKR 70/2005 and 73/2005, dated 23.02.2007.

⁵⁷ AKI 35/2005, issued on 19.10.2005.

⁵⁸ AKI 10/2006.

⁵⁹ The Head of the Equality Authority assured the author of this report that there is compliance 24/3/2009.

⁶⁰ Information provided by an officer of the Cypriot Equality Body 26/3/2009.

Judicial practice

There has been no case reported on such issues.

The only legal reference to access to employment was made by the investigation into a complaint to the Equality Body, which considered in some detail the relevant provisions of the *Law that provides for the recognition of professional qualifications and related matters* 31(I)/2008 (for details of the case see “Chapter IV, 1.2. Language requirement”).⁶¹

Miscellaneous

The author has been informed that there are still some administrative or bureaucratic barriers to obtain licences for taxi or bus services: apparently it takes up to six months for a Union citizen to obtain such a licence, but this matter is currently under investigation by the Equality Body as part of more general complaint regarding the administrative or bureaucratic barriers to access to the free exercise of services in the country.⁶²

Text(s) in force

The Law that provides for the recognition of professional qualifications and related matters, 31(I)/2008.

⁶¹ AKI 107/2007, issued on 12.12.2008.

⁶² Information provided by officer of the Cypriot Equality Body.

EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY-OBSTACLES TO FREE MOVEMENT

1. Working conditions (direct, indirect discrimination)

Workers from an EU Member State are entitled to the same wages, which are either agreed with the employer or are based on collective agreements applying to various sectors of the economy. In order to protect vulnerable groups of employees due to their weak bargaining power, an Order is issued annually by the Ministry of Labour stipulating a minimum wage for certain occupations (e.g., shop assistants, clerks, child-care workers, and personal care workers). On the basis of relevant legislation, the employer is obliged, within a period of one month from the date of commencement of the job, to communicate to the newly recruited employee in writing the terms of his/her employment. In cases of non-compliance, complaints can be submitted to the Director of the Department of Labour Relations. State officials and the Cyprus Industrialists and Employers Federation (OEB) are of the view that equal treatment of all workers⁶³ is properly observed and that free movement of workers did not result in less favourable treatment or any form of discrimination (direct, indirect discrimination) against Union citizens or third country nationals.⁶⁴ Trade unions, however, maintain that Union citizens' worker rights are not fully respected and that there is regular violation of the principle of equal treatment against Union citizens and their partners and families. Trade unions in the tourism sector (hotels and restaurants) claim the working conditions for Union citizens and other migrant workers are unacceptable.⁶⁵

2. Social and tax advantages

As far as tax advantages and liabilities are concerned, since accession to the EU in 2004, tax liability is based on the principle of residence and taxable residents in Cyprus are taxed with respect to their worldwide income, while non-taxable residents are taxed with respect to Cyprus-source income only. EU citizens must contact the Department of Inland Revenue for

⁶³ Statement by Michalis Antoniou at Diversity Management Training seminar, organised by Symfilios and the Cyprus Employers and Industrialists Federation (OEB), 4th April 2008, University of Nicosia/Intercollege. During 2007 OEB prepared the "Handbook for Equal Treatment at Work and Employment," which was funded by the EU.

⁶⁴ Interview with by Demetris Michaelides, head of section on migrant workers and of the Cyprus EURES, Ministry of Labour 14.3.2008.

⁶⁵ Interview with Andreas Matsas, head of International and European Relations, SEK, 13.3.2009; see also Lefteris Geogriades (SYXKA-PEO) interviewed by the Cypriot daily *Haravgi*, 4.5.2008.

a Taxpayer's Identification Code. They must present their passport and also complete Form I.R. 163A. Tax liability is based on the principle of residence. According to the Income Tax Law, a person is considered to be resident in Cyprus for tax purposes if he/she resides for a period or more which, in aggregate, exceeds 183 days. Non-tax residents having a permanent establishment in Cyprus may elect, if it is to their benefit, to be taxed in accordance with the provisions applicable to tax residents.

As far as social insurance is concerned, there is a general earnings-related Social Insurance Scheme which covers compulsorily, every person gainfully occupied in Cyprus either as an employed or self-employed person. Voluntary insurance is allowed to persons who wish to continue their insurance after a prescribed period of compulsory insurance. The scheme is financed by earnings-related contributions payable by the insured person, the employer and the State. Since 1st May 2004, Cyprus has enforced EC regulation 1408/71, which coordinates the social security systems of the member states of the EU, the European Economic Area and Switzerland. The scheme provides for various benefits, including marriage benefit, maternity grant, maternity allowance, unemployment and sickness benefit. Unemployment benefit is paid for involuntary unemployment and is payable for a period that cannot exceed 156 days for each period of interruption of employment. Where the legislation of the Republic of Cyprus does not provide for a right to a pension on the basis of age for some categories of unpaid workers, the pre-condition of age is considered to be satisfied as long as the EU nationals entitled to the right of permanent residence have completed their 65th year of age. The precondition of more than two years' continuous residence for an EU national who has been providing paid or unpaid service in the Republic of Cyprus to be granted permanence residence does not apply, if he/she has suffered incapacity to work as a result of an accident or illness in the context of work, events that confer a right to a pension payable in total or in part by the Department of Social Security.

3. Other obstacles to free movement of workers

In "Chapter X: Miscellaneous," the Report on Cyprus 2007 referred to the unique political situation in Cyprus, particularly as regards the exercise of the right of free movement of workers who are Union citizens and reside in the northern territories, where the Republic of Cyprus Government exercises no effective control. The question is how to treat Union citizens and their family members who reside in the areas of the unrecognised TRNC (workers or jobseekers) and seek rights provided by the free movement directive in the southern territories, which are under the effective control of the Republic of Cyprus. The questions to be addressed are:

Are they entitled to equal treatment and the social advantages of Cypriots and other EU citizens? Even if this category of Union citizens does not qualify as 'frontier workers,' are their position and thus their corresponding rights *analogous* for all intents and purposes to 'frontier workers'? Or, is their situation so fundamentally different, deriving from the wholly unique

situation in Cyprus, as one of “the Cypriot states of exception,”⁶⁶ requiring that they are treated as a separate category? And if so, are there any legal reasons justifying the denial of their right to equal treatment and access to the rights and social advantages as defined by the Directive?

Of particular relevance is the existence of the residence clauses, which have a bearing in defining the scope of equal treatment and the nature of social advantage as defined in the laws (e.g., the cases of C-212/05 *Hartmann* and C-213/05 *Geven*). The Report on Cyprus for 2007 referred to the legal, conceptual and practical difficulties that generate different kinds of repercussions on free movement of workers arising from the situation in Cyprus. A crucial question here is how to construe the ceasefire line, which cuts across a de facto divided country, as this is dependent on the way one construes the legal regime of the breakaway Turkish Republic of Northern Cyprus (TRNC),⁶⁷ a regime that remains unrecognised.⁶⁸ Is it a ‘border,’ a ‘soft border,’ a ‘frontier line’ or merely a ‘default line’ that acknowledges the status quo and makes arrangements for the failure to find a settlement by suspending the implementation of the Acquis, as provided in Article 1 of the Treaty of Accession of Cyprus to the EU. The references in Law 7(1)2007 (9.2.2007)⁶⁹ to the territorial application of the implementation of the Directive⁷⁰ an issue deriving the de facto division of Cyprus are problematic matters for free movement of workers. Article 22 (3) of the said law explicitly confines the implementation of the right to equal treatment,⁷¹ as well as any other rights beyond the right of residence “only in relation to Union citizens and the members of their families who reside in the territory in which the Republic of Cyprus exercises effective control.”⁷² Therefore two questions need to be addressed:

- What is the status of the northern territories as regards the exercise of rights that derive from the Acquis in the area under the effective control of the Republic?
- Does residence outside the area under the effective control of the Republic justify different treatment, i.e., is the resulting indirect discrimination justifiable under the law?

In answering the first question, it has to be pointed out that in some contexts the northern territories are considered as ‘unrecognised,’ ‘militarily occupied territories’⁷³ and ‘outside the EU,’ as the ECtHR recognised that Turkey’s army “exercises effective overall control over that

⁶⁶ C.M. Constantinou (2008) “On the Cypriot States of Exception,” *International Political Sociology* (2008) 2, pp. 145–164.

⁶⁷ The documents of the Republic of Cyprus refer to those areas/ territories which have been illegally occupied by the Turkish military since 1974. The formulation in EU documents and the UN is somehow more neutral referring to “areas not under the effective control of the Republic of Cyprus.”

⁶⁸ For more on the legal questions of recognitions see J. Crawford (2007) *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford, p. 81. Also see Eyal Benvenisti (1993) *The International Law of Occupation*, Princeton University Press, pp. 177-181.

⁶⁹ This is also the case in other laws.

⁷⁰ Such as article 20 of the law.

⁷¹ Under sec. 22 (1).

⁷² Articles 2 and 20 of Law 7(1)/ 2007.

⁷³ See E. Benvenisti (1993) *The International Law of Occupation*, Princeton University Press, pp. 177-181.

part of the island” and that “such control [...] entails her responsibility for the policies and actions of the ‘TRNC.’”⁷⁴ In this construction, we are *not* dealing with a ‘frontier’ between two EU member countries (e.g., Germany and France, etc.) but a mere ceasefire line whereby the northern territories are under the [illegal] control of a third country. However, matters are far more complicated than that: the territories in the northern part of Cyprus cannot be treated as part of Turkey and have never been treated so by the EU or any other international body; Turkey herself has not even annexed these territories.

The EU has developed constitutional arrangements to deal with territories that are considered to have a special relationship under European Community law due to their exceptional circumstances. Such examples are overseas countries or territories,⁷⁵ the outermost regions,⁷⁶ the Channel Islands, the Isle of Man, Gibraltar, the Faroe Islands, the Aland Islands and Ceuta and Melilla. The difference between these regimes, whether underdeveloped regions or financial or other services centres, and the situation in Cyprus is that the former have a regulated constitutional link recognised by all sides, whereas in the case of Cyprus, we are dealing with a regulation of a territory of an unrecognised regime. This does not mean that there is no constitutional relationship; in fact there are at least four dimensions of this relationship: first, there is a complicated regime regulated by the Treaty of Accession and an EU Regulation as regards the territorial aspects of the accession of Cyprus; second, Turkish-Cypriots who reside in the north are automatically Union citizens, as they are automatically citizens of the Republic of Cyprus; third, EU *acquis*-derived rights, which have the Republic of Cyprus as their locus in the *de facto* divided country are likely to be increasingly influencing the legal, socio-economic and political developments in what can be seen as a process of quasi-harmonisation or *de facto* harmonisation, if Turkey is to be integrated in the European and global economic system.⁷⁷

As far as EU law is concerned, which is the basis of analysis in this report, we are dealing with territories which are part of the EU, but “the application of the *acquis* [is] suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.”⁷⁸ Protocol 10 of the Accession Treaty stipulates that ‘the application of the *acquis* shall be suspended in those areas of the Republic of Cyprus in which

⁷⁴ *Loizidou v Turkey*, ECHR 18 December 1996, 108 ILR 443, 466-7 (para 56).

⁷⁵ Annex II of the EC Treaty lists these territories and includes 13 British overseas countries and territories (e.g., Anguilla, Cayman Islands, Falkland Islands, etc.), 6 French overseas territories and territorial communities (e.g., New Caledonia and Dependencies, French Polynesia, etc.); 2 Dutch overseas countries (i.e., Aruba and Netherlands Antilles); 1 Danish, i.e., Greenland. For more on these see Murray, 2004: 3-18. —use full ref for murray here since first ref. for footnote 80 use short form: see murray,2004, pp--

⁷⁶ For more on these see F. Murray, F. (2004) *EU & Member State Territories, The Special Relationship under Community Law*, Thompson, Sweet & Maxwell, Stevenage Herts, pp. 18-35.

⁷⁷ For a more detailed analysis on the subject see N.Trimikliniotis (2009) “Exceptions, Soft Borders and Free Movement for Workers,” Paul Minderhoud and Nicos Trimikliniotis (ed.) *Rethinking the Free Movement of Workers: The European Challenges Ahead*, University of Nijmegen, pp. 135-154.

⁷⁸ Article 1, EU Accession Treaty - Protocols on Cyprus, see <http://www.cyprus.gov.cy/MOI/pio/pio.nsf/All/DA5EA02B13392A77C2256DC2002B662A?OpenDocument>

the Government of the Republic of Cyprus does not exercise effective control' (Art. 1). It also referred the matter to the Council, which would, acting unanimously on the basis of a proposal from the Commission, 'define the terms under which the provisions of EU law shall apply to the line between those areas referred to in Article 1 and the areas in which the Government of the Republic of Cyprus exercises effective control' (Art. 2). However, Article 3 stipulates that 'nothing in this Protocol shall preclude measures with a view to promoting the economic development of the areas referred to in Article 1,' but 'such measures shall not affect the application of the *acquis* under the conditions set out in the Accession Treaty in any other part of the Republic of Cyprus.' Moreover, Article 4 provides that in the event of a settlement, 'the Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the adaptations to the terms concerning the accession of Cyprus to the European Union with regard to the Turkish Cypriot Community.'

Moreover, the accession to the EU of a *de facto* divided Cyprus⁷⁹ is regulated by the "Green Line Regulation,"⁸⁰ a fact that has somehow blurred the status of the 'TRNC': the very existence of a Green Line Regulation substantiates the argument that the 'Green Line' remains a 'quasi-border' or a 'soft border' of the EU.⁸¹ The reference in Law 7(I)/2007 to "effective control of the territory" has certainly expanded considerably the scope for the authorities' discretion as to whether to allow EU citizens living the northern (occupied) territories the right to exercise their rights under the Directive. In fact, I am informed that the authorities do not accept applications for the registration certificate from Union citizens who do not reside in the areas under the effective control of the Republic of Cyprus.⁸² Moreover, as reported in 2007, the practice as regard partners of Union citizens residing in the northern part of Cyprus is to allow them to travel or use the legal ports and airports the first time they enter the country, but to subsequently put them on the "stop list" once they have entered the territories of the Republic of Cyprus.

There is a *prima facie* case of indirect discrimination and the question is whether such discrimination can be justified under the law. The residential stipulation to the territory under the effective control and the current administrative practices flowing from this discriminate against Union citizens, when compared to the Turkish-Cypriots who reside in the north and other Union citizens who reside in the south. Article 22 of the Directive regarding "territorial

⁷⁹ See ECRI (2005) Third Report on Cyprus, European Commission against Racism and Intolerance, Council of Europe, Strasbourg, 16 May 2006 and Corrigendum to Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession (OJ L 161, 30.4.2004), [http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=304R0866R\(01](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=304R0866R(01)

⁸⁰ Corrigendum to Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession (OJ L 161, 30.4.2004), [http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=304R0866R\(01](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=304R0866R(01)

⁸¹ See N. Trimikliniotis (2008) "Borders, Migration, Security and Trafficking Dilemmas: Current Debates and Cypriot Challenges", *The Cyprus Review*, Volume 20: 2, Fall 2008.

⁸² This is the standard practice of the district immigration offices as instructed by the Immigration officer (the Director of Population Archive).

scope” explicitly stipulates: “The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.” In fact, the discrimination caused is manifold: by failing to recognise the rights of Union citizens to free movement, whilst recognising the rights of Turkish-Cypriots who reside in the same territories to have access to the rights and benefits of the Republic causes a chain of multiple discriminations that may undermine fundamental rights guaranteed in the Acquis:

- (a) it is contrary to the principle of free movement, which has “fundamental status,”⁸³ because it creates obstacles to the exercise of this right which is contrary to the Directive. The Directive allows for some restrictions if they can be justified within the categories of the exceptions provided under chapter VI (Art. 27-33), which provides for restrictions on the right of entry and the right of residence on the grounds of “public policy, public security or public health.” However, no such stated policy has been stipulated in the law that transposes the said Directive, nor has there been any other official justification offered for restricting the implementation of the principle of free movement.
- (b) It is contrary to the equal treatment principle as it results in indirect discrimination against Union citizens residing in the north: the same restrictions do not apply to Cypriot nationals. Of some relevance here may be the case of *Tetyana Tomko v. Republic of Cyprus through the Aliens and Immigration Department*.⁸⁴ A Ukrainian woman married to a Turkish Cypriot and residing in the northern part of Cyprus won an appeal against the Immigration Department who had rejected her application for renewal of her residency permit, on the grounds that she was residing in the Turkish-controlled north rather than in the Republic-controlled south and because her marriage was not recognised by the Republic as it was carried out in the north. The Supreme Court found the Government’s arguments to be lacking legal basis and granted her the appeal. Even though Tetyana Tomko was a third country national the same logic, by analogy, applies to Union citizens who reside in the northern territories and must be afforded treatment equal to other Union citizens. The test of whether an indirect discrimination is legally justified is provided in the anti-discrimination acquis under Directives 43/2000 and 78/2000, a provision transposed verbatim by the relevant legislation in Cyprus.⁸⁵ Therefore this “apparently neutral provision, criterion or practice” that puts persons of certain nationality,⁸⁶ or racial or ethnic origin at a

⁸³ As stipulated in the preamble of Directive 38/2004.

⁸⁴ Supreme Court case no. 709/2006, dated 20.06.2007.

⁸⁵ The Equal Treatment (Racial or Ethnic Origin) Law No. 59(I) /2004 (31 March 2004); The Equal Treatment in Employment and Occupation of 2004 No. 58 (1)/2004 (31 March 2004); the Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19 March 2004). For details on this see N.Trimikliniotis and C. Demetriou (2008) “Evaluating the Anti-discrimination Law in the Republic of Cyprus: A Critical Reflection,” *The Cyprus Review*, Volume 20: 2, Fall 2008, pp. 79-116.

⁸⁶ Under the equal treatment provisions of Directive 38/2004 (Article 24).

particular disadvantage compared with other person, can only be justified if “it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

- (c) There may be good reasons why the Cypriot authorities would choose to be cautious about granting these rights to Union citizens residing in the northern territories,⁸⁷ and good reasons that ??there are inherent complications resulting from the operation of the Green line Regulation.⁸⁸ The likely justification provided for the restriction is that the current status quo creates a situation that does not allow the implementation of the Acquis in the northern territories and that the issue is one of public policy and public security, under the general rubric of the “law” or “doctrine of necessity” given the situation in Cyprus.⁸⁹ However, the European Court of Human Rights (ECtHR) in the case of *Aziz v. the Republic of Cyprus*⁹⁰ ruled that the ‘doctrine of necessity’ must be exercised in a manner that does not operate as a legal justification for the suspension of constitutional rights and violate the nucleus of rights or the principle of equality. This provision results in problematic implementation of the principle of free movement and indirect discrimination *within the territory* under the effective control of the Republic of Cyprus.⁹¹ However, it is unlikely to meet the stringent legal test of the non-discrimination acquis, which requires that such instances of indirect discrimination are allowed, if they are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The only exceptional circumstances provided by the Directive apply to particular individuals and their specific circumstances and do not give blanket coverage to all Union citizens residing the north, and these are stipulated in the Directive (see preamble paragraphs 22, 23 and 24). In fact the general approach of the Directive is to severely restrict the right of states to expel Union citizens, as Article 28 of the Directive provides for “Protection against expulsion.” The exceptions and derogations relate to serious situations that may justify severe action such as

⁸⁷ For instance the reasoning may be an attempt to protect Greek-Cypriot properties from being usurped by Union citizens as a result of the de facto partition following the coup, the invasion and occupation since 1974.

⁸⁸ It aims to combat illegal immigration of third country nationals and to detect and prevent any threat to public security and public policy. See Communication from the Commission COM(2006) 551 final, Brussels, 25.9.2006, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=506DC0551&lg=en

⁸⁹ See C.M.Constantinou (2008) “On the Cypriot States of Exception,” *International Political Sociology* (2008) 2, pp. 145–164 and N.Trimikliniotis and C. Demetriou (2008) “Evaluating the Anti-discrimination Law in the Republic of Cyprus: A Critical Reflection,” *The Cyprus Review*, Volume 20: 2, Fall 2008, pp. 79-116.

⁹⁰ ECHR/no. 69949/01 (22 June 2004), Reported at [<http://www.echr.coe.int/eng/Press/2004/June/ChamberJudgmentAzizvCyprus220604.htm>], accessed on 20.10.2008. The case is discussed in the Cyprus Country Report of the European Network of Legal Experts in the non-discrimination field (state of affairs up to 8 January 2007) available at [http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/cyrep07_en.pdf], accessed on 20.10.2008.

⁹¹ The 2007 Report considered that the relevant provision in Law 7(1)/2007 seems superfluous given the Treaty of Accession and the Green Line Regulation 866/2004 of 29.04.2004 regulates the peculiar “soft border” of Cyprus under the current situation as long as the de facto partition persists. This is the division line of Cyprus, which is nothing more than a ceasefire line. When Cyprus acceded to the EU as a divided island the EU decided to make this into a ‘soft border’ of the EU. See Corrigendum to Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession At OJ L 161, 30.4.2004), [http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=304R0866R\(01](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=304R0866R(01)

expulsion of Union citizens. It is unlikely that these would allow for discriminatory treatment in the granting of a registration certificate, which must be issued immediately, once it is recognised that the person applying is a Union citizen. Given that we are not dealing with expulsion of Union citizens but refusal to grant a registration certificate, a mere “administrative formality” under Article 9 of Directive 38/2004, the question then becomes: are there any other residual powers deriving from the sovereignty of the national state to decide on any other “imperative grounds of public security” or exceptional and serious grounds of public policy, which justify the Republic of Cyprus’s refusal to grant registration certificates to those Union citizens residing in the north? Here again, we enter into the territory of the ‘doctrine of necessity,’ referred to above, deriving from the abnormal situation in the country invoked by Greek-Cypriot judges in a 1964 Supreme court case and regularly used and expanded ever since, which refers to those ‘temporary and minimum provisions absolutely necessary for the functioning of government.’⁹² Not only is it quite difficult to justify any connection between “provisions absolutely necessary for the functioning of government” and the refusal to grant registration certificates to Union citizens, but even if there is some connection, in the application of the principle established in the case of *Aziz* the invocation of necessity must not violate “the very essence of the right” to freedom of movement without discrimination. Therefore any necessary arguments are unlikely to be successfully invoked by the Republic of Cyprus as justification for failure to comply with the Directive.

4. Specific issues: frontier workers (other than social security issues), sportsmen/sportswomen, maritime sector, researchers, artists

4.1 Frontier workers

The 2007 Report on free movement of workers in Cyprus reported that issues relating to ‘frontier workers’ are unlikely to have any bearing on Cyprus, given that Cyprus is an island and has no recognized ‘borders’ but a ceasefire line, known as the “Green Line,” which de facto divides the country. If there is no ‘frontier,’ then it logically follows that there cannot be ‘frontier workers.’

4.2 Sportsmen / sportswomen

Football, basketball, volleyball, handball are popular sports; rugby is confined to the British Bases Area and there is no ice-hockey in Cyprus.

⁹² For a discussion on the ‘doctrine’ or ‘law’ of necessity, see L. Papaphilippou (1995) *The Law of Necessity and the Constitutional Order in Cyprus [Το Δίκαιο της Ανάγκης και η Συνταγματική τάξη στην Κύπρο]*, Nicosia, Cyprus; I. Nicolaou (2000) *The Control of the Constitutionality of the Laws and the Separation of Powers of the State Institutions of Cyprus- Constitutional Regulation and the Evolution of the Law of Necessity [Ο Έλεγχος της Συνταγματικότητας των Νόμων και της Κατανομής των Αρμοδιοτήτων, των Οργάνων του Κράτους στην Κύπρο – Η Συνταγματική Ρύθμιση, η Εξέλιξη και το Δίκαιο της Ανάγκης]*, Εκδόσεις Αντ. Ν. Σάκκουλα, Athina, Greece; and A. N. Loizou (2001) *The Constitution of the Republic of Cyprus [Σύνταγμα Κυπριακής Δημοκρατίας]*, Nicosia, Cyprus.

The situation has not changed since the 2007 report: the Aliens and Immigration Law imposes no restrictions on professional sports people who are citizens of EU Member States. Furthermore, the Cyprus Sports Organization applies the ruling of the Court of Justice on 12 April 2004 in the *Igor Simutenkov* case (C-265-03). Free movement legislation has applied in the sports sector since 2004. Sports people who are citizens of EU Member States are treated in exactly the same way as Cypriot nationals as far as registration with and transfer from and to teams are concerned. Using the example of football players to illustrate, according to the Regulations of the Cyprus Football Association, in 2008 teams in the first league could have the same unspecified number of non-amateur EU players as Cypriot nationals, Reg.20(1) (1), and the same applies for second-and third-league teams but the players in the second and third leagues can be either amateurs or non-amateurs, Reg.20(2)(1) and 20.3(1), respectively; during the first transfer period (i.e., 1/6/-31/8) EU non-amateur footballers can transfer (Reg. 1.4), during the second transfer period (1/1/-31/1) the same number (up to two) of Cypriot nationals and EU players can transfer in the case of the second and third football league, Reg.1.4(6c).

The rules applying to Cypriot sports have taken into account the *Bosman* ruling in 1995.⁹³ From the regulations studied and according to sports officials, there are no regulations of national sports federations and sports organisations limiting the access of migrants and ethnic minorities to sports. In second-division football in Cyprus there are 230 Cypriot players and 110 foreigners. There are calls from the Pancyprian Footballers' Association (PFA) for the Cyprus Football Association to adopt the Scottish football regulations, which made a rule in 2008 that each team must include within their 18-member squad four to five under twenty-one year olds.⁹⁴ The Association raises the concern that Cypriot footballers are being displaced by foreigners (EU nationals and third country nationals), and believes that adoption of a Scottish-type rule will work as an indirect quota for Cypriots, who will become the 'core' of the squad, as it is unlikely that foreigners would move to Cyprus before they are 21 years old.⁹⁵ The Association considers that Cypriot footballers suffer from discrimination as they are less likely to accept certain conditions that foreigners will accept.⁹⁶ In any case this is a major issue of debate in Europe, following the *Bosman* ruling in 1995.⁹⁷ The Pancyprian Footballers' Association, however, argues that there is problem of reverse discrimination and calls for the adoption of a rule in the spirit of the UEFA 'Home-grown Player rule,' which is also discriminatory under EU law but--unlike a quota system--it constitutes indirect, rather than direct, discrimination.

⁹³ Union Royal Belges des Sociétés de Football Association ASBL and others v. Jean-Marc Bosman; Case C-415/93, ECR I-4921.

⁹⁴ See «Οι αριθμοί φοβίζουν. Νοιάζεται η ΚΟΠ;», *Επάγγελμα Ποδοσφαιριστής*, Journal of the Pancyprian Footballers' Association issue 1, 2008, p. 10.

⁹⁵ According to the journal of the Pancyprian Footballers' Association.

⁹⁶ Interview with Spyros Neofitides, President of the Pancyprian Footballers Association, Nicosia, 3.3.2009.

⁹⁷ Union Royal Belges des Sociétés de Football Association ASBL and others v. Jean-Marc Bosman; Case C-415/93, ECR I-4921.

The argument here is that the system may be justified under EU law if it can be objectively justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary.⁹⁸ The Pancyprian Footballers' Association complains that foreign footballers who play on second-division teams as "amateurs"⁹⁹ obtain work permits and are registered by some football clubs in jobs unrelated to football and then used in matches as "amateurs." this in turn results in instances of non-payment and deportation from the country. Apparently from 2009-2010, new regulations of the football league will no longer allow third country nationals to be registered as "amateurs" but only as professionals.¹⁰⁰ The Pancyprian Footballers' Association also noted a discriminatory practice of the CFA regarding the football games scheduled during the Christmas holidays: the games were scheduled for 27 and 28 December 2008, dates arranged apparently due to pressure on the CFA from the football clubs that wanted to avoid their contractual obligations of paying the foreign players' travel tickets required when there is a vacation period.¹⁰¹ As a result of industrial action (i.e. strike) by the Pancyprian Footballers Association, there were no matches for the second, third and fourth divisions, but the first division went ahead as scheduled.¹⁰²

The authorities give assurances that no quota system operates. However, it is difficult to make any conclusive assessment regarding the issue of what is termed as 'structural' discrimination, as there is very limited information/ statistics on the participation of migrants, minorities or other potentially discriminated groups in sports in Cyprus. There is no authority keeping track of statistics on the representation of migrants and ethnic minorities in any of the sports, save for professional football and basketball, where non-nationals are employed – but these are usually specially recruited and well-paid professionals rather than members of immigrant communities living in Cyprus, who fall in the lowest echelons of the labour hierarchy.¹⁰³ We cannot quantify the extent of the involvement of migrants and ethnic minorities as athletes, coaches, officials and fans in the sports under examination (football, basketball and athletics). In general, the only visible non-natives are the professional athletes and coaches in the top football and basketball leagues. There is minimum involvement of migrants, who did not arrive en mass until 1990; as for the Turkish-Cypriot ethnic community, the problems of the de facto partition and the ethnic conflict that preceded the de facto partition mean that there is minimum participation of Turkish-Cypriots in sports, although there are some individual cases of Turkish-Cypriot who do participate, despite the political and social

⁹⁸ Article 2(b) of EU Directive 43/2000.

⁹⁹ Information provided by Spyros Neofitides, President of the Pancyprian Footballers Association.

¹⁰⁰ Information provided by Spyros Neofitides, President of the Pancyprian Footballers Association.

¹⁰¹ Information provided by Spyros Neofitides President of Pancyprian Footballers Association.

¹⁰² See «Δεν θα μας ... σταυρώσουν Χιστουγεννιάτικα»;», *Επάγγελμα Ποδοσφαιριστής*, Journal of the Pancyprian Footballers' Association, Issue 1, 2008, p. 14-15.

¹⁰³ See N. Trimikliniotis and P. Pantelides (2003) 'Mapping Discrimination in Cyprus: Ethnic Discrimination in the Labour Market,' *The Cyprus Review*, Vol. 15, No.1, Spring 2003, pp. 121-148; N. Trimikliniotis and C. Demetriou (2007) 'Cyprus', in: A. Triandafyllidou and R. Gropas (ed.) *European Immigration: A sourcebook*, Avebury: Ashgate, pp.45-58.

problems: we are informed that there are a handful of young Turkish-Cypriot footballers playing with some second-division football clubs.¹⁰⁴ Until a couple of years ago, the first-division club Nea Salamina had some Turkish-Cypriot footballers playing.

Legislation/Regulations

Cyprus Football Association (2008), *Regulations for the Registration and Transfer of Football Players*, P.O Box 25071, 1306 Nicosia, Cyprus, info@cfa.com.cy.

4.3 The Maritime sector

The focus should be placed on how Member States apply Community rules and similar provisions in agreements with non-EU countries, on equal treatment as regards employment, working conditions and, in particular, pay to seafarers who are EU nationals or non-EU nationals covered by clauses in such agreements.

According to the Cyprus Shipping Chamber,¹⁰⁵ which is the social partner for the employers in the collective agreement, there is minimum standard which fixes the salary and other benefits as per CHAPTER 26 of the collective agreement, which is headed as "Equality":

Each seafarer shall be entitled to work, train and live in an environment free from harassment and bullying whether sexually, racially or otherwise motivated. A seafarer to whom this Agreement is applicable shall be covered by the terms and conditions of the Agreement from the date on which the seafarer departs from the port of engagement whether he/she has signed Articles or not, until the date when he/she signs off or returns to his/her port of engagement, or the date when the engagement comes to an end or the date when the employer's obligation to pay wages ceases whichever is the later.¹⁰⁶

The Chamber official also suggested that Cyprus will soon ratify the ILO Maritime Labour Convention. Moreover, a circular from the Immigration Office refers to the Council of Ministers decision,¹⁰⁷ which provides for the issuance and renewal of temporary resident and work permits to members of staff of foreign interest companies and firms:¹⁰⁸ the circular extends the provision of resident and work permits to cover Cypriot shipping companies.

Cyprus has signed bilateral Agreements on Merchant Shipping with a number of countries: Algeria, Bulgaria, China, Cuba, Egypt, India, Iran, Latvia, Lithuania, Malta, Philippines, Poland, Romania, Russia, Sri Lanka, and Syria. Agreements with Belgium/Luxembourg, Greece, Italy, Pakistan and Antigua and Barbuda. These have been signed and will enter into force soon. Agreements with Estonia, Germany, Hungary, Libya, Slovenia, South Korea, Lebanon, Thailand

¹⁰⁴ Interview with officer of the Cyprus Football Federation, Nicosia, 11.2.2009.

¹⁰⁵ Information provided by Sophocles Constantinou, Executive Officer Cyprus Shipping Chamber, 6.5.2008.

¹⁰⁶ Cyprus Collective Agreement for Seafarers aboard Cyprus Cargo and Tanker Vessels for Cyprus beneficially owned vessels (effective from 1 January 2008 until 31 December 2010).

¹⁰⁷ Decision no. 67692, dated 24.9.2008.

¹⁰⁸ These are the former off-shore companies.

and South Africa have been initialled and signatures are pending.¹⁰⁹ We are informed¹¹⁰ that there is a standard clause providing for the same treatment on all matters relating to transport. An example of such a clause is the following:

Each Contracting Party shall grant to vessels of the other Contracting Party the same treatment as it affords to its own vessels engaged in international maritime transport in respect of free access to ports, levying of port dues and taxes, use of ports for loading and unloading cargoes and for embarking and disembarking passengers. This paragraph shall also apply to vessels chartered by shipping companies of the other Contracting Party flying the flag of a third country.¹¹¹

4.4 Researchers / artists:

Some literature on this subject is beginning to surface. However, more promotion is required so that researchers and artists become aware of their rights and the opportunities available for asserting these rights. So far we are not aware of any complaints that EU nationals or other foreign nationals are not treated equally, but this is probably due to lack of awareness.

There is very little on the status of the Cypriot artist: this was highlighted by the Cyprus Chamber of Fine Arts (E.KA.TE)¹¹² in a recent Convention on the Status of the Artist in Cyprus,¹¹³ which has followed the Convention on the Status of the Artist in Europe.¹¹⁴ Recently however, there has been an increased interest in the status of artists; in fact the only work that exists on the subject of artist status in Cyprus was published in 2009.¹¹⁵ The booklet includes a section on international mobility of artists (pp. 22-24) and specifically refers to the facilities in passport controls and residents permit; oddly enough it only refers to Law 92(I)/2003 as amended by Law 126(I)/2004, a law abolished by the current legal regime, Law 7(I)/2007, and fails to mention the new law.¹¹⁶

¹⁰⁹ http://www.mcw.gov.cy/mcw/dms/dms.nsf/intrelations_en/intrelations_en?OpenDocument

¹¹⁰ Information provided by Sophocles Constantinou of the Cyprus Shipping Council 6.8.09.

¹¹¹ Art. 9 of Agreement on Maritime Transport Between the Government of the Republic of Cyprus and the Government of the Republic of Korea. The Government of the Republic of Cyprus and the Government of the Republic of Korea are referred to as "the Contracting Parties."

¹¹² See the speech by the president of the Cyprus Chamber of Fine Arts (E.KA.TE) at the Chamber's website at http://www.ekatecy.com/news/news_20081220.htm, accessed 18.4.2009.

¹¹³ Held in Nicosia on 15.3.2009 and organized by the Cultural Service.

¹¹⁴ Although the convention aim was not directly the harmonisation of social and fiscal systems for artists, but to enhance the specificities of each country, build a common view, promote union in diversity, inevitably it did consider various social and fiscal systems in the EU member countries. It was held on 15 and 16 of December 2008, at the Centre Georges Pompidou – Beaubourg museum, Paris. It included 27 delegations from the Member States of the European Union, 5 observers from candidate countries to the entry in the European Union, 16 observers from other countries within Europe, 12 guest experts, 5 observers from the cultural area of UNESCO and guests invited by the Maison des Artistes. See <http://www.europeanconventionofvisualarts.eu>, accessed 18.4.2009.

¹¹⁵ This was circulated on 15.3.2009 at the Convention.

¹¹⁶ This is particularly odd given that in footnote 44 on p. 22 it refers to the sources of information as the Ministry of Labour and Social Insurance and the Migration Office, citing the dates May 2005 and February 2009.

Also as a result of EU-wide initiatives, there have been some developments on the status and situation of researchers in Cyprus. The expanding numbers in the academic and research community in Cyprus, including a number of researchers who are Union citizens who are working in the country, makes the issue of the status of researchers and their mobility quite important. The EURAXESS Bridghead Organisation and Service Centre for Cyprus is the Research Promotion Foundation;¹¹⁷ as “the Cypriot EURAXESS Service Centre” it provides information regarding:

Research in Cyprus

- The R&D Landscape in Cyprus
- Accommodation
- Childcare and Schooling
- Intellectual Property Rights
- Language Courses
- Recognition of Qualifications
- Salaries and Taxation
- Social and Cultural Aspects
- Social Security, Pension Rights
- Health & Medical Care
- Visas & Entry Conditions and Work Permits

Moreover, the Research Promotion Foundation is promoting the European Charter for the Rights of Researchers and the Code of Conduct: The Charter sets out the rights and duties of researchers, as well as research and funding institutions; the Code aims at ensuring equal treatment of all researchers in Europe and increases transparency in their recruitment. Three private tertiary education institutions have already undersigned the Code and Charter (Cyprus College, Frederick Institute of Technology and Intercollege), all of which have since 2008 become private universities and are the largest tertiary educational institutions of the country: they have now become the European University of Cyprus, Frederic University and the University of Nicosia, respectively. The University of Nicosia is also a ‘promoter’ of the Researchers’ Charter.¹¹⁸

Moreover, despite the fact that the largest universities have undersigned the code, the provisions contained in the Charter and Code as regards the researchers’ working conditions, worker rights, job security, etc., remain underdeveloped. An examination of the situation of researchers in Cyprus will almost certainly reveal that that there is no proper monitoring and that there are widespread violations of the “General Principles and Requirements applicable to Employers and Funders” as stipulated in the Charter. There are serious problems in terms

¹¹⁷ The scientific Officer in charge is Pierantonios Papazoglou (ppapazoglou@research.org.cy)

¹¹⁸ The person in charge is Pavlos Pavlou, at pavlou.p@unic.ac.cy

of recognition of the profession,¹¹⁹ non-discrimination,¹²⁰ research environment,¹²¹ working conditions,¹²² job security and stability and permanence of employment,¹²³ funding and salaries,¹²⁴ gender balance¹²⁵ and career development.¹²⁶ It is likely that in most research institutions in Cyprus there is a lack of awareness of the rights of researchers, and the status of the ‘researcher’ as such remains outside the ‘normal’ academic professional and academic job promotion structure, even though research and publications are the key to academics’ promotions and advancement. Moreover, the position of junior researchers remains by and large precarious, undervalued, underpaid and insecure. It remains rather odd that none of the public universities has undersigned the Charter and Code, nor that any trade unions or other associations have realized the importance of promoting researchers’ rights. In any case, the Charter and Code are voluntary and purely ‘soft law’; nonetheless, they can provide a good basis for any action in labour law or discrimination cases as to the level of standards in Cyprus.

Recent legal literature

The *Researcher’s Guide to Cyprus*, which was prepared by the Cyprus Mobility Centre, provides information about Cyprus, its research landscape and various mobility-related

¹¹⁹ The Charter stipulates that “All researchers engaged in a research career should be recognised as professionals and be treated accordingly. This should commence at the beginning of their careers, namely at postgraduate level, and should include all levels, regardless of their classification at national level (e.g. employee, postgraduate student, doctoral candidate, postdoctoral fellow, civil servants).”

¹²⁰ “Employers and/or funders of researchers will not discriminate against researchers in any way on the basis of gender, age, ethnic, national or social origin, religion or belief, sexual orientation, language, disability, political opinion, social or economic condition

¹²¹ Employers and/or funders of researchers should ensure that the most stimulating research or research training environment is created which offers appropriate equipment, facilities and opportunities, including for remote collaboration over research networks, and that the national or sectoral regulations concerning health and safety in research are observed. Funders should ensure that adequate resources are provided in support of the agreed work programme.

¹²² Employers and/or funders should ensure that the working conditions for researchers, including for disabled researchers, provide where appropriate the flexibility deemed essential for successful research performance in accordance with existing national legislation and with national or sectoral collective-bargaining agreements. They should aim to provide working conditions which allow both women and men researchers to combine family and work, children and career. Particular attention should be paid, *inter alia*, to flexible working hours, part-time working, tele-working and sabbatical leave, as well as to the necessary financial and administrative provisions governing such arrangements.

¹²³ Employers and/or funders should ensure that the performance of researchers is not undermined by instability of employment contracts, and should therefore commit themselves as far as possible to improving the stability of employment conditions for researchers, thus implementing and abiding by the principles and terms laid down in the *EU Directive on Fixed-Term Work*

¹²⁴ Employers and/or funders of researchers should ensure that researchers enjoy fair and attractive conditions of funding and/or salaries with adequate and equitable social security provisions (including sickness and parental benefits, pension rights and unemployment benefits) in accordance with existing national legislation and with national or sectoral collective bargaining agreements. This must include researchers at all career stages including early-stage researchers, commensurate with their legal status, performance and level of qualifications and/or responsibilities.

¹²⁵ Employers and/or funders should aim for a representative gender balance at all levels of staff, including at supervisory and managerial level. This should be achieved on the basis of an equal opportunity policy at recruitment and at the subsequent career stages without, however, taking precedence over quality and competence criteria. To ensure equal treatment, selection and evaluation committees should have an adequate gender balance.

¹²⁶ Employers and/or funders of researchers should draw up, preferably within the framework of their human resources management, a specific career development strategy for researchers at all stages of their career, regardless of their contractual situation, including for researchers on fixed-term contracts. It should include the availability of mentors involved in providing support and guidance for the personal and professional development of researchers, thus motivating them and contributing to reducing any insecurity in their professional future. All researchers should be made familiar with such provisions and arrangements.

issues.¹²⁷ It also involves promotional and awareness-raising activities such as various publications aimed at researchers both at home and abroad, training sessions on mobility issues and Information Days aiming to encourage Cypriot Research Organisations to advertise their vacancies and researchers to submit their CVs in pursuit of jobs in other European countries.¹²⁸

Relevant Publications:

- The European Charter for Researchers¹²⁹ and the Code of Conduct¹³⁰
- *Η Θέση του Καλλιτέχνη στην Κύπρο*, by RAI Consultants Public Ltd on behalf of the Cultural Services of the Ministry of Education and Culture, March 2009. It was funded by the UNESCO Participation Programme 2004-2005.

4.5 Access to study grants

Study grants are available to all students who are resident in Cyprus. It is not clear whether the worker and the members of his/her family are treated equally with regard to accessing study grants in Cyprus. Relevant here is a Report by the Cypriot Equality Body, which referred to the case of *Martinez Sala v Freist Bayern*, case C-85/96 (12.5. 1998) and deduced that “an educational grant or benefit is a matter that falls within the ambit of EU law.”¹³¹ Therefore we can assume that the basic principle-- in this case refusal by the authorities to give an educational grant or other benefit to a student whose parents are residents in Cyprus because his/her parents do not have a permit of residence--is discriminatory on grounds of nationality (violating Article 6 of the EC Treaty). Refusing to grant a Union citizen a benefit that is granted to all persons lawfully resident in the territory of Cyprus, on the grounds that the claimant was not in possession of a document that Cypriot nationals are not required to have, constitutes discrimination directly based on nationality.

¹²⁷ The Cyprus Mobility Centre has been developed in the frame of a European Commission co-funded project, named “Development of the Cyprus Mobility Centre” (CYMOCEN). The project also involves a number of other activities such as the development and hosting of a Portal that will provide updated information regarding mobility, employment and living in Cyprus.

¹²⁸ The Centre is a member of the European Network of Mobility Centres (ERA-MORE), an initiative of the European Commission aiming to provide personalised assistance to researchers wishing to pursue their next career step abroad. The various national Mobility Centres can provide researchers with customised information on practical matters regarding their move abroad such as entry conditions for them and their families, issues regarding employment, social security and tax issues, medical coverage but also administrative and cultural issues regarding the host country.

¹²⁹ Available as a link to the Research Promotion Foundation at http://crpf.metacanvas.com/EN/int_cooperation/euraxess/rights.html: The European Charter for Researchers is a set of general principles and requirements which specifies the roles, responsibilities and entitlements of researchers as well as of employers and/or funders of researchers.

¹³⁰ Available as a link to the Research Promotion Foundation http://crpf.metacanvas.com/EN/int_cooperation/euraxess/rights.html The Code of Conduct for the recruitment of researchers consists of a set of general principles and requirements that should be followed by employers and/or funders when appointing or recruiting researchers.

¹³¹ AKR 33/2004, dated 10.1.2005, p.10-11.

RELATIONSHIP BETWEEN REGULATION 1408/71 AND ARTICLE 39 AND REGULATION 1612/68

Law 7(I) of 2007 (9.2.2007) replaced all previous legislation, including Regulations 1612/68.¹³² As stated in the 2007 Report, the Republic of Cyprus retains the three basic categories of pension schemes that are available to both Cypriots and citizens of EU Member States: (a) for State employees, also including employees of semi-governmental organisations and local authorities, for example; (b) occupational pension schemes, catering to members of the various trade unions; and (c) pension schemes offered by private insurance companies which, in effect, are no more than life-insurance policies. The vast majority of workers in Cyprus subscribe to (a) and (b). Supplementary pension schemes that are meant to facilitate worker mobility in the EU are, of course, voluntary and EU workers who have been paying towards such schemes can take their contributions with them when they leave Cyprus if the conditions spelled out in a scheme are fulfilled. One difficulty that has been identified in discussions of the issue with officials from the Ministry of Labour and Social Insurance is that all information concerning pension schemes is in Greek, thus placing EU workers at a great disadvantage. Otherwise, for all intents and purposes, a worker from an EU Member State is in exactly the same position as far as supplementary pension schemes are concerned.

The current pension system in Cyprus comprises the General Social Insurance Scheme, the Social Pension Scheme, the Special Allowance to pensioners, the Public Assistance Scheme, the Occupational Pension Schemes for Employees in the broader Public Sector and the Voluntary Provident Funds and other similar collective arrangements. Both the government and the semi-government employees' pension schemes offer supplementary pension schemes (see below). On 17 November 2006, the Republic of Cyprus enacted Law 146(1)/2006 on "The establishment, registration, functioning and supervision of professional pension provident funds," which was intended to transpose Directive 2003/41/EC. This is the text in force since 2007.

¹³² These include EEC Directives 64/221; 68/360; 72/194; 73/148; 75/34; 75/35; 90/364; 90/365; 93/96 and regulations 1251/70; 312/76; and 2434/92.

EMPLOYMENT IN THE PUBLIC SECTOR

1. Access to the public sector

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

No changes can be reported since the Report of 2007. Article 31(a) of Public Service Law 1990-2006 states that only Cypriot nationals or Union citizens can be appointed to the public service, with the exception referred to in the Report.

An issue of concern is the general practice in the public sector and civil service to stipulate in their job descriptions criteria that operate as barriers to entry of European citizens. These often amount to unlawful indirect discrimination: an example of this is the failure of the police to recruit Pontians (i.e., Greek citizens who reside permanently in Cyprus, some of whom have obtained Cypriot nationality and passports) due to the fact that “potential candidates” do not have “the necessary qualifications,” “mostly nationality and fulfilment of their military service for men.”¹³³ A complaint was lodged with the Cypriot Equality Body by a Union citizen civil engineer, who wanted to apply for a certain post that required that the employee be a member of the Chamber of Civil Engineers of Cyprus (E TEK).¹³⁴ To be a member of E TEK requires residence in Cyprus. The Equality Body ruled that this was a case of access to the public service, and that the job description for the post of officer of metal work was discriminatory against Union citizens and contrary to the freedom of movement principle and recommended that the Attorney General proceed with changing the relevant job description. E TEK has been reluctant to change their practices of excluding non-Cypriot nationals based on a residence provision in their constitution; complaints are before the Equality Body, whilst decisions of the Equality Body are still to be complied with.

Another decision involved an Italian national, Roberto Pigo, who complained to the Equality Body over the Educational Service Committee’s refusal to add his name to the public school register of Italian teachers.¹³⁵ The case had gone before the Supreme Court, which ruled that the complainant had the necessary professional qualifications and the refusal of the Educational Service Committee to register him was null and void.¹³⁶ On 5 November 2007, Mr. Pigo complained to the Equality Body that the Educational Service Committee had failed to comply with court’s ruling and that this amounted to indirect discrimination on the grounds

¹³³ Letter to the researcher by the Head of the Police Bureau for Combating Discrimination, TAE/432/1(V), dated 23.9.2008

¹³⁴ AKI 22/2006, issued 11.12.2006.

¹³⁵ AKI 107/2007, issued on 12.12.2008.

¹³⁶ Case n. 1062/04, decision issued on 24.6.2006.

of nationality. The Equality Body analysed the legal regime contained in Directive 89/48, which was transposed by Law 179(I)2002 as amended by law 129(I)2003 to transpose 2001/19/EC as well as the transposition of 2005/36/EC by law 31(I)2008 (dated 6.6.2008). The Equality Body determined that the Educational Service Committee had introduced elements related to the recognition of diplomas that amounted to indirect discrimination on the grounds of descent and contravened Article 39 on free movement of workers that necessitated removing discrimination on the ground of nationality. It is one of the very few cases where the Cypriot Equality Body decided to make its decisions binding and impose sanctions should the Educational Service Committee fail to comply with the findings.

A number of complaints against local/municipal authorities have gone before the Cypriot Equality Body; another problematic public authority involves the nursing profession (in the public sector). As these are cases currently under investigation by the Equality Body no more details can be provided at this point.

1.2. Language requirement

Regarding the language requirement, the Anti-Discrimination Authority has made some important decisions (see Chapter II). If a job vacancy in the public sector requires ‘excellent,’ ‘very good’ or ‘good knowledge’ of the Greek language, both the meaning of each of the aforementioned terms as well as what constitutes evidence to that effect have been defined by the Public Service Board. Consequently, if a citizen of an EU Member State wishes to apply for a job in the public sector for which knowledge of Greek is required, he/she has to provide the necessary documentary evidence that they possess the knowledge required, in the same way as a Cypriot national applying for a position in the public sector has to do by law.

The Cypriot Equality Body has found that a number of public sector institutions have used language as a barrier to access. The Report on Cyprus for 2007 referred to an Equality Body decision on a complaint submitted by an EU national regarding a CTO (Cyprus Tourist Organisation, semi-governmental) requirement that a Greek-speaking manager be hired if a person wanted a permit to operate a tourist office.¹³⁷ The decision criticised the practice of requiring knowledge of the national language, which constitutes discrimination on the ground of language amounting at the same time to indirect discrimination on the ground of race/ethnic origin.¹³⁸ Even though the Equality Body issued its report on 1/8/2006, the Cyprus Tourist Organisation has so far failed to comply with the recommendation of the Equality Body.

¹³⁷ Decision dated 01.08.2006. The Cypriot Equality Body concluded that it cannot make any concrete recommendations, because there are third party rights involved (referring to the person hired for a university teaching post) and because an appeal is in progress before the Supreme Court, filed by the complainant, seeking to cancel the University’s decision to select the other applicant.

¹³⁸ Law on Equal Treatment in Employment and Occupation (2004), Article 16(1). The decision referred also to Regulation 1612/68/EEC, which sets as an EU target the elimination of all forms of discrimination owing to nationality in the field of employment, as well as to the law transposing Directive 2000/78/EC, which prohibits direct or indirect discrimination on the grounds of race or ethnic origin in employment, occupation and self-employment. The decision further instructs that this regulation be abolished, in accordance with the law transposing Directive 2000/78/EC which provides that all laws and regulations contravening the said law must be abolished.

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

As far as recognition of professional experience and seniority are concerned, a distinction must be made between (a) a promotion position, and (b) an entry-level position. Promotion positions are open only to internal candidates and require “service,” which by law means service in the immediately lower hierarchic position; in other words, existing legislation and public service practice dictate that seniority in the service is a prerequisite for applications for a promotion position within the public service.

Chapter II of law 31(I)2008 (dated 6.6.2008), which purportedly transposes Directive 2005/36/EC, stipulates the requirements for the recognition of past experience for certain specific professions.

According to the Department of Public Administration all positions for the civil service and the public sector at large are open to Union citizens and there is full recognition of qualifications, professional experience and seniority for access to the public sector. The job description for an advertised post will stipulate the qualifications and the years of experience required for appointment. The appointment is the responsibility of the Public Service Commission. For senior management posts in the public sector, the job description may require previous experience, which can be in administration, the public or private sector, in any EU country. In terms of the language requirement, this depends on the level of the post advertised: entry-level officer posts require ‘good knowledge’ of Greek and very good command of one of the official EU languages (English, French or German). For most posts, especially more senior posts, candidates must have ‘very good knowledge’ of Greek, which is certified by the possession of a Greek secondary school certificate, an A’ Level qualification in Greek, or a degree from a Greek university. For the position of permanent secretary excellent command of Greek is required plus one of the official EU languages.

2. Working conditions

There are a number of obstacles to free movement that relate to unequal treatment due to possible administrative and bureaucratic barriers to the exercise of certain rights or discrimination against Union citizens (and third country nationals). These include acquiring various official documents,¹³⁹ certain rights,¹⁴⁰ benefits including welfare,¹⁴¹ that are offered to Cypriots but may be denied to Union citizens.¹⁴² Some potentially discriminatory practices have been identified

¹³⁹ Trade unionists referred to hospital certificates for free treatment or other documentation for everyday transactions.

¹⁴⁰ For instance, denying EU citizens access to the electoral register for the purpose of voting in local elections was held to be discriminatory on the basis of race or ethnic origin (Files AKP 75/2005 and AKP 78/2005).

¹⁴¹ The Anti-Discrimination Authority found that the Welfare Office of the Cyprus Ministry of Labour and Social Insurance’s denial of the welfare benefit and access to the Vocational Training Scheme for Persons with Disabilities to a Greek national of Georgian origin, who suffers from muscular dystrophy, amounts to unlawful discrimination.

¹⁴² For instance the Anti-Discrimination Authority found that it was unlawful discrimination to deny subsidies for heating benefits during the winter months to Union citizens who resided in mountain villages on the basis of race or ethnic or national background under Protocol 12 of the ECHR (Files AKP 22/2004, AKP 42/2004, AKP 43/2004, AKP 44/2004, AKP 49/2004, AKP 58/2004); it found that the refusal of the health authorities to subsidize the fertility treatment (IVF) of a Pontian Greek citizen was also discriminatory (File AKP 54/2004).

and possibly addressed as a result of complaints and investigations by the Cypriot Equality Body. One such example is the potentially discriminatory information required on application forms for the public/civil service.¹⁴³

Since the 2007 Report-apart from the passage of Law 31(I)2008 (dated 6.6.2008), which deals with the recognition of professional qualifications- there has been no development in relation to working conditions that has enhanced the right of EU Citizens and their family members to move and reside freely in the territory of the Republic of Cyprus.

Text(s) in force

Law 31(I)2008 (dated 6.6.2008).

2. Access to work

The EU Directive allowing foreign students from third countries¹⁴⁴ to work part time was transposed in Cyprus with an amendment (Law 184(I) of 2007) to the Aliens and Immigration Law that entitles students from third countries to work on a part-time basis, up to 20 hours during the term and 40 hours during their holidays.

A crucial issue for 2007 was the transposition of Council Directive 2003/109/EC. In spring 2007, Directive 2003/109/EC was finally transposed, after more than a year's delay, by amending the existing Aliens and Immigration Law Cap. 105. The scope of the amended law, 8(I)/2007, covers third country nationals staying lawfully in the areas controlled by the Republic for at least five uninterrupted years, as per Article 18Z(1). Excluded from the scope of the law are foreign students, persons on a vocational training course, persons residing in the Republic under the Refugee Law, persons staying in the Republic for reasons of a temporary nature and foreign diplomats, Art. 18Z(2). Moreover, persons who have been granted the status of a long-term migrant in another EU Member State may nevertheless be refused an immigration permit if they are considered to be a threat to public health, Art. 18KB(1) or to "public security and public order," Art. 18KG(1). The period of five years of lawful residence, required by the law as a pre-condition for the status of long-term migrant, is not deemed to have been interrupted if the applicant was absent from Cyprus for a period not longer than six consecutive months or for a total of maximum 10 non-consecutive months, Art. 18H(2). An application may be turned down for reasons of threat to "public order and public security," Art. 18IA(1). Further, the

¹⁴³ In this case (File Number AKI 26/2005) an application for employment in a civil service position, regulated under subsidiary legislation, which required the applicants to supply personal information including nationality of spouse at birth; religion and place of birth of applicant and spouse; religion and place of birth of applicant's parents. It was found that, in line with a similar complaint examined during 2005 the information required in the form was not necessary for the purposes of appointment and left open the possibility of indirect discrimination on the ground of, inter alia, religion, national or ethnic origin and recommended the amendment of the regulation concerned (File AKI 26/2005).

¹⁴⁴ COUNCIL DIRECTIVE 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

Interior Minister may decide to deport a person who has been granted the status of a long-term migrant if the person constitutes a serious threat to “public order or public security,” Art. 18IST(1). The following preconditions must be met in order for the status of the long-term migrant to be granted:

- The applicant must have steady and regular financial means at his disposal to support himself and the dependent members of his family without resort to the national social insurance system. The criteria used to decide if the means are adequate are: his income, the cost of living including cost of accommodation, having at his disposal accommodation which complies with safety and hygiene standards, and in the case that he will be self-employed, then the criteria is the feasibility of his intended business,
- The applicant must have health insurance.
- The applicant must not constitute a threat to public order and security (Article 18Θ).

It is notable that the requirement for knowledge of the Greek language, history and culture was removed from the earlier draft of the law, following lobbying from the trade unions who insisted that if the language/history/culture requirement was to remain then free classes should be offered by the Government. Although the law was passed in early 2007, the application forms for applying for the status of a long-term migrant were not made available by the Ministry until recently, when they appeared on the Interior Ministry’s website. No application has yet been examined. The Interior Minister had, before his resignation, started disciplinary proceedings against the Chief Immigration Officer for failing to implement this law and for continuing to deport third country nationals entitled to this status.

The situation regarding the issuance of long-term migrant status has been complicated further, if not stalled altogether, for the vast majority of migrant workers in Cyprus following the Supreme Court of Cyprus case, *Cresencia Cabotaje Motilla v. Republic of Cyprus through the Interior Minister and the Chief Immigration Officer* (case no. 673/2006, 21.01.2008). The applicant, a female migrant who had lived and worked lawfully in Cyprus for six years, applied to the Interior Minister for the status of long-term migrant as soon as the deadline for the transposition of Directive 2003/109/EC expired. The Interior Minister rejected the application, on the grounds that the applicant’s successive residence permits were limited as to their duration. The Ministry’s decision was based on article 18Z(2) of the Aliens and Immigration Law Cap 105, as amended by Law 8(I)/2007 purporting to transpose Directive 2003/109/EC, which excludes from the scope of the law persons, inter alia, “whose residence permit has been officially restricted as regards its duration.” The applicant petitioned the Supreme Court to set aside the said decision of the Interior Minister, arguing that Article 18Z(2) of the Aliens and Immigration Law was intended to transpose Article 3(2)(e) of the Long-term Residence 2003/109/EC Directive; however whilst the Directive states “persons whose residence permit has been formally limited,” Cypriot law states “persons whose residence permit has been formally limited as to its duration.” The Supreme Court, by a majority vote, rejected the appeal on the grounds that the fixed-term duration of the applicant’s visas did indeed fall within the

exception of Article 18Z(2) of the Cypriot law, Article 3(2)(e) of the Long-term residence Directive that the addition of the phrase “*as to its duration*” did not deduct from the effectiveness of the Directive; and that the fixed-term nature of the residence visas granted to the applicant did not create a reasonable expectation “that the person has put down roots in the country”(Directive Preamble, Article 6). The impact of the addition of the phrase “as to its duration,” which was added to the Cypriot law, was at the heart of the disagreement between the majority decision and the dissenting opinion of the Supreme Court judges. The dissenting opinion states that the said phrase fundamentally transforms the essence of the exception provided for in Directive Article 3(2)(e), since it is clear that the intention of the Directive is to exclude persons from residing in the EU temporarily or on a permit which has been limited for a specific purpose. The dissenting opinion further states that the term “formally limited” used in Directive Article 3(2)(e) refers to the temporary nature of a stay, and is not related to its duration but rather to the nature of the status or the profession of the person concerned. Given that in Cyprus the vast majority of migrant workers are, as a matter of policy, issued with fixed-term visas, this decision essentially abolishes the right to long-term residency as provided by Directive 2003/109/EC.

MEMBERS OF THE WORKER'S FAMILY (ESPECIALLY TREATMENT OF THIRD COUNTRY FAMILY MEMBERS)

1. Residence rights--transposition of Directive 2004/38/EC

1.1. Situation of family members of jobseekers

Third country family members, based amending legislation was introduced amending legislation (Law 7(1) of 2007) in February 2007, which provides for two improvements for family members. Firstly, family members of an EU citizen who are not citizens of an EU member State have a right of residence and permanent residence, irrespective of their nationality (Art. 5(1)). Secondly, the definition of a 'family member' is broadened so that a partner, whether male or female, of an EU citizen who is cohabiting/has a continuous relationship with him/her which is adequately documented, enjoys the same right of entry and free movement and residence as family members (Art. 4(2) (a)).

1.2. Application of *Metock* judgment

The *Metock* judgment has had a profound influence on legal and administrative practices in Cyprus, and it reversed *Akrich* referred to further down. On 14.01.2009, the Director of the Civil Registry and Migration Department issued a circular (30/2004/IV), which referred to an inter-departmental meeting between interested governmental parties and a representative of the Legal Service of the Republic, where the legal significance of *Metock* (C-127/08) was discussed: non-European spouses of EU citizens fall within the scope of implementation of the right of citizens of the Union and their family members to move freely and reside in the area of the Republic according to Law 7(I)/2007 and therefore have a right to apply for a residence card (MEU2A), irrespective of whether the marriage took place in Cyprus or abroad. Instructions were given to all officers of the Civil Registry and Migration Department for the immediate implementation of the ECJ decision.¹⁴⁵ The residence card is valid for five years unless the passport of the applicant has an expiry date before the five years are up, in which case the residence card must be valid for up to one month before the expiry of the applicant's passport.

¹⁴⁵ Communication to the author from the Ministry of Interior, 9.9.2009.

The Ministry of Interior¹⁴⁶ notes that according to decision C-206 of the ECJ, dated 12.2.2008, the administration (i.e. the Immigration authorities) is not obliged to re-examine applications filed prior to the new decision C-206 of the ECJ. Although the question of retrospective application of *Metock* may not be an issue, there is a strong case for correcting situations and reconsidering cases where previous legal residence was considered to be a necessary requirement to be granted rights under the Free movement of workers law, as is happening in Ireland. Individuals may well use the *Metock* case in an appeal to the courts to reopen their cases, not by claiming retrospective application of *Metock* but for correcting the current and future status.

1.4 Application of Akrich (condition of previous legal residence)

Prior to the *Metock* case, the practice was to follow the rule of previous legal residence. Under the new legislation, family members who are not EU citizens can enter Cyprus upon producing a valid passport. However, the passport requirement does not apply *if the family member/s are in possession of a Residence Form issued in another EU country*, Art. (5)(3)(b); in such cases their passport is not stamped, Art. 5(4). In the event of family members who do not possess the required travel documents, or visa, the proper Authority allows them reasonable time to acquire the documents needed to verify or otherwise prove they are entitled to the right to move freely and reside in the Republic of Cyprus (Art. 5).

The family members who are not EU citizens, and accompany or arrive to meet an EU citizen, have the same residence rights if they are in possession of a valid passport, Art. 8(2). It should be noted in this context that the right to residency over three months applies both to family members who are EU citizens, Art. 9(1)(d), as well as those who are not EU citizens, Art. 9(2), and who accompany or arrive to meet an EU citizen who satisfies the requirements for residency over three months. Finally, another change introduced by Law 7(1) of 2007 is that the right to residency also applies for family members who are third country nationals, Art. 8(2), and who are also entitled to permanent residence for a period of ten years, which is automatically renewable, Art. 18(1). Those family members who are entitled to enter Cyprus can also depart in order to travel to another EU Member State by showing the same travel documents as those needed to enter (Art. 6).

According to Article 11(1) of Law 7(1) of 2007, family members who are not citizens of an EU member State and intend to stay for more than three months must apply (Form MEU2A) for a "Residence Form" no later than four months after their arrival and upon payment of 20 Cyprus pounds (approximately 34 euros), Art. 11(2)(a), and are issued with a document (Residence Registration Confirmation Document, a 'Residence Form') certifying they have registered their presence. Family members who are EU citizens apply for an "EU Citizen Confirmation of Registration" document on form MEU1A and pay a fee of 10 Cyprus pounds

¹⁴⁶ Communication to the author from the Ministry of Interior, 9.9.2009.

(approx. 19 euros). Failure to apply for a Residence Form carries a penalty of up to 1,500 Cyprus pounds (approx. 2,586 euros), Art. 11(2) (b). The Residence Form is valid for up to five years. Finally, if a family member who is not citizen of an EU Member State is in possession of a "Residence Form" issued in another Member State, he/she will not have their passport stamped upon entry, Art. 13(1).

Texts in force

The legal position concerning family members for 2007 has changed since 2006 with the enactment of Law 8(I)/2007 (14.02.2007), which amends the *Aliens and Immigration Law*.

1.5 Rights of family members

The family members of an EU citizen have a right to free movement and residence, and enjoy the right to work. A 'family member' is defined in Part II Art. 4(1) of Law 92(1)/2003 as amended by law 121(1)/2004, to refer to the spouse and children under the age of twenty-one of an EU citizen as well as their dependent children, parents and grandparents and those of their spouse. Upon entering Cyprus, the national is not required to obtain a visa or an equivalent, except in the case of *family members* who are not EU citizens. Thus, the German spouse of a French worker would not require a residence permit. As far as it has been possible to ascertain from the immigration branch of the Cyprus Police, third country nationals who are family members of a worker who is an EU citizen are treated in the same way as EU citizens and their file is designated as "European citizen or dependent." Thus, while family members who are not EU citizens are required to obtain a visa or an equivalent, Art. 5 (2), every effort is made to help these family members obtain the visa and no fee is required.

According to Article 8 (3), in order to be issued with a residence permit, the following documents are required of *family members* of EU citizens (form MEU 7):

- Their valid passport or identity card with which they entered the Republic of Cyprus.
- A document issued by the appropriate Authority in their country of origin or from which they have come, which proves that they are family members of the EU national applying for a residence permit.
- Where applicable, as provided in Article 4 (2) and (4), a document issued by the appropriate Authority in their country of origin or from which they have come which certifies that the persons concerned are maintained by the worker or that they lived with him/her under the same roof in the country concerned.

The provision of the documents and the procedure for examining an application for residence permit is not to be an obstacle to the immediate implementation of the employment agreement reached by the applicants, Art. 8 (4).

A right to permanent residence in the Republic of Cyprus is provided in Article 15 (2) (a-b) to those related to, maintained by, or who had been living in the country of previous residence with, workers who exercise their right of permanent residence in order to provide paid or

unpaid services. Furthermore, again, an effort should be made to facilitate the entry of such persons to Cyprus, Art. 15 (3). The dependents of persons who settle in Cyprus in order to provide or to receive unpaid services are entitled to permanent residence (Art. 17); such permanent residence is granted in writing, Art. 18 (2), and is valid for at least five years in all the territory of the Republic of Cyprus and is renewed automatically with the interested worker applying, Art. 18 (2).

The dependents of EU nationals who provide or receive paid services have a right to a residence permit for the duration of the services concerned (Art. 19). No residence permit is issued or indeed required if the duration of the services concerned is less than three months.

Family members of persons who have settled in Cyprus in order to provide or to receive unpaid services have a right in the existing legislation to take up paid or other activity (art. 17). Family members who are not citizens of an EU Member State are issued with a residence document that has the same validity as the residence permit issued to the EU citizen on whom they are dependent, art. 17 (5).

In order for (a) the spouse, (b) the dependents, (c) the dependents of the spouse of a citizen of an EU Member State, who does not have a right to residence under other provisions of Community Law, to obtain a residence permit, the citizen concerned is required not only to produce the valid passport or identity card with which they entered Cyprus and a health certificate, but also documentary evidence proving that (a) the applicant him/herself and his/her family members have medical insurance that covers them for all the risks in Cyprus and (b) they have adequate financial means so as not become a burden on the social welfare system of the Republic during the period of their residence, Art. 58 (2) (b). The same conditions apply for the renewal of a residence permit (Art. 12) and to breach the provisions of Part VII, including the maximum fine of 500 pounds that is provided in Part VII (Art. 54) of Law 92 (1)/2003 as amended. For any other issues, which EU citizens or their family members would like to raise to claim a residence permit (Form MEU 6), matters finally rest with the Minister of the Interior, who has the discretion to deviate from the provisions of Part VII as for other categories of workers (Art. 60, 62 and 63).

The provisions of Part VII of the Law do not affect the legal provisions pertaining to the purchase of a second home in Cyprus (Art. 61).

The family members of an EU national--as defined in Art. 15 (2) and (3)- see above-- who are entitled to permanent residence on the basis of having exercised unpaid activity under Article 25, are also entitled to permanent residence if they have been living in Cyprus, Art. 26 (1). The requirements concerning residence, continuous residence (defined in Art. 28), and activity stated in 28 (a) and (b)(1) do not apply if the spouse of the applicant exercising the unpaid activity is a Cypriot national, Art. 25(2).

Article 34 of Part V of Law 92 (1)/2003 concerns the right to residence of family members and dependents of both paid and unpaid workers who have ceased their professional activity (Form MEU 4). Furthermore, the spouses and dependents of such a worker may take up paid or unpaid activity in the Republic (Art. 35).

If the EU national exercising unpaid activity dies while offering such activity and before obtaining permanent residence, his/her family members are entitled to permanent residence, Art. 26 (1), if one of three criteria stated in Article 21 (2) is satisfied.

In order to obtain a residence permit (Form MEU 6), citizens of EU Member States who do not have a right to residence under other provisions of Community Law but have a right to residence (Art. 54) and can take up paid or unpaid activity (Art. 55) require, inter alia, documentary evidence proving that their family members have a comprehensive medical insurance that covers them in Cyprus and that they themselves have adequate financial means so as not become a burden on the social welfare system of the Republic during the period of their residence, Art. 58 (2) (b). The same conditions apply for the renewal of a residence permit (Art. 12).

The spouse and dependent children of students can take up paid or unpaid activity (Art. 45) and are subject to the same provisions when entering and exiting the Republic (as stated in Art. 5 and 6- see above) as the categories of workers dealt with in Parts II-V. Family members of students who are not citizens of an EU Member State are issued with a residence document for the same duration as the residence permit issued to the student on whom they are dependent, Art. 47 (3).

Family members of the student must provide: the valid passport or identity card with which they entered the Republic; a document issued by the appropriate Authority in the country from which they have come stating that they are related to the student; a health certificate, issued or verified by the Medical Services or the Services of Public Health of the Ministry of Health of the Republic stating that the applicant does not suffer from any of the disease/illnesses listed in Attachment 2 of Law 92 (1)/2003, Art. 48 (2) (e).

As far as the right to family reunification is concerned, Council Directive 2003/86/EC was transposed into Cypriot law in 2007 without making use of the provision stipulated in Article 4/3 of the Directive. The effect is that the right to family reunification is not extended to the unmarried partner of the sponsor with whom the sponsor is in a duly attested stable long-term relationship, or to a person who is bound to the sponsor by a registered partnership. The current legal framework (including 2007) essentially excludes homosexual partners of the sponsor, although the question remains whether the right to family reunification may cover the homosexual spouse of the sponsor, lawfully married in accordance with the laws of another jurisdiction, as recognised by the recent AA report on the subject (see Chapter III, File No AKP 68/2008). On 14.02.2007 Council Directive 2003/86/EC (22.09.2003) was purportedly transposed into Cypriot law, after a delay of approximately two years, by amending the existing Aliens and Immigration Law Cap. 105. The scope of the amending law, Law 8(I)/2007, 14.02.2007, covers third country nationals staying lawfully in the areas controlled by the Republic of Cyprus for at least one year, who have reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status, Law 8(I)/2007, Art. 18KI (1). The provisions of the law do not apply where the sponsor is an asylum seeker; has applied for or enjoys temporary protection; has applied for

or enjoys subsidiary protection on humanitarian grounds; or is a recognised refugee under the refugee laws, Refugee Law No. 6(I)/2002, 28.01.2000. The law also excludes from its scope the family members of a European Union citizen, Law 8(I)/2007, Art. 18KI (3), and applies without prejudice to more favourable provisions of bilateral and multilateral agreements. Subject to a number of preconditions¹⁴⁷ the entry and residence for family reunification purposes is allowed for the following family members:

- The sponsor's spouse provided that that the marriage took place at least one year before the submission of the application for family reunification. To this effect, a marriage certificate must be produced, Art. 18LA(2)(c).
- The minor children (i.e., unmarried and under 18 years of age) of the sponsor and of his/her spouse, including the sponsor's or the spouse's adopted children , as well as adopted children of the sponsor who are exclusively dependent on him or her;
- The minor children including adopted children of the sponsor and the children of the spouse, where the spouse has custody and the children are exclusively dependent on him or her, Art. 18L(1).

In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the Republic of Cyprus, the family reunification of a further spouse and his/her children that s/he has with the sponsor is not allowed, Art. 18L(4). The Director of the Immigration Department may revoke a permit or reject the application of family members for entry and residence for the purpose of family reunification for reasons of public security, public order or public health, Art. 18LZ(1). The Director may also revoke a permit or reject the application where the sponsor and his/her family members no longer live in a real marital or family relationship or where it is found that that the sponsor is married or is in a stable long-term relationship with another person, Art. 18LST(1).

The amending law, Law 8(I)/2007, did not transpose Article 4/3 of Council Directive 2003/86/EC and does not authorise the entry and residence either of the unmarried third country national partner of the sponsor with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Directive Article 5/2. Consequently, where the sponsor is a homosexual having a duly attested stable long-term relationship or a registered partnership with a third country national, s/he will not be entitled to family reunification.

It must be noted that the law recognises stable long-term relationships when it comes to revoking a permit or rejecting an application for family reunification but not when it concerns the granting of the right to family reunification to unmarried couples.

¹⁴⁷ The preconditions are that the sponsor must be lawfully residing in the areas controlled by the Republic of Cyprus for at least two years; must have accommodation sufficient for a comparable family in the same region, which must meet the general health and safety standards and secure a decent life; must have health insurance for himself/herself and the members of his/her family; must have steady and regular financial means to support himself/herself and the members of his/her family without resort to the state social security system: Cyprus/Aliens and Immigration Law, as amended by Law 8(I)/2007, article 18LB.

The problem with the way homosexual marriages are treated is also highlighted in this context: where such a marriage lawfully conducted in a country where homosexual marriages are recognised gives rise to the right of family reunification in Cyprus. Since Cypriot law recognises marriages lawfully conducted in other jurisdictions and considers a polygamous marriage valid (albeit granting the right to family reunification to only one of the spouses of the sponsor), a homosexual marriage which lawfully took place in another country where homosexual marriages are recognised could potentially also give rise to the right for family reunification. This assumption, however, has not been tested in practice yet and the Cypriot authorities dispute the fact that the current legal framework forces them to recognise homosexual marriages conducted outside Cyprus.¹⁴⁸ The recent decision of the Equality Body referred to above precisely raises such issues.¹⁴⁹

1.6 Abuse of rights or marriages of convenience (Art. 35 of Directive 2004/38)

Article 1 of Law 7(I)2007 refers to the Aliens and Immigration Law, Cap. 105 (as amended) to define ‘fake, bogus, sham’ marriages,¹⁵⁰ articles 2(1) and 7A, 7B, 7C, 7D. The definition there is a marriage between a legal resident of the Republic and a foreign national “with the sole aim [being] the legal entry and residence of the latter in the Republic.” The Immigration Officer, if (s)he ascertains this is the case according to the indications and after consulting the advisory committee, may (1) forbid the residence of this person, or (2) nullify or refuse to renew his/her residence permit and order deportation/expulsion, when the following elements are present:

- (a) the couple does not reside under the same roof;
- (b) the couple has never met before the wedding;
- (c) absence of any serious contribution towards the responsibilities that derive from the wedding;
- (d) the statements of the spouses as regards their identity (name, residence address, nationality/citizenship and profession), the circumstances of their first meeting or other important information of a personal character that concerns them are contradictory;
- (e) the spouses do not speak a language they both understand;
- (f) a sum of money has been paid (other than money in the form of a dowry where this is common practice in certain countries);
- (g) there are indications that one or both spouses have in the past had a false marriage or have problems as regards their stay in the Republic.¹⁵¹

The above information may be derived from (a) statements from the spouses or third persons; (b) investigations and interviews conducted by the Immigration officer; (c) documents which have been made available for consideration by the Immigration officer.¹⁵²

¹⁴⁸ Author interview with officials at the Interior Ministry, 29.02.2008.

¹⁴⁹ File No AKP 68/2008.

¹⁵⁰ The term used in the Greek text is “εικονικός γάμος”.

¹⁵¹ Article 7A(3)(α-ζ) change to english of the Aliens and Immigration Law, Cap. 105.

¹⁵² Article 7A(4)(α-γ) change letters to english of the Aliens and Immigration Law, Cap. 105.

The law also sets up an advisory committee to advise the Immigration Officer, which includes spokespersons from the Ministry of Justice and Public Order, the Social Welfare Service, the District Administration where the spouses reside and the Registration Officer, 7B(4)(2)(a-d).

Moreover, the law provides for a hierarchical appeal system to the Minister of Interior, which must be filed within 20 days of the date of issuing the decision of the Immigration Officer, 7C(1). The decision of the Immigration Officer is not implemented before the expiry of the date for the implementation of the appeal and prior to the implementation of that decision, 7C(2). The Minister of Interior must issue his decision within 90 days from the date of appeal, 7C(3). In case of appeal the appellant has a right of residence until the issuance of the Minister's decision, 7C(4). Over and above this, the spouses have a right to apply to the Supreme Court to challenge the administrative decision of the Immigration Officer or the Minister, under article 146 of the Constitution.

A foreign national who had a false marriage or has in any manner contributed to such a practice is illegal and carries a penalty up to 3 years imprisonment or a fine of up to 3000 pounds (5000 euro) or both (7D).

2. Access to work

Family members of Union citizens are entitled to work and have full rights to access to work as Union or Cypriot citizens.

It is noted that the way Cypriot courts deal with the issue of reverse discrimination faced by family members of Cypriots is not consistent. There is no decision of the full house of the Supreme Court, hence the various Supreme Court judges approach the issue differently.

In the case of *Svetlana Shalaeva* (no. 824/2005, dated 7.4.2008), the judge allowed the appeal of a Russian citizen married to a Cypriot man against the Immigration Department. He reiterated the basic reasoning of previous cases he had presided over such as *Saiedi v. The Republic of Cyprus* (case no. 1241/2006, dated 28.7.2006), *Kathie v. The Republic of Cyprus* (case no. 1578/2005, dated 21.5.2007) and *Petrosian v. The Republic of Cyprus* (case no. 453/2006, dated 22.10.2007): that considering the rights derived from the Community on free movement of workers,¹⁵³ it would be absurd if Cypriots did not enjoy the same rights as other Union citizens, stating that : "it is self-evident that Cypriots would be entitled to enjoy the same rights as citizens of other Member States of the EU."¹⁵⁴ The same judge¹⁵⁵ had first outlined the argument in the case of *Saiedi. The Republic of Cyprus* (case no. 1241/2006, 28.07.2006): Cypriots must be afforded the same rights as other Union citizens. A similar approach was taken in the case of *Ahmad Houssein Yakhini and Malamo-Pyrilli Yakhini* (case no. 136/06,

¹⁵³ He referred to the law that preceded the current law 7(I)/2007, which is Law 92(I)/2003 (Ελευθέρης Διακίνησης και Διαμονής των Υπηκόων των Κρατών Μελών της Ευρωπαϊκής Ένωσης και των Μελών των Οικογενειών τους Νόμος του 2003).

¹⁵⁴ Per Judge Nicolaides . He awarded damages of 800 pounds plus costs and VAT.

¹⁵⁵ Judge Nicolaides.

dated 4.4.2007); in this case the judge referred to the fact the third country national appellant who was married to a Cypriot national had rights derived from the rights of family members of Union citizens and cited a relevant case-- *Mahmood Adil v. The Republic of Cyprus* (case no. 1452/05, dated 13.1.06). However, the issue of free movement of Union citizen workers and their families was not elaborated upon by the court judge,¹⁵⁶ as the reasoning of the judgment pivoted around the failure to properly take into account a genuine marriage and thus the exercise of the right to family life.

There are a number of appeal cases where the applicant claimed there had been a violation of the principle of free movement of workers-- the court did not rule on this issue, even though it found for the applicant's right to family life, such as the cases of *Loizos Loizou and Tetyana Tumanova Loizou* (case no. 1931/2006, dated 27.03.2008) and *Husaen Osman Nawari and Elli Georgiou* (case no. 867/06, dated 16.10.2007). In the case of *Arofat Salayava and Andreas Charalambous* (case no. 143/2006, dated 13.06.2007) it was decided that the third country wife of a Cypriot who was temporarily residing abroad for the purposes of study but was regularly visiting his wife, who was residing with his parents in Cyprus was entitled to enjoy the free movement of workers rights of spouses of Union citizens.

A very different line of argumentation is followed in other cases, by judges who consider that the right to free movement of workers does not apply to Cypriot citizens who are residing in Cyprus and have never exercised their right to free movement themselves. In the case of *Sari Tekin* (case no. 290/2006, 27.07.2007), a third country national and his Cypriot wife won an appeal against the Immigration Authorities against the deportation of the former on the basis of their right to family life.¹⁵⁷ However, the Supreme Court judge¹⁵⁸ considered that the law transposing Directive 38/2004 does not apply to Cypriot citizens who never actually *entered* the Republic: a condition precedent for the application of this law is that the Union citizen *enters the country*, given that it is about the right to settle and move in the EU, which implies that there is a presupposition that the Union citizen has actually 'moved' within the EU. The judge explicitly disagreed with the relevant finding in the case of *Saiedi v. The Republic of Cyprus* (1241/2006, 28.07.2006), which was discussed above. He instead referred to the above line of reasoning and cited the case of *Morson and Jhanjan* [1982] ECR 3723, which referred to a claim for a similar right under *Regulation 1612/98*.¹⁵⁹ He also quoted *Uecker and Jacquet* [1997] ECR I-3171, which decided that Community provisions deriving from Regulation 1612/68 cannot be claimed by workers who have never exercised the right to free movement within the Community. In the case of *Kulwant Singh* (case no.7/2007, dated 9.7.2008), the court judge¹⁶⁰ followed the reasoning of *Sari Tekin*, a case that was cited as authority by the court.

¹⁵⁶ Per Judge Artemis.

¹⁵⁷ Art. 8 of the ECHR and Art. 15 of the Republic of Cyprus Constitution.

¹⁵⁸ Per Judge Constantinides .

¹⁵⁹ This is similar to the Cypriot transposition legislation.

¹⁶⁰ Judge Erotocritou.

Article 2 of the 2007 Law foresees that an EU citizen is every person who is a citizen of the EU other than the Republic of Cyprus; this provision is also included in Article 3 ‘Beneficiaries’ of the Directive. It is noted that the Ministerial Committee for the Employment of Aliens decided on 28.8.2009 that matters of entry and stay in the Republic of family members of Cypriots will be decided on the basis of the respective conditions for family members of other EU citizens as provided in Law 7(1)/2007.

3. The situation of family members of jobseekers

Family members who are jobseekers are entitled to all the allowances that Cypriot and EU citizens are allowed. As explained in the section on jobseekers, unemployment benefit for all is dependent on contributions to social security, so the question as regards social security is whether the family member has any contributions from previous employment (under Regulation 1408/71, implemented since 1.5.2008). He/she can transfer from other EU countries his/her contribution and search for a job for up to three months under the same regulation. The benefits enjoyed by family members are the same as for Union citizens under Law 95(1)/2006,¹⁶¹ as set out above in the relevant section of this report, “Chapter I: Entry, residence, departure 2. Situation of jobseekers.”

4. Other issues concerning equal treatment (social and tax advantages)

No issues to be reported.

Text(s) in Force

- Law 7(1)/2007 on the ‘Right of EU Citizens and their Family Members to Move and Reside Freely in the Territory of the Republic of Cyprus’ Concerning the Free Movement and Residence of Citizens of EU Member States and their Family Members.
- Law 95(1)/2006 on Public Assistance
- Law 41/80 on Social Insurance

Recent legal literature: Department of Labour (2008) *Ελεύθερη διακίνηση και διαμονή Ευρωπαϊκών Πολιτών και Μελών των Οικογενειών τους*.¹⁶² This is a guide [in Greek] on Law No. 7 (1)/2007 on the ‘Right of EU Citizens and their Family Members to Move and Reside Freely in the Territory of the Republic of Cyprus’ Concerning the Free Movement and Residence of Citizens of EU Member States and their Family Members.

¹⁶¹ Ο περί Δημόσιων Βοηθημάτων και Υπηρεσιών Νόμος, dated 28.4.2006.

¹⁶² This translates as Free Movement and Residence of European Citizens and Members of their Family.

RELEVANCE/INFLUENCE/FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGEMENTS

C-212/05 Hartmann, C-213/05 Geven

Both cases involved the category of 'frontier workers' and as such this is unlikely to have any bearing on Cyprus. However, the cases have a bearing in defining the scope of equal treatment and the nature of social advantage as defined in the text of the laws.

C-287/05 Hendrix

The issue of the social benefits is to some extent a sensitive and controversial in Cyprus. This decision may have some bearing on Cypriot courts; moreover, the fact that the ECJ stated that the provisions of Regulation 1408/71 must be interpreted in light of the objective of Article 42 EC, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers, is significant for a potential case in Cyprus on the subject of freedom of movement. Moreover, the ruling that the residence condition can be applied only if it is objectively justified and proportionate to the objective pursued is again a significant authority for future court cases in Cyprus.

C-291/05 Eind

The case of *Eind* established the principle that when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third country national who is a member of his family has a right to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national, has no bearing on the determination of that national's right to reside in the latter State. This is important for Cyprus in the way it deals with the right to family reunification: in general it has a restrictive approach and may be found to have a deterrent effect to freedom of movement.

C-208/05 ITC

This decision is one that is important crucial for Cypriot courts: so far Cypriot courts have been reluctant to disapply legislation, save for very exceptional legislation, that was contrary to the constitution. This is significant for migrant workers and would allow them to invoke rights deriving directly from the EU Acquis, which are enforceable by them and which the national courts must protect, to disapply any provision of domestic law which is contrary to such provisions.

C-1/05 Jia

In the *Jia* case the European Court of Justice (ECJ) gave a judgment which has direct relevance to the rights of dependent relatives seeking to join European Economic Area nationals exercising free movement rights within the United Kingdom. The case is clearly significant for Cyprus as it touched upon the earlier ECJ decision of *Akrich* [2003] EUECJ C-109/01; moreover, it sheds some light on how the Cypriot immigration authorities and courts are currently interpreting the obligations of Cyprus under European Community law concerned with what a dependent relative would need to show before being granted a permanent residence permit. The non-Member State family member of the EU national exercising their free movement rights might have to show that they had been lawfully resident in another part of the European Union before their entry to the Member State in which the application was being made. However, the Court found that there was no requirement for Ms Jia to have lawfully resided in another Member State, which limits the application of the judgment in *Akrich*. However, there are differences that distinguish the two situations: Ms Jia was lawfully present in Sweden when she made her application; she had not sought to evade the country's immigration laws and Swedish law did not preclude the possibility that a residence permit would have been granted, provided that she had been able to provide sufficient proof of her dependency. In *Akrich*, by contrast, the applicant had unlawfully entered the United Kingdom on two occasions and had been deported. What is most directly important for Cyprus is that the ECJ allowed Ms Jia to switch from one status (visitor) under national immigration rules to residency under the terms of European Community law. Also, Cyprus is not entitled to implement a blanket requirement for previous lawful residence in another Member State as a condition precedent to granting a residence permit to a non-Member State dependent relative seeking to remain on the basis of their dependency on an EEA national exercising free movement rights in the UK. This can have an important effect on the immigration law and practices in Cyprus.

C-97/05 Gattoussi

This a case regarding the proper construction the Euro-Mediterranean Agreement, which establishes an association between the European Communities/Member States, and the Republic of Tunisia. This provision may affect the rights of a third country national from a country with such an agreement to remain in the territory of the Republic of Cyprus: where such a person has been duly permitted by the Republic of Cyprus to work, this right would seem to extend for a period beyond the period of validity of his permission to remain.

C-287/05 Hendrix; 1612/68/EC with Regulation 1408/71/EC

The issue in the *Hendrix* case has an important bearing on the provisions of non-contributory benefits in Cyprus. The fact that the ECJ stated that the provisions of Regulation 1408/71 must be interpreted in the light of the objective of Article 42 EC, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers, is significant for a potential case in Cyprus on the subject of freedom of movement. Moreover, the ruling that the residence condition can be applied only if it is objectively justified and proportionate to

the objective pursued is again a significant authority for future court cases in Cyprus: the current rules on non-contributory benefits have stringent residence tests attached to them, deliberately designed to exclude Union citizens exercising the right to freedom of movement, resulting in discriminatory effects against those Union citizens and their families resident in other EU countries. Furthermore, the rules are designed to exclude Union citizens who reside in the northern part of the country in “the territories where the Republic of Cyprus Government does not exercise effective control.” Related here are the rules deriving from Reg. 1612/68 Regulation 1408/71/EC, with their strong emphasis on prohibiting discriminatory treatment in comparison with that of national workers, by providing for the systematic application of the rule of national treatment as far as all conditions of employment and work are concerned. For instance, the regime referred to above in “**Chapter I: Entry, residence, departure,**” regarding the situation of jobseekers (social/public assistance and other benefits available through the Service of Grants and Allowances under the Ministry of Finance), contains exclusion of EU citizens from the benefit regime of Cyprus: the stipulation providing a general presumption that Union citizens who are not employed or self-employed and are residing in Cyprus for the purpose of finding work are not entitled to public benefit, without properly balancing this with a proviso that provides that access to any benefit shall not be any way discriminatory against Union citizens when compared to access of those who are resident in Cyprus, i.e., overwhelmingly Cypriot nationals. The strict residential conditions may be considered to be indirectly discriminatory against Union citizens residing outside Cyprus (see *C-326/90, Co v Belgium*).

C-527/06 Renneberg

Renneberg will have bearing in Cyprus, but so far no case has gone before the courts or the Equality Body on the subject; nor has this report identified any rule that is contrary to the finding or the broader principle of the *Renneberg* case.

C-94/07 Raccanelli

The *Raccanelli* case is relevant to Cypriot law, and may well have important implications on Cypriot law as well as administrative practice with regard to the provisions of study grants to Union citizens. The growing academic and research community; the expanding but already large tertiary education sector; the extensive use of English in Cyprus; the relatively good environment for research for a recently acceded EU country (large under-researched areas particularly as regard social and natural sciences coupled with the relatively good infrastructural provisions) are important factors that attract researchers from the EU and their families. Various research grants are offered, such as those provided by the Research Promotion Foundation (RPF), which was established at the initiative of the Government of the Republic of Cyprus to promote the development of scientific and technological research in Cyprus due to the fundamental importance of research in contemporary societies.¹⁶³

¹⁶³ The Foundation is an independent organisation governed by a twelve-member Board of Directors, appointed by the Council of Ministers for a five-year period. The Foundation's core objective is the promotion of scientific and technological research in Cyprus. Several specific objectives and priorities have been defined by the Foundation's Statute and the decisions of its Board of Directors, for the promotion of this main objective (see http://crpf.metacanvas.com/EN/ipe_info/general_info.html accessed 19.4.2009).

The well-established rule that the definition of ‘worker’ within the meaning of Article 39 EC must not be interpreted narrowly is relevant to the grant provisions of the RPF,¹⁶⁴ which may contain elements that are unduly restrictive. The finding of the court in *Raccanelli* that “any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’” needs to be further reflected upon in interpreting the various rules governing research grants. The ruling that “the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration only if his activities are performed for a certain period of time under the direction of an institute forming part of that association and if, in return for those activities, he receives remuneration” provides the basis for challenging the following provisions of the latest Call for instance of the RPF, “Desmi 2008.”¹⁶⁵

The various Calls of the RPF, including the latest one, provide for cooperation, and indeed not only encourage the substantive involvement in the research by institutions, foundations and individual researchers from other EU countries, but make it a condition precedent to the formation of the network that will be funded in the research. However, the rules contain various discriminatory elements for researchers to be funded as employed researchers of Cypriot institutions or other institutions based in Cyprus, as workers exercising the right to free movement in the EU. For instance, in the categories of eligible persons the term ‘researcher’ is defined as “academic, scientist who works permanently or has a contract of employment/cooperation with an institution” but the contract of employment/cooperation must be “a contract of indefinite duration or a long duration that is not confined to a single task or research program.”¹⁶⁶ Such a provision amounts to direct discrimination against workers of fixed-term contracts (Directive 1999/70/EC), or even those on part-time contracts (Directive 97/81/EC). Moreover, this provision is, *prima facie*, indirectly discriminatory against EU citizen researchers who would otherwise be allowed to exercise their right to be employed or contracted for services by an institution in Cyprus, when compared to Cypriots. The issue then is if such a measure is ‘proportional’ to the aim of the particular provision and in line with the general test of anti-discrimination *acquis*: is it objectively justified by a legitimate aim, and are the means of achieving that aim appropriate and necessary? I assume that the goal would be to encourage ‘local’ research and infrastructural investment in ‘developing’ the institutions based in Cyprus, but such an aim must be achieved by such means as provided in the provision is unlikely to be justifiable. Moreover, it is likely to be contrary to the ruling of *Raccanelli*, by both unduly restricting the definition of researcher as ‘worker’ and restricting free movement of workers. A complaint is pending before the Cypriot Equality Body on the basis of this logic.

¹⁶⁴ This serves as a model for various grants and allowances for researchers in Cyprus.

¹⁶⁵ See for the booklet of rules of the particular Call «Δέσμη 2008» for 2008-210 for applications http://www.research.org.cy/EL/cy_research_fund/desmi_2008/index.html accessed 19.4.2009.

¹⁶⁶ See page 121 of the booklet of rules of the call «Δέσμη 2008».

Chapter VIII

APPLICATION OF TRANSITIONAL MEASURES

Issues relating to the practical problems, individual cases and national case law pertaining to the functioning of transitional arrangements have been outlined in the report, particularly ***“Chapter I: Entry, residence, departure.”***

Chapter IX

MISCELLANEOUS

Over and above the court system, the only national organisation where citizens can launch complaints for violation of Community law on free movement for workers (apart from SOLVIT centres) is the Cypriot Equality Body.

STATISTICS

We have no detailed data regarding the duration of EU workers' mobility or their repatriation or as far as trends of EU workers versus third -country nationals are concerned. In 2007, the third year of Cyprus's membership in the European Union, there was a very significant increase in the number of EU workers. More precisely, according to the Statistical Section of the Social Insurance Services, Ministry of Labour, the average monthly number of EU citizens who were working and paying social insurance was 31,345 compared to 20,542 in 2006; hence compared with migrants from third countries we have similar sorts of increases in the numbers: 50,687 in 2007 and 46,671 in 2006. They were employed in the following sectors of the economy: hotels 4,395 (14.2%), construction 6,074 (19.38%), wholesale and retail trade 4,064 (12.97%), restaurants 3,790 (12.09%), manufacturing 3,246 (10.35%), and in transport/communications/storage 1,723 (5.5%).

Figures from the Social Insurance Services¹⁶⁷ give different numbers, as they are based on social insurance contributions; these show that the total number of Union citizens paying social insurance contributions is 37,470, which is considerably less than the 50,687 referred to above. The discrepancy in the figures is probably due to the fact that the former refers to the numbers of Union citizen workers who have paid social insurance contributions, whilst the latter referred to processed applications. According to the same table, European citizens working in Cyprus in 2007 were from the following countries: Austria 97, Belgium 57, Bulgaria 4479, France 307, Germany 544, Denmark 44, Switzerland 30, Greece 8622, Estonia 71, UK 4880, Ireland 98, Iceland 3, Italy 91, Low Countries 178, Latvia 343, Lithuania 258, Luxemburg 5, Norway 24, Hungary 636, Poland 3573, Portugal 52, Slovakia 1876, Slovenia 46, Sweden 173, Czech Republic 319, Finland 73, non- disclosed countries 4400. Of course the numbers increased in comparison to 2006 as Bulgaria and Romania joined the EU on 1.1.2007.

An issue of concern for the authorities in 2007 is the large numbers of illegal entrants from the northern Turkish-occupied territories through the "Green line" (i.e., buffer zone, see next section). In 2007 there were 662 persons who entered illegally from the north as opposed to 615 in 2006 and 1264 in 2005. There were 2892 expulsions/deportations in 2007, compared with 2983 for 2006; however we are informed by the police that the number expelled is very much dependent on the capacity to detain persons, and that they currently are working at more or less 'full capacity.'

¹⁶⁷ See <http://www.mlsi.gov.cy/mlsi/sid/sid.nsf/All/40E8F0171DEE0E30C225739B003FD1BC?OpenDocument>

EQUAL TREATMENT OF WORKERS UNDER EC LAW AND REMEDIES AGAINST VIOLATIONS BY EMPLOYERS

Kees Groenendijk¹

1. Introduction

The legal literature on free movement of workers tends to focus on the relationship between EU nationals employed or looking for a job in another Member State and the authorities of that state. Most publications deal with the right to reside and work in that state, the unlawfulness of nationality requirements, other forms of open or indirect discrimination in the law or barriers to equal treatment caused by practices of public authorities.

In this paper I intend to deal with two other questions: first, the question of what rights are granted by Community law to non-national workers in the relationship with their employer. And, second, what remedies are available if the employer does not comply with his obligations and violates Community law? These questions are not new, but they have acquired a new relevance with accession of new Member States to the Union. Over the last years national reports on the application of free movement rules in many Member States have mentioned the issues of substandard payment and unequal working conditions of workers from Member States that acceded to the EU in 2004 and 2007.

2. Equal treatment of foreign workers as basic principle

From the very outset, the EEC Treaty stated, in its Article 48 (the present Article 45 of the Treaty on the Working of the EU - TWEU), that the freedom of movement for workers entails “the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.” This is a specification of the general non-discrimination clause in the present Article 18 TWEU.

This basic rule was specified in 1961, in Regulation no. 15, the first regulation on free movement of workers.² In 1968 it was extended in Article 7 of Regulation 1612/68.³ According to Article 7(1) a national of another Member State may not be treated differently from national

¹ Centre for Migration Law, Radboud University Nijmegen, The Netherlands, 19 November 2009.

² Article 8 of Regulation No. 15, OJ of 28 August 1961, p. 1073-1084.

³ Regulation 1612/68, OJ 1968 L 257 of 19 October 1968.

workers by reason of his nationality “in respect of any conditions of employment and work, in particular as regards remuneration, dismissal and should he become unemployed, reinstatement or re-employment.” This provision covers all four stages of employment: (1) selection and recruitment, (2) remuneration and other conditions of employment, (3) dismissal and other forms of ending the employment relationship, and (4) re-employment with the same or another employer. Moreover, Article 7(4) stipulates: “Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of the other Member States.” This provision directly and automatically determines the illegality of any discriminatory clause in individual or collective employment contracts.

These central provisions of free movement law remained in force after the entry into force of the new Directive 2004/38 on the free movement of Union citizens and their family members.⁴

At first sight, these provisions were not revolutionary. Similar equal treatment provisions can be found in Article 6 of the ILO convention on migrant workers adopted in 1949⁵ and in Article 19(4) of the European Social Charter (ESC) signed in 1961. The ILO rules were used as a model when drafting the first EEC Regulations.⁶ Similar provisions are included in later international instruments, adopted within the UN and the Council of Europe. It is appropriate to mention here, that Cyprus was among the first states that ratified the ILO Convention no. 97 and the ESC.⁷ Cyprus also is one of the five EU Member States that has ratified the Twelfth Protocol to the ECHR with the general anti-discrimination clause similar to Article 26 of the ICCPR. The Cyprus government over the years has shown concern for the treatment of foreign workers, at least on paper. Cyprus is one of the five Member States that has ratified ILO convention no. 143 adopted in 1975.⁸ That convention explicitly guarantees the equal rights of undocumented foreign workers arising out of past employment. Illegal employers are obliged to pay the same salary and provide equal benefits even to undocumented workers. The draftsmen of that convention, apparently, were concerned about the application of those rules in practice. Their attention to effective remedies is reflected in the following provision: “In case of dispute about the rights referred to in the preceding paragraph, the worker shall have the possibility of presenting his case to a competent body, either himself or through a representative.”⁹

⁴ Article 38(1) of Directive 2004/38/EC, OJ 2004 L 158 and L 229/35.

⁵ ILO Migration for Employment (revised) Convention no. 97.

⁶ S. Goedings, *Labor Migration in an Integrating Europe*, The Hague 2005 (Sdu), pp.263, 308 and 338.

⁷ Cyprus ratified ILO Convention no. 97 in 1960 and the European Social Charter in 1968.

⁸ Cyprus ratified ILO Convention no. 143 in 1977. The other Member States having ratified that convention are Italy, Portugal, Slovenia and Sweden.

⁹ Article 9(2) of ILO Migrant Workers (Supplementary Provisions) Convention no. 143.

3. Two differences between intergovernmental law and Community law

In my view the equal treatment clauses in Community free movement law differ from similar rules in other international instruments in two important ways. *First*, the EC rules are more specific and they extend to areas not covered by the other instruments. Article 7(2) of Regulation 1612/68 extends the equal treatment to “the same social and tax advantages as national workers.” Over the past decades, in the case law of the Court of Justice this short clause has been interpreted as covering a wide range of issues, from reduction of train fares, compensation for victims of serious crimes to the right to live together as non-married partners.¹⁰ Article 8 extends the equal treatment to trade union membership, the right to vote and be elected in the management of trade unions and the right to vote and be elected in workers’ representative bodies.¹¹ This was the first clause in EC law granting political rights to nationals of other Member States. It can be seen as the nucleus of the future union citizenship.¹² In certain Member States, e.g., Germany, the visible large-scale participation of immigrant workers in trade unions and in the workers’ councils of large companies has clearly contributed to their integration in the country of residence.

The *second* major difference between equal treatment provisions in international instruments and in Community law relates to the external controls on the implementation of the agreed rules in the states bound by those rules. Both systems to a large extent entrust the national authorities and national courts with the interpretation and enforcement of the rules. Sometimes the national implementation is supplemented by a system of supervision that is triggered by individual complaints. Within the EC there are at least two major institutions, the Commission and the Court, that provide for external control and do not depend only on action of the individual citizens concerned. Their presence and activities greatly enhance the actual application of the agreed common rules.

4. Workers from countries outside the EU

So far we have discussed workers who are nationals of a Member State. Although the EEC Treaty uses a wider term, “workers of the Member States,” in the regulations just mentioned the scope of free movement was restricted to EU nationals and their family members.¹³ However, over the past decades a range of Community law provisions have been adopted that grant equal treatment with respect to conditions of work and employment to large categories of workers who are nationals of third countries. Such clauses are included in the agreements

¹⁰ D. Martin and E. Guild, *Free Movement of Persons in the European*, London/Edinburgh 1996 (Butterworths).

¹¹ The equal access to management functions in trade unions was added in 1976 by Regulation 312/76, OJ 1976 L 39.

¹² M. Condinanzi, A. Lang and B. Nascimbene, *Citizenship of the Union and Freedom of Movement of Persons*, Leiden 2008 (Martinus Nijhoff), pp. 65-104.

¹³ See Article 1(1) of Directive 1612/68.

the EC has concluded with future Member States,¹⁴ with the Maghreb countries¹⁵ and with other third countries.¹⁶ A similar clause in Article 9 of Decision 1/80 of the EEC-Turkey Association Council is of great relevance in practice, since almost one quarter of all third country nationals in the EU are nationals of Turkey. The Court has held that national legislation in Austria that excluded lawfully employed Turkish workers from eligibility for the public law workers representative bodies did violate the equal treatment clause in Decision 1/80.¹⁷

Over the last six years the Council, on the basis of the ECT Articles 62 and 63, adopted 15 directives concerning the status of different categories of third-country nationals. In many of those directives there is a provision granting equal access to employment, equal working conditions, equal remuneration or equal treatment regarding dismissal, health and security. Such provisions are to be found in the directives on family reunification, on long-term residents, on students, on refugees and beneficiaries of subsidiary protection, on the rights of asylum seekers and in the recently adopted directive on admission of highly qualified workers from third countries (the so-called Blue Card Directive).¹⁸ The wording of those provisions varies. They are not as broad and as detailed as Articles 7 and 8 of Regulation 1612/68 on EU workers. Neither is it explicitly provided that discriminatory clauses in individual or collective agreements are null and void. But, the relevant provisions in the new directives, without any doubt, create an obligation to provide equal treatment. But an obligation for whom: the Member State, the employer or both? This raises the issue of the implementation of EC law.

Before I turn to that issue, I would like to remind you that the EU Charter of Fundamental Rights, which has become part of primary Community law with the entry into force of the Lisbon Treaty, contains a number of provisions that will be relevant for the protection and equal treatment of workers. The Charter provides in Article 15 that “everyone has the right to engage in work and to pursue a freely chosen or accepted occupation” and that “nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.”¹⁹ Of course, ‘equivalent’ is not the same as ‘equal.’ But this clause in the Charter at least requires public authorities and other employers to justify unequal treatment of third country workers in the cases not covered by the new directives or other EC law equal treatment rules.

¹⁴ Art. 37(1) of the Association Treaty EC-Poland and similar clauses in the Europe Agreement concluded with other candidate Member States in 1993.

¹⁵ Art. 64 of the Mediterranean Association Agreements between the EC and Algeria, Morocco and Tunisia, OJ 2000 L 70.

¹⁶ E.g., in the Partnership Agreements between the EC and Russia, Ukraine, Moldova, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan and Uzbekistan.

¹⁷ ECJ 8 May 2003, C-171/01 (Birlilte/Wählergruppe Gemeinsam, ECR 2003, I-4301 and ECJ 16 September 2004, C-465/01 (Commission/Austria) ECR 2004, I-8291. See also Article 9 of the 1963 Association Agreement EEC-Turkey.

¹⁸ Article 14(1) of Directive 2003/86, Article 11(1)(a) and Article 21(1) of Directive 2003/109, Article 26 of Directive 2004/83, Article 11 of Directive 2003/9 and Article 14(1) of Directive 2009/50; see also K. Groenendijk, Access of Third-Country Nationals to Employment under the New EC Migration Law, in: F. Julien-Laferrière, H. Labayle and O. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, Brussels 2005 (Bruylant), pp. 141-174.

¹⁹ Article 15(1) and 15(3) of the Charter, OJ 2007 C 303, p. 1-16. The official Explanations to Article 15(3) of the Charter explicitly refer to Article 19(4) of the European Social Charter, OJ 2007 C 303, p. 23.

Article 21(2) of the Charter stipulates that “within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.” Originally the clause in the present Article 12 EC Treaty that prohibits any discrimination on the grounds of nationality within the scope of the Treaty was meant to protect the nationals of the Member States. After extension of the scope of the EC Treaty by the Treaty of Amsterdam, covering admission, residence and rights of third country nationals as well, it is not easy to justify why Article 12 would not protect third country nationals with regard to new issues that are now within the enlarged scope of the Treaty.²⁰ Once the Charter becomes legally binding this restricted interpretation of Article 18 TWEU and of Article 21(2) of the Charter will become even more difficult to justify. Of course, not every difference in treatment amounts to discrimination. Certain differences are provided for in the Treaty itself, e.g., free movement is restricted to Union citizens and their family members. But other differences in treatment on the grounds of nationality will have to be justified by Member States and by employers.

Finally, the Charter also provides that every worker” will be entitled to protection against unjustified dismissal and has the right to fair and just working conditions, such as limited working hours and annual paid leave.²¹

5. Different forms of application of EC law within Member States

A *first* way to implement EC law is by amending the national legislation in order to make it compatible with EC law. No such amendment is necessary if the national law was already in conformity with the EC rule. If the national legislation provided for equal treatment of workers irrespective of their nationality and declared discriminatory clauses null and void, no change in that legislation is required. The employer will be bound and can be sued on the basis of the national law.

The *second* way in which EC law is applied is on the basis of the direct effect of the EC rule. If that rule is directly applicable a worker can invoke that rule before the authorities and the national courts. According to the constant case law of the Court of Justice non-discrimination and equal treatment clauses are directly applicable.²²

If the rule is codified in primary Community law (the TWEU or a treaty between the EC and a third country) or in a regulation, the Community law rule can be relied on both against public authorities and against third parties. Thus, Article 7 of Regulation 1612/68 can be invoked by workers or their family members having used their free movement rights against their

²⁰ C. Hublet, *The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?* *European Law Journal* 2009, pp. 757-774.

²¹ Articles 30 and 31 of the Charter.

²² E.g., ECJ 30 September 1987, 12/86 (Demirel) ECR 1987, 3719, point 14 (EEC-Turkey), ECJ 31 January 1991, C-18/90 (Kziber) ECR 1991, I-199 point 15 (EEC-Morocco), ECJ 4 May 1999, C-262/96 (Sürül) ECR 1999, I-2685, point 65 (EEC-Turkey) and ECJ 29 January 2002 (Pokrzeptowicz) C-162/00 ECR 2002, I-1049 points 19-30 (EC-Poland).

employers. The professional football player Bosman could invoke Article 48 EC Treaty against his former employer the Royal Club Liégeois SA.²³ The Slovak handball player Kolpak could rely on the equal treatment clause in Article 38 of the Association Treaty between the EC and Slovakia, in his case against the German Handball Federation.²⁴ The Russian football player Simutenkov did successfully rely on a similar clause in the EC-Russia Partnership Agreement, in his case against the Spanish Football Federation and the Spanish Minister of Culture.²⁵ A similar clause in the Treaty of Cotonou,²⁶ concluded in 2000 between the EC and what used to be called the Lomé countries in Africa, Asia and the Americas, so far has never given rise to a case before the Court of Justice. I am unaware of the actual application of this last equal treatment clause in the Member States.

Workers from third countries with whom the EC has not concluded a similar agreement and who are within the personal scope of one of the new migration and asylum directives just mentioned, can directly rely on the access to employment and equal treatment clauses in those directives in cases where a national or other public authority is or has been their employer or is the prospective employer. The Court has repeatedly held that directives cannot create obligations for individuals. Private employers, individual or companies, are not directly bound by a directive. They can only be bound by the national law implementing the directive.²⁷

However, in those cases the employer may be bound to grant equal treatment because the clause in the directive (or in other EC law instruments) is implemented at the national level in a *third* way. According to the case law of the Court, national authorities and courts are obliged to interpret the national legislation to the extent possible in such a way that it is in conformity with EC law.²⁸ This form of implementation is especially relevant with regard to clauses in the directives that cannot be relied on directly against a private employer. It can be used in cases where the applicable national norms contain vague or general terms, such as 'good faith,' 'proper behavior' or 'public order.' A good example is the case of a Dutch company that decided to give each of its Dutch employees a number of shares in the company as a bonus. The foreign workers did not get any shares because the national law of the French mother company did allow non-EEC nationals to be owners of its shares. Several foreign workers sued the company and a Dutch labor court held that the general obligation of an employer under Dutch labor law 'to behave as a proper employer' should be interpreted in conformity with the equal treatment clauses in international treaties. Hence, the company was ordered to give an equal number of shares to the foreign workers or, if this was not possible, to pay them

²³ ECJ 15 December 1995, C-415/93 (Bosman), ECR 1995, I-4921.

²⁴ ECJ 8 May 2003, C-438/00 (Kolpak) ECR 2003, I-4135.

²⁵ ECJ 12 April 2005, C-265/03 (Simutenkov), ECR 2005, I 2579.

²⁶ Article 13(3) of the Treaty of Cotonou, OJ 2000, L 317/10.

²⁷ ECJ 26 February 1982, 152/84 (Marshall I), ECR 1986, 723.

²⁸ ECJ 4 July 2006 C-212/04 (Adeneler) ECR 2006, I-6057 and ECJ 23 April 2009 C-378/07 (Angelidaki) not yet in ECR.

the value of the shares.²⁹ The case concerned Turkish and Moroccan workers. But the same reasoning would apply with regard to discrimination of EU workers or with regard to third country workers under the new migration and asylum directive. The case dates back to 1986. Today such a case would be decided on the basis of the more recent Dutch General Equal Treatment Act that entered into force in 1994.³⁰

In a similar way the national equal treatment legislation of Member States should be interpreted, to the extent possible, in such a way as to live up to the obligations of the Member State under Community law. This obligation to interpret national law in conformity with EC law also applies to official national Equal Treatment Commissions or similar bodies established in most Member States. This brings me to my second question: the available remedies.

6. Effective remedies against discriminatory treatment by employers

Lawyers often are inclined to think that recourse to courts is the appropriate reaction in cases of discrimination by employers. Workers, however, seldom perceive approaching lawyers or courts as an attractive alternative. Visible reliance on the law may well be the end of their employment relationship. Courts are perceived as expensive and slow. Moreover, national courts often have a defensive attitude against Community law. Lack of knowledge or experience with Community law, an attitude to 'defend' the national law that is better known against 'invasion' by Community law or other reasons mean that national courts, at least in the first years after its adoption, have a tendency to disregard EC law or interpret it in such a way that existing national law can be applied in the way it always has been.

A typical example of this defensive attitude in my view is the 2008 judgment of the Supreme Court of Cyprus in the *Motilla* case on the (non-) application of Directive 2003/109/EC on the status of third country nationals who are long-term residents³¹ to third country workers employed in Cyprus. Cyprus has a policy of granting residence and employment permits to low skilled workers from third countries that are explicitly restricted to two years and are non-renewable. However, in real life, at the end of the two years many of those workers are not required to leave the country, but are given a new two-year, non-renewable permit. Only highly skilled and managerial workers receive a permanent residence permit. The central question in this case was whether a worker who has been lawfully employed for more than five years on the basis of such temporary permits is within the personal scope of the Directive. The majority of the Supreme Court in the first judgment on this directive by the highest court of a Member State, considering the text of the directive, the policy of the government and the explicit temporary character of the permits, held that the worker was not entitled to long-term resident

²⁹ Kantonrechter Gorinchem 8 December 1986, Rechtspraak vreemdelingenrecht 1986, no. 79.

³⁰ Act of 2 March 1994, Staatsblad 1994, no. 230.

³¹ Directive 2003/109/EC was adopted on 25 November 2003 and published in OJ 2004 L 16/44. The Directive had to be implemented in the national legislation of Member States by 23 January 2006.

status.³² With all due respect I hold this conclusion to be incorrect, since it would leave the Member States free to exclude whole categories of workers from the scope of the directive and thus severely restrict its effect, by simply stating that their employment is temporary whilst in reality it is not. The Commission's Explanatory Memorandum on the proposal for this directive makes it clear that one of the purposes of the directive is to grant equal treatment to third country workers lawfully employed for five years in a Member State. Exception was made for the workers admitted "solely on temporary grounds" for inherently temporary jobs.³³ This defensive attitude is not exclusive to Cyprus. It can be observed in other Member States as well. The Netherlands government applies the same reasoning as the Cyprus Supreme Court with regard to ministers of religion (read: imams) who have been lawfully admitted for more than five years.³⁴

7. Alternative remedies

In practice a worker has at least four alternatives to going to court: do nothing, resign and let the violations of his rights continue, try to get support of a trade union against the discriminatory behavior of the employer, file a claim with an Equal Treatment Commission or with an Ombudsman. I will conclude with a few words on each of the latter three alternatives.

Whether *trade unions*, the workers council or another workers' representation are perceived as an attractive alternative depends on the membership, the accessibility and the past activities of those bodies on behalf of migrant workers. In some Member States trade unions have succeeded in organizing large numbers of immigrant workers, not only as simple members but also in their governing bodies. In Germany and Sweden trade unions have visibly acted on behalf of migrant workers. In other Member States trade unions have been more ambivalent regarding migrant workers (e.g., Netherlands and France), or are perceived as being mainly active for their predominantly white, male and middle-aged members.³⁵

Under Community law trade unions may act on behalf of workers, irrespective of their nationality and irrespective of the lawfulness of their residence and work. The new directive on sanctions against employers of illegally staying third country nationals, adopted by the Council in June 2009, provides the legal basis for activities of trade unions on behalf of undocumented workers.³⁶ Article 13 of that directive stipulates:

³² Supreme Court of Cyprus Second Instance Jurisdiction 21 January 2008 (Motilla v. Republic of Cyprus, case No 673/2006). Four of the thirteen judges dissented with the majority.

³³ COM(2001) 127 of 13.3.2001, p. 14-15 and Article 3(2)(e) of Directive 2003/109. In a letter of 12 October 2009 to the Cypriot organisation KISA – Action for Equality, Support, Antiracism in Nicosia the European Commission states: "Indeed it is not the purpose of this provision to allow for consecutive prolongations of residence permits for periods of validity of less than five years each time to exclude third-country nationals from eligibility for long-term resident status, despite their legal and continuous stay of more than five years."

³⁴ The Aliens Chamber of the District Court of Amsterdam held that this position is incompatible with Directive 2003/109/EC in a judgment of 3 June 2009, LJN: B18797.

³⁵ *R. Penninx and J. Roosblad (ed.)*, Trade Unions, Immigration, and Immigrants in Europe, 1960-1993, A Comparative Study of the Actions of Trade Unions in Seven West European Countries, 2000 (*Berghahn*). The editors observe that Turkish workers are highly organized in Belgium and Sweden, but have a relatively low trade union membership in France, Switzerland and the Netherlands (p. 200).

³⁶ Directive 2009/52 of 18 June 2009, OJ 2009 L 168/24.

“Member States shall ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when provided for by national legislation.”

Moreover, it is provided:

“Member States shall ensure that third parties which have, in accordance with the criteria laid down in their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of an illegally employed third-country national, with his or her approval, in any administrative or civil proceedings provided for with the objective of implementing this Directive.”

The national legislation of Member States will have to give trade unions and NGOs, acting for undocumented migrant workers, ways to effectively enforce the rights of these migrant workers. This new directive even provides for the possibility of granting the undocumented worker a temporary residence permit pending the proceedings of the worker against his (former) employer.³⁷

From the national reports of the Network on Free Movement of Workers on developments in recent years it appears that in several Member States the national Equal Treatment Body or Ombudsman has been active on behalf of EU migrants. Because the Commission has published the annual report on its website, they have become a valuable source for researchers and policy makers.³⁸

The recent report on Cyprus mentions the activities of the national *Anti-Discrimination Authority* not only with regard to the long delays in issuing residence documents to EU nationals, but also on the discriminatory refusal of heating benefits, health care, and the potential discrimination against EU nationals in the recruitment for employment in the public sector.³⁹ The Dutch report on 2008/09 refers to an opinion of the Dutch Equal Treatment Commission that, after an extensive investigation, established the indirect wage discrimination of EU-8 workers.⁴⁰ In earlier years that Commission has published opinions on the use of language requirements to exclude EU workers from jobs in cases where the required level of knowledge of Dutch language (speaking without a foreign accent) was not relevant for the job.

The reports on 2008/09 on several Member States mention the activities of the national *Ombudsman* or comparable institutions providing a remedy against discriminatory treatment of EU workers. The Greek Ombudsman was active on the issue of the exclusion of EU

³⁷ Article 13(4) explicitly refers to a similar clause on temporary residence permits for victims of trafficking in Directive 2004/81.

³⁸ The reports of the Network can be accessed via <http://ec.europa.eu/social/main.jsp?catId=475&langId=en>

³⁹ The 2007 report on Cyprus can be accessed via <http://ec.europa.eu/social/keyDocuments.jsp?type=3&policyArea=24&subCategory=458&country=26&year=2007&advSearchKey=&mode=advancedSubmit&langId=en>

⁴⁰ Commissie Gelijke Behandeling Opinion 2008, no. 128.

nationals from study grants in 2008 and in earlier years against the substandard employment conditions of EU-8 workers. In Latvia the Ombudsman denounced the illegality of the permanent residence requirement excluding EU workers from social security benefits. The Portuguese Ombudsman acted against discriminatory registration fees for the transfer of football players from other Member States. The reports on 2007 mention activities of the Czech Defender of Public Rights against substandard working and payment of temporarily employed Polish nationals, and of the Ombudsmen in Hungary and Luxembourg with regard to the social security rights of EU workers.

The relatively easy access and low costs of the Equal Treatment bodies and Ombudsmen and their competence and capacity to conduct independent investigations means that those institutions have become an attractive and possibly effective remedy against violations by employers of the rights of EU and third country workers under EC equal treatment rules.⁴¹ This applies with regard to violations by private employers, by companies and by public authorities acting in the capacity of employer. Of course, appeal to a court may still be necessary, if the employer does not comply with the opinion of the Ombudsman or the Equal Treatment Body. But the number of employment discrimination cases before those bodies clearly tends to exceed the number of such cases before the courts. Moreover, the courts often lack the investigatory competence or are less inclined to use their investigatory powers in discrimination cases than the alternative bodies. Interestingly, the two alternative bodies in several Member States appear to take Community law more seriously – or at least at an earlier stage – than some national courts. Maybe this more open attitude can be explained by their institutional perspective. Ombudsmen and Equal Treatment bodies tend to pay more attention to the position of the individual person irrespective of his or her nationality. National courts may have a tendency to start reasoning from the perspective of the state. Courts, after all, are state institutions. But their judgments in a democratic state are binding for the state and other public authorities.

⁴¹ A. Brenninkmeijer and P. Nikiforos Diamandouros, *The role of ombudsmen and similar bodies in the application of EU law*, report on the 5th Seminar of the National Ombudsmen of EU Member States and Candidate Countries 11-13 September 2005, The Hague 2006.

EUROPEAN REPORT on the Free Movement of Workers in Europe in 2007

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Executive Summary

Free movement of workers is a cornerstone right of all nationals of the Member States. In examining how the Member States have implemented this right in 2007, the following key issues arise:

- Access to the territory, residence and protection from expulsion: workers and job seekers are able to access the territory of other Member States and to remain there under the provisions of Directive 2004/38. A number of Member States appear to have taken the opportunity of a new directive to introduce new restrictions which did not apply before. This phenomenon deserves close attention as it does not appear to be consistent with the intention of the directive.
- Transitional arrangements regarding EU-8 workers are gradually being lifted across all the Member States. There are very few member States which are still applying significant restrictions. In light of this it seems unlikely that many Member States will seek to justify a further extension of the transitional arrangements for the EU-8. As regards the EU-2, the situation is much less positive. Many Member States apply transitional restrictions, even one EU-8 Member State. The protection of job seekers seems particularly weak as regards expulsion.
- Equal treatment in access to procedures is a substantial problem in a number of Member States. Delays in administrative procedures which result in the inability of a worker to enjoy his or her rights are widespread. Respect for the obligation to issue a residence certificate immediately is widely flouted and access to remedies not always available. These weaknesses hinder the exercise of the right of free movement with particularly severe consequences for job seekers and their family members.
- Language requirements are still applied in many Member States although they constitute an important obstacle to free movement of workers. While in many cases these requirements are stated to be applied according to the principle of proportionality, the area is one deserving careful attention.
- A number of Member States are denying the right of family reunification with third country national family members of EU migrant workers where those family members seek to enter from outside the EU. This is causing substantial hardship for workers in a number of Member States and a distortion of the use of free movement rights as workers, in some cases in desperation, exercise free movement rights to move to yet another Member State primarily in order to enjoy family reunification. This is counterproductive to the good functioning of the internal market.

In general, 2007 has seen some progress towards the realisation of the free movement rights of workers across the EU though there is still much room for improvement.

General Introduction

1. TRANSPOSITION OF DIRECTIVE 2004/38

In most Member States the transposition of Directive 2004/38 started in 2006 and was completed during 2007. Only Luxembourg did not succeed in transposing the Directive in its national legislation in 2007. In the majority of Member States the transposition of Directive 2004/38 resulted in a reinforcement of the status of EU migrants and their family members in comparison with their status under the previous law. In some Member States rules formerly in administrative instructions or case-law of national courts have been codified in legislative acts. In some Member States transposition resulted in national rules that are more favourable than the Directive. In Belgium the national law provides for acquisition of the permanent residence status after three years of lawful residence rather than the five years provided for in the Directive.

On the other hand, several national reports mention that the transposition of Directive 2004/38 was used as an occasion to introduce more strict rules. In Denmark, Finland, Ireland and the UK with reference to the *Akrich* judgment a rule was introduced requiring third-country national family members to prove previous lawful residence in another Member State. Italy limited the admission of those family members to the ones who had regularly entered the country (see chapter 1). In Lithuania the acquisition of the permanent residence status was made conditional on passing a language test. Germany reduced the access to social benefits for jobseekers not qualifying as a worker. Most of these retrograde measures are problematic considering the text of the Directive and the recent judgment of the Court in *Metock*, either because the Court held that requiring previous lawful residence in another Member State or regular entry is incompatible with the Directive, or because of the Court's general observation "that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals" (par. 59).

2. ENLARGEMENT

At the beginning of 2007 Bulgaria and Romania acceded to the Union. The number of nationals of other EU Member States having registered residence in those two states is still relatively small (approximately 5,000 in Bulgaria and 9,000 in Romania). Most EU-15 Member States decided to make use of the transitional provisions on workers from the two new Member States. All EU-8 Member States, except Hungary granted full freedom of movement to citizens of Bulgaria and Romania. In reports on some EU-8 Member States disagreement with the continued application of the transitional regime to their workers in some of the EU-15 is mentioned as a major reason for allowing full freedom of movement to Bulgarian and

Romanian nationals. Several EU-15 states decided in 2007 to no longer apply the transitional rules to EU-8 workers (see chapter 8). Several reports mention problems with substandard employment conditions (Ireland and Finland) or substandard housing conditions (Netherlands) of (posted) EU-8 workers. According to some of those reports, the legislative measures against those practices are rather ineffective.

3. APPLICATION OF SCHENGEN ACQUIS IN EU-10

A major event in 2007 was the full application of the Schengen acquis in the EU-10. The lifting of controls on persons at the internal borders with the EU-10 Member States is of great practical and symbolic importance. It removes practical obstacles to the free movement of persons between Member States. In several EU-10 Member States the importance of this event was compared with the accession to the EU in 2004. Application of the Schengen acquis was considered as the final acquisition of full membership of the EU.

4. RECOGNITION OF QUALIFICATIONS AND ACCESS TO PUBLIC SERVICE

In the majority of Member States the transposition of Directive 2005/36 of the recognition of qualification was completed in 2007 (see chapter 2).

The reports on Estonia, France, Hungary, Spain and the UK mention improvements in the access of Union citizens to employment in public service during 2007 (see chapter 4).

5. DEPORTATION AND DETENTION

The reports on Ireland, Italy and the Netherlands refer to the introduction of national legislation or administrative practices on deportation and detention of Union citizens on public order grounds or because Union citizens are held to be an unreasonable burden on the public purse. The Irish report refers to “multiple deportation” of Romanian nationals. The new national rules or measures either are an explicit effort to establish which actions of national immigration authorities are still in conformity with Community free movement law or they appear to have been adopted without proper regard to the applicable Community law.

6. EQUAL TREATMENT IN IMMIGRATION PROCEDURES?

In some reports (a.o. on Belgium and Sweden) the question is raised whether the more strict national procedural rules in immigration cases generally, adopted in 2007, can be applied to Union citizens and their family members. Where those national rules provide for special immigration tribunals or for a more limited judicial review than afforded to nationals of the Member State concerned in their disputes with national authorities, the application of more strict immigration procedures may be problematic as to their compatibility with Directive 2004/38, with the equal treatment provisions and with the general principle of Community law that national procedural rules should at least provide equivalent protection of rights granted to individuals under Community law.

In some Member States the Ombudsman appears to play an important role in protecting free movement rights of EU nationals in cases where access to national courts may be difficult or not possible (e.g. in the Czech Republic, Hungary and Luxembourg).

7. BUREAUCRATIC OBSTACLES AND LANGUAGE REQUIREMENTS

Several reports mention bureaucratic or other obstacles to free movement: long delays in the actual registration (Cyprus), or in issuing documents to EU nationals (UK) or the application of an additional income tax requiring nationals to pay the difference between the income tax in the host Member State and the own Member State (Latvia). This tax may well be an obstacle to return to the latter Member State. Long delays in registration and issuing of documents may well result in unequal treatment of (undocumented) EU nationals by employers during this waiting period. The report on Portugal mentions efforts to remove of an obstacle affecting the movement of cross-border worker across the Portuguese-Spanish border as one of the major events in 2007.

The increased relevance of language requirements as an obstacle to the exercise of free movement rights is mentioned in the reports on Cyprus, Hungary and Lithuania (see chapter 2).

8. THIRD-COUNTRY NATIONAL FAMILY MEMBERS

Finally, the treatment of third-country national family members continues to raise serious problems in several Member States. This relates not only to the additional conditions for admission such as the one that gave rise to the *Metock* judgment, but also to the (non-)admission of same sex partners or registered partners and the access to employment of those family members (see chapter 5). Positive developments in 2007 in this respect are the abolition of the income requirement and fees for visa in Slovakia, the introduction of a judicial remedy against a refusal of a visa for third-country national family members, and the application of the Courts judgment in *Eind* on the admission of family members of a national who returns to Denmark after having used his freedom of movement.

ENTRY, RESIDENCE, DEPARTURE AND REMEDIES

INTRODUCTION: TRANSPOSITION OF DIRECTIVE 2004/38/EC

The year 2007 finally saw the transposition in all European Union Member States of the EU Citizens Directive (hereafter “the Directive”),¹ which should have been transposed by 30 April 2006. The exception is *Luxembourg*, which, by the end of the year, had only partially transposed the Directive in response to the proceedings brought against it by the European Commission (Case C-294/07). In *Belgium*, the law transposing the Directive, which was adopted on 25 April 2007 and published shortly thereafter, only entered into force on 1 June 2008, which raises questions about the direct effect of some of the Directive’s provisions between transposition and the law’s entry into force. The two newest Member States, *Bulgaria* and *Romania*, which joined the EU in January 2007, also have legislation in place transposing the Directive, although a number of its provisions have not been transposed. In *Romania*, transposition occurred by way of an Emergency Ordinance which entered into force with that country’s accession to the EU on 1 January 2007. The following Member States transposed the Directive in 2007: *Belgium* (but see above), *Cyprus* (national law adopted in February 2007 and implemented in November 2007), *Finland* (May 2007), *Greece*, *Hungary* (July 2007), *Italy* (April 2007), *Malta* (July 2007) and *Spain* (April 2007). *France* finalized the transposition, which started in 2003, in March 2007. While in *Latvia* the Directive was transposed by means of a Regulation in 2006, a draft law on the free movement of EU citizens, EEA citizens and Swiss citizens has since been formulated, which, if adopted, will place the Directive on a higher normative footing within the national legal system.

During 2007, several amendments were adopted (or were pending) in the ten Member States which joined the EU in May 2004 with a view to improving the national rules transposing the Directive. For example, in *Poland*, the amendments have aligned the national legislation more closely with the Directive in the area of the expulsion of EU citizens with regard to the application of the public health exception and the proportionality principle in the context of expulsion on grounds of public policy. However, given the continuing small number of EU citizens from other Member States employed and resident in the new Member States and the limited practice, including in terms of national court rulings, it continues to be difficult to assess the real impact of Community free movement law in those countries.

¹ European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77; OJ 2004 L 229/35 (Corrigendum).

In the following Member States, it was expressly noted that the transposition of the Directive has, on the whole, resulted in more favourable national provisions on free movement than was the case previously: *Belgium, Finland, Italy, Latvia, Netherlands, Slovakia* and *Spain*. Moreover, in *Belgium*, some national provisions are now more liberal than those found in the Directive. The right to permanent residence in Article 16 of the Directive is afforded to EU citizens and their family members after three years of continuous residence rather than the five years specified in the Directive,² and the notion of family also includes same-sex marriages and a broader definition of partnership than that found in the definition of family in Article 2 of the Directive. In the *Czech Republic*, the concept of the registered partnership, which has been given equivalent status to marriage in immigration legislation, was introduced into national migration legislation in 2007.

This chapter discusses the application in the 27 Member States of the Community rules on the entry, residence and departure of EU citizens and members of their families in 2007, as well as of the remedies available to them if refused entry or residence or subjected to expulsion. The chapter also contains a separate section addressing the treatment of job-seekers in national law and practice, which the rapporteurs were once again requested to draw attention to in drafting their reports. A notable concern identified relating to some Member States is the temptation to circumvent the more stringent Community rules on entry and expulsion by applying national rules relating to aliens generally and particularly in respect of new EU citizens from *Bulgaria* and *Romania*.

ENTRY

As observed in previous Reports, the application in Member States of the rules relating to the entry of EU citizens and EEA nationals is generally uncontroversial and all Member States now permit the entry of EU citizens or EEA nationals on the basis of a travel document or national identity card. What appears less clear, however, is the other documentation that would be permissible to prove identity and nationality in the absence of these documents, or in the absence of the required visa in the case of third-country national family members (see Article 5(4) of the Directive which relates to the Court of Justice's judgment in Case C-459/99, *MRAX*). This problem is observed explicitly in the reports of *Bulgaria* and the *Netherlands*. In *Italy*, the EU citizen entrant or his or her family member is given 24 hours to present this evidence, which is considered by the national legislator to be a reasonable period of time in the light of Article 5(4) of the Directive.

² However, despite the overall improvements noted in *Finland* after transposition, there has also been some regression in that the qualifying period for permanent residence for EU citizens and their family members has been increased from four to five years. Similarly, and as observed in the 2006 Report, the qualifying period for permanent residence of four years residence in *Lithuania* has been abolished in favour of the five-year period.

Moreover, there continued to be difficulties in 2007 in law and in practice surrounding the admission of family members and particularly third-country national family members of EU citizens in some Member States. In the *Czech Republic*, for example, the time-limit of 14 days set down in the law for issuing visas at the border, which would be applicable to third-country national family members of EU citizens who require a visa to enter the territory, would not appear to conform to the requirement in Article 5(2) of the Directive that such visas are to be issued “as soon as possible and on the basis of an accelerated procedure”. However, no information is available on the application of this provision in practice. In *Finland*, the May 2007 legislation transposing the Directive lays down the requirement that third-country national family members must previously have been lawfully resident with their EU citizen family member in another Member State as a condition for enjoying free movement rights in *Finland*. The position in *Ireland* and *Italy* was similar. This restrictive approach relying on the *Akrich* (C-109/01) judgment is no longer justified in the light of the Court of Justice’s recent judgment in *Metock* (Case C-127/08). In *Spain*, some doubts have been raised about the correct transposition of Article 5(4) of the Directive by the 2007 Royal Decree in respect of third-country national family members subject to the visa requirement in Regulation 539/2001/EC and whether the absence of such a visa will automatically result in a refusal of entry.

In a few Member States, the grounds upon which entry may be refused to EU citizens, and in particular to their third-country national family members, appear to go beyond the scope of the public policy, public security and public health exceptions stipulated in the Directive. In the *Czech Republic*, third-country national family members are subject to additional refusal criteria as compared with EU citizens. In *Finland*, the position of EU citizens who have entered and registered their residence is stronger in the case of removal on these grounds than those who have “merely entered”, and this is discussed in the section on “Departure” below. In *Slovakia*, as noted in previous Reports, the denial of entry to foreigners, including EU citizens, who are deemed to be undesirable persons, i.e. foreigners who were administratively expelled or on whom the punishment of expulsion in criminal proceedings was imposed, might be problematic if the person concerned was expelled in the past for reasons which are not compatible with the permissible grounds for the refusal of entry outlined in Article 27 of the Directive. In *Slovenia*, the national legislation transposing the Directive continues to permit refusal of entry on the basis of “international relations”. Moreover, the public policy exception in connection with entry can be applied more strictly in respect of EU citizens from the new Member States, although there is no case law to verify what actually occurs in practice. Finally, in the *United Kingdom*, there is anecdotal evidence that Bulgarian and Romanian nationals (hereafter “A2 nationals”) are routinely asked whether they are working in the country and requested to produce evidence of this. Even though unauthorized work by A2 nationals constitutes a criminal offence under the UK Accession Regulations 2006, it does not fall within the public policy exception under Community law and thus refusal of entry for this reason is not justified.

RESIDENCE

With regard to residence of up to three months, the Directive, in Article 5(5), permits Member States to require EU citizens to report their presence within their territory within a reasonable and non-discriminatory period of time after entry. However, few Member States exercise this option (i.e. *Malta* – one month; *Poland* – four days; *Romania* – 15 days). It is questionable whether the four-day period in *Poland* amounts to a “reasonable” period of time as stipulated in the Directive. In *Ireland*, as also observed in the 2006 Report, the right of residence for up to three months in the implementing regulations is subject to the condition that the person concerned “does not become an unreasonable burden on the social welfare system of the State”, which is not in conformity with Article 6(1) of the Directive stipulating unequivocally that this right of residence is to be afforded “without any conditions or any formalities other than the requirement to hold a valid identity card or passport”.

With regard to residence for a duration longer than three months, a significant majority of Member States have exercised the option in Article 8(1) of the Directive to require EU citizens to register with the relevant national authorities within three months (or longer)³ of their arrival upon which a registration certificate is issued (*Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden*). As observed in the 2006 Report, a residence permit was still being issued to EU citizens in *Lithuania* as amending legislation to replace this permit with a registration certificate was pending by the end of 2007. In *France*, the 2007 measures transposing the Directive oblige EU citizens to register with the mayor of the locality in which they wish to establish their habitual residence, although they are not required to hold any document to this effect. While Article 8(1) stipulates that sanctions for the failure to register are permissible provided they are proportionate and non-discriminatory, the maximum penalty of approximately EUR 2,250 in *Cyprus* would appear to be disproportionate. In the *Netherlands*, the maximum sanction includes imprisonment for up to one month or a fine of the second category (which is not defined). In contrast, the maximum fine in *France* for a failure to register is EUR 90.

In the *Czech Republic, Ireland, Slovakia* and the *United Kingdom*, EU citizens are under no obligation to register, although they are entitled to apply for a registration certificate if they so wish. As noted in the 2005 and 2006 Reports, such documentation may still be necessary to prove length of residence in the country for other reasons, such as naturalization, although this is no longer the case in *Ireland*, where the Department of Justice, Equality and Law Reform advised that other evidence can be put forward to prove length of residence, such as the existence of a mortgage, bank accounts or taxes paid.

³ E.g. in *Portugal*, the obligation to register falls within 30 days after a period of three months.

The application of EU free movement law with regard to registration of residence was hampered in some Member States by lengthy delays in the issue of registration certificates, which is not in conformity with Article 8(2) of the Directive stipulating that such certificates are to be issued immediately. This problem was also identified in the 2005 and 2006 Reports. In *Cyprus*, there was a waiting list of up to one year and more for appointments to obtain the registration certificate, which would appear to be mainly the result of staff shortages in the regional office in Nicosia, which receives more than half of the applications from EU citizens. In *Finland*, the registration process continued to take up to two months in certain police districts (e.g. Helsinki), which is explained by the rather large number of registrations compared with the small number of staff responsible for handling them. Attention was also drawn to similar delays in the 2005 and 2006 Reports, which raises the question why more resources have not been put into place to process applications. In the *United Kingdom*, while the administrative instructions stipulate that such certificates should be issued “immediately” on application and that the UK Home Office’s published aim is to issue them within 20 days, disclosure of information obtained under the Freedom of Information Act indicates that, in practice, it can take more than six months for residence certificates to be issued. Indeed, in the first three-quarters of 2006, over 1,700 applications for residence certificates had not been completed within six months. Similar delays also apply to the issue of residence cards for third-country national family members and documents certifying permanent residence.

Discriminatory national provisions relating to residence are identified in some reports that impact adversely on third-country national family members. In *France*, the requirement that third-country national family members apply for a residence card within two months of arrival if the planned period of residence is for more than three months was recently found by the *Conseil d’Etat* to be in clear violation of Article 9(2) of the Directive, which stipulates a minimum period of three months. In the *United Kingdom*, a specific legal regime operates only in respect of the entry of third-country national family members whereby UK Immigration Officers have the power at the border to revoke their documents, including residence documents, if they are not satisfied that they are the family members of a qualified EU citizen.

The rules in Member States transposing the residence conditions in Articles 7 and 8 of the Directive are generally unproblematic, although there are some irregularities and regression from the position prior to transposition in some Member States. For example, in *Italy*, applicants for a registration certificate have to prove that they enjoy comprehensive sickness insurance cover and, in the case of a private insurance policy, need to attach a copy of an Italian translation of the policy to the application. Previously, however, a voluntary registration with the Italian health care office, which was granted on payment of a fee, was considered valid sickness insurance for the purpose of residence. In *Latvia*, the meaning of the “sufficient resources” condition for students was defined as 50 per cent of the minimum wage, which is an amount higher than the threshold below which Latvian nationals become eligible for social assistance. Therefore, by tying this condition to a fixed amount without taking into account the personal situation of the person concerned and to a higher level than the social assistance

threshold is not in conformity with Article 8(4) of the Directive. A similar issue arises in *Lithuania*, where the “sufficient resources” condition was fixed at one minimum monthly salary for foreigners (including EU citizens) and at 50 per cent of this salary for students. Moreover, as also noted in the 2006 Report, the condition of proof of accommodation remained in place. A positive development in the *Netherlands* was the amendment to the Aliens Circular in April 2007 clarifying that the “sufficient resources” condition in relation to economically non-active EU citizens can be satisfied by the existence of resources abroad so long as the EU citizen is able to rely on them unconditionally. In *Spain*, the residence conditions were not transposed at all by the Royal Decree, which came into force in April 2007, and this omission raises the concern that the conditions might therefore be interpreted restrictively by the authorities.

With regard to the right of permanent residence, the administrative courts in *Germany* ruled, in accordance with Article 16 of the Directive, that this right arises after five years continuous and lawful residence and cannot be subject to further conditions, such as non-dependence on social assistance or that the previous five years on the territory have to be connected with the exercise of free movement rights under Community law. This position appears to be more favourable than the rulings of Asylum and Immigration tribunals in the *United Kingdom*, which have adopted a narrow interpretation of this provision (erroneously in the view of the UK rapporteurs), namely that lawful residence of EU citizens from new Member States prior to their accession cannot be taken into account in the calculation of the five-year period. In *Latvia*, the Immigration Law stipulates that foreigners must pass an official language test before they can be granted permanent residence. Given that the definition of foreigner also encompasses EU citizens and their family members, this means that the legislation is potentially applicable to them, although in practice no language test is applied according to information provided by the Office of Citizenship and Migration Affairs. Similarly, in *Lithuania*, foreigners are now required to pass a state language and Constitution exam before permanent residence can be granted and it remains unclear whether this provision also applies to EU citizens and their family members, although it would appear that it does not since the adoption in October 2007 of an Order relating to the issuance of the permanent residence certificate.

There are still provisions in Member States concerning the issue or non-issue of residence permits that appear to conflict with Community law. In *Hungary*, and as also observed in the 2005 and 2006 Reports, the conditions for rejecting the application for or withdrawing the residence certificate on account of the EU/EEA national suffering legally defined diseases endangering public health occurring within three months of his or her arrival is not in conformity with Article 29 of the Directive, especially as HIV/Aids appears to still be included in the national list of diseases endangering public health.

Concerning retention of the right of residence, as outlined in Article 14 of the Directive, it is notable that the legislation adopted in *Italy* transposing this provision does not mention paragraph 3 prohibiting automatic expulsion of the EU citizen or his or her family member if they have recourse to the social assistance system of the host Member State. Furthermore, Article 15(2) stipulating that expiry of the identity card or passport on the basis of which the

person entered the Member State and was issued with a registration certificate or residence card cannot constitute a ground for expulsion is not transposed.

TREATMENT OF JOB-SEEKERS

There are explicit national rules in a number of Member States (*Denmark, Finland, France, Hungary, Malta, Netherlands, Sweden*) on the right of job-seekers from other Member States to enter and reside in their territory for more than three months. In the *Netherlands*, job-seekers have a right to residence for more than three months if they can demonstrate that they are still looking for work and have a real opportunity of obtaining it. But they also have to register their residence after three months like all other EU citizens. However, in *Sweden*, job-seekers are expressly precluded from the obligation to register their residence after three months and the condition in Article 14(1) of the Directive of not becoming an unreasonable burden on the social assistance system within the initial three-month residence period is not applicable to them. In *Denmark* and *Malta*, express legal provisions stipulate that EU job-seekers may reside in the country for up to six months, although they will not be asked to leave on expiration of the six-month time limit if they can demonstrate that they continue to look for work and have a real chance of obtaining employment. In *Hungary*, the new law transposing the Directive that entered into force on 1 July 2007 is more favourable and flexible than former provisions because it does not specify a six-month time limit for the residence of EU citizens who are job-seekers. However, no practice has been recorded.

In other Member States, however, it is only implicit under the national rules that job-seekers enjoy a right of residence. Consequently, this means that in those Member States where registration of residence is required under national rules, job-seekers are in practice under an obligation to register their residence if they intend to stay for a longer period than three months (e.g. *Estonia, Lithuania*).⁴ Similarly, in *Poland*, the obligation of EU citizens to report their presence to the authorities within four days (see above) also applies to job-seekers. In *Latvia*, EU citizens do not need to obtain a registration certificate if they reside in the country for up to six months within a one-year period for the purpose of employment. In the view of the national rapporteur, this means that job-seekers who have not been employed in the country previously may apply for a registration certificate if they meet the general conditions for EU citizens who wish to reside in Latvia without the status of an employee or as self-employed persons. In *Italy*, the lack of explicit provisions means that it is unclear whether a job-seeker would be treated as a worker or non-worker and therefore required to have sufficient economic resources. However, in *Poland*, the understanding of the rapporteur is that the job-seeker would need to possess sufficient financial resources to continue looking for work for a period exceeding three months. In the *United Kingdom*, job-seekers do not usually encounter difficulties with regard to their residence unless they apply for social benefits

⁴ This constitutes a regression in *Lithuania* as previously the law stated expressly that EU job-seekers were not required to register for six months.

In the newest Member States, Article 14(4)(b) of the Directive, which provides that “Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged”, has been transposed in *Romania* but not in *Bulgaria*.

DEPARTURE

The “sliding scale” of rules in Article 28 of the Directive relating to the expulsion of EU citizens has, on the whole, been transposed faithfully in Member States. However, gaps exist in a number of Member States. For example, in *Bulgaria*, the strengthened safeguards in Article 28(2) of the Directive regarding the expulsion of EU citizens who are permanent residents have not been transposed. Moreover, there is no explicit reference to the “best interests of the child” and the 1989 UN Convention on the Rights of the Child in the transposition of Article 28(3)(b). The UN Convention is also not expressly mentioned in the regulation transposing this provision of the Directive in *Ireland*. In the *Netherlands*, the obligation to take account of the general considerations listed in Article 28(1) of the Directive before an expulsion decision is taken is not transposed in the Aliens Circular with the result that the more general weighing of interests found in the General Administrative law is applicable. Neither has this obligation been transposed in *Slovakia*, while in *Finland* it is only activated in the case of deportation (i.e. applicable to those EU citizens and their family members who have registered their residence or have obtained a residence card) and not refusal of entry, which is problematic because EU citizens and their family members may already have entered the country and resided there de facto for some time even though they have not registered their residence or been issued with a residence card. In *Spain*, the Royal Decree transposing the Directive appears to limit the application of the Article 28(1) considerations in the case of the expulsion of EU citizens or EEA nationals who are permanently resident whereas no such qualification appears in the provision itself.

As noted in the 2005 and 2006 Reports, in some Member States there is little or no indication in the domestic implementation of Community rules of what is actually meant by public health, public policy and public security. This is the case in *Bulgaria*, the *Czech Republic*, *Estonia* and *Slovakia* where these grounds are reiterated in the national legislation but where no definition is available. Consequently, the rapporteur for *Slovakia* concludes that the provisions in the national legislation are vague and leave a lot of room for police discretion, a situation that is compounded by the lack of administrative or judicial practice. In *Italy*, only “imperative grounds of public security” in Article 28(3) of the Directive are defined in the transposing legislation. In *Lithuania*, there continue to be no specific provisions in the foreigners’ legislation regarding the departure of EU citizens, which means that they remain vulnerable to expulsion on broader grounds than those stipulated in the Directive. Moreover, no specific rules exist regarding the detention of EU citizens, although there is still no practice substantiating possible inconsistencies with Community law.

It would appear that in some Member States criminal convictions alone may, at least on the

face of the law, constitute a reason for the expulsion of EU citizens without considering the personal conduct of the individual concerned to determine whether s/he constitutes an actual and serious threat to the fundamental interests of society (i.e. on grounds of public policy and public security). Indeed, this is the position in administrative practice in *Bulgaria* where previous criminal convictions are considered as a threat to public order and constitute sufficient grounds to deport a foreigner. Given that Article 33(1) of the Directive has not been transposed, this practice could potentially be applied in respect of EU citizens. In *Finland*, on the other hand, the rapporteur notes a distinct improvement in the conformity of judicial decisions with Community law on the expulsion of EU citizens. Similarly, in the *United Kingdom*, there have been a number of positive adjustments to the rules applicable to the deportation of EU/EEA citizens, namely deletion of the list of criminal offences justifying deportation without the need to demonstrate personal conduct or evidence of propensity to offend and abandonment of the policy on deportation of EU/EEA citizens sentenced to imprisonment for two years or more. However, the UK Borders Act, which came into force in October 2007, contains a provision on the automatic deportation of foreign criminals (including EU/EEA citizens). This provision has not yet been brought into force but may be contrary to Community law.

In *Romania*, while the principal of proportionality is adhered to in the letter of the law, EU citizens may also be removed (or refused entry) if they have been declared as “undesirable”, a concept which is not elaborated and which could raise questions in the context of its compatibility with Community law particularly if the declaration was issued before freedom of movement principles began to apply. A similar potential problem has been identified in *Slovakia* regarding the refusal of entry to foreigners who are deemed to be “undesirable persons” (see also the section on “Entry” above). In *Slovenia*, as with entry, deportation can be ordered when the registration of residence (or permanent residence) has been refused to EU citizens or their family members on the grounds that they pose a threat to *inter alia* “international relations”.

There are recorded instances in Member States where authorities continue to use national rules on foreigners to expel EU citizens and their family members to circumvent the more stringent provisions of Community law despite the fact these rules require that prevalence is given to the latter. EU citizens from the new Member States, particularly Bulgaria and Romania, and third-country national family members are most affected. The practice in *Italy* gives rise to particular concerns given also that the law was amended in November 2007, both procedurally and substantively, to facilitate the expulsion of EU citizens for serious reasons (i.e. on grounds of State security and imperative grounds of public security). No official data is available, but reports in the Italian press indicate that 510 EU citizens were expelled in 2007 and that 181 orders were based on imperative reasons of public security, which means that the order has immediate effect. The only published judgment concerned a challenge by a Romanian national who was facing expulsion on this ground because she was a prostitute. The judge held that the fact that the person in question was a prostitute was insufficient basis

for the expulsion decision. In the *Netherlands*, the practice of immigration authorities to apply national rules of expulsion on public order grounds continued in 2007 despite the judgment of the Court of Justice in the infringement procedure against the Netherlands in June of that year (Case C-50/06). Moreover, the Dutch rapporteurs also refer to pilot projects undertaken by local police in Rotterdam and The Hague that explore the limits of Court of Justice case law regarding possibilities for the expulsion of EU citizens who have committed a series of minor offences and caused major nuisance to the public.

In *France*, the measure of “taking a foreigner back to the frontier” (*reconduites à la frontière*) is not to be used in the case of EU citizens because the criteria for its activation do not conform to Community law. However, administrative practice indicates that this measure was used during 2007 in respect of Bulgarian and Romanian nationals. Furthermore, the public policy exception was interpreted broadly in respect of these nationals, although the administrative courts have since confirmed that unauthorized work by Bulgarian and Romanian citizens (in respect of which the transitional provisions on their freedom of movement are still operable) does not amount to an infraction on the basis of which an expulsion measure can be taken. In *Greece*, a first instance decision (adopted in accordance with the directly effective provisions of the Directive and before its actual transposition and implementation at the national level) ruled that the permanent expulsion of a Bulgarian national pursuant to a custodial penalty could not take place if it did not conform to the conditions in Articles 27-33 of the Directive (but see also below on the compatibility of measures of permanent expulsion with Community law). In *Ireland*, there were a series of deportations in July 2007 against Romanian nationals without visible means of support on the basis that they had become an unreasonable burden on the social welfare system, a response that was in sharp contrast to the previously liberal regime operating in this area.⁵ While the 2007 law in *Cyprus* transposing the Directive faithfully reflects its provisions concerning the permissible restrictions that can be imposed on the right of free movement on grounds of public policy, public security or public health, the rapporteur observes that throughout 2007 concerns were expressed by human rights NGOs about the continuing practice of immigration authorities to deport EU citizens.

With regard to third-country national family members, in *Austria*, a number of Administrative Court procedures have been postponed (i.e. unlimited residence ban against a Nigerian national married to an Italian and the expulsion of a Serbian national who is the son of a German) pending the judgment of the Court of Justice in response to a request for a preliminary ruling by the Administrative Court (Case C-551/07, *Sahin*).

In *Denmark*, the judicial practice of permanent expulsion or life-long exclusion of EU citizens who have been convicted of serious criminal offences has been questioned from the

⁵ Moreover, in 2007, 520 nationals from the EU-10 and EU-2 Member States (with Polish nationals being in the majority), who fail the habitual residence condition attached to social assistance payments, were repatriated from Ireland on a voluntary basis by the Reception and Integration Agency.

point of view of the principle of proportionality in Article 27(2) of the Directive and the case law of the Court of Justice (Case C-115-116/81, *Adoui and Cornuaille* and Case C-348/96, *Calfa*).

As noted in previous Reports, the courts in a number of Member States have confirmed that EU citizens cannot be presented with the option of expulsion in lieu of serving a term of imprisonment (where this possibility exists for foreign offenders under national law) because this would not conform to Community law (*Italy* with reference to a Supreme Court judgment in 2004), or they cannot receive an additional penalty of expulsion except in connection with public policy or public security grounds (*Portugal* with reference to a Supreme Court of Justice judgment in 1991) as indeed is also foreseen in Article 33(1) of the Directive. In *Spain*, however, this provision has not been transposed on account of the July 2006 Government Memorandum, which refers to the likelihood that such a measure will be ineffective in the light of the abolition of internal borders.

The public policy exception has also given rise to the interesting question of the validity of restrictions on freedom of movement imposed on EU citizens in their own countries. In *Romania*, the general practice of limiting the free movement of Romanian nationals returned from other Member States under a readmission agreement for a period of up to three years, was found by national courts to be a disproportionate response and not in conformity with the strict Community interpretation of the public policy exception (see also the recent judgment of the Court of Justice in Case C-33/07, *Jipa*). On the other hand, in *Germany*, the refusal to grant a passport to a German national with substantial tax arrears was considered to be a valid measure under Community law.

REMEDIES

There are a number of issues identified in the national reports relating to new developments in Member States, as well as ongoing concerns, that impact on the transposition or otherwise of the provisions on remedies in Directive 2004/38/EC.

The new foreigners' jurisdiction established in *Belgium* (*Conseil du Contentieux des étrangers*), and operational since 1 June 2007, is applicable to all foreigners, including EU citizens. However, it gives rise to concerns in respect of its compatibility with Article 31(3) of the Directive given that it is unclear whether the new body will be able to fully review the facts and circumstances on which the decision is based and not merely the legality of the decision. The law establishing this jurisdiction appears to indicate only the latter possibility despite the contrary assertions of the Belgian authorities. A similar procedural problem of incomplete review was identified in the *Netherlands* where a judge asked to decide on the lawfulness of the detention of a Belgian national was precluded by the Judicial Division of the Council of State from also considering the legality of the decision declaring the EU citizen to be undesirable at the end of her period of imprisonment, which, according to the rapporteurs, means that there is a real risk of continued detention in breach of Community law.

In *Luxembourg*, the draft law introduced in November 2007 that will complete transposition of the Directive constitutes a significant improvement to the appeal mechanisms currently in

place in respect of decisions on refusal of entry and residence and expulsion in that it provides for detailed provisions. As at the end of 2007, remedies for these decisions were provided by the general procedural rules of administrative tribunals and actions sought under these rules did not have suspensive effect. In *Spain*, transposition of the provisions in the Directive concerning notification of decisions (Article 30) and procedural safeguards (Article 31) is only partial. With regard to Articles 30(1) and (2), the transposition is indirect referring to provisions in the general legislation on aliens and the common administrative procedure, while Article 31(3) stipulating that the “redress procedures shall allow for an examination of the legality of the expulsion decision, as well as on the facts and circumstances on which the proposed measure is based”, is not expressly referred to in the Spanish legislation.

In *Austria*, as observed in the 2005 and 2006 Reports, both Supreme Courts (i.e. the Constitutional Court and the Administrative Court) interpret the rules implementing the Court of Justice’s judgment in *Dörr and Ünal* (C-136/03), which calls for a remedy with suspensive effect under Article 9 of Directive 64/221/EEC (since repealed by Directive 2004/38/EC), as applying to Turkish workers. But the dispute between the courts concerning whether the national provisions are applicable to third-country national family members of Austrians who have not exercised their free movement rights has not been resolved.

ACCESS TO EMPLOYMENT

The issue of equality in access to employment for citizens of the Union outside their state of nationality engages a very wide number of different issues and fields of law and practice. As access to employment in this chapter excludes the public service, the subject matter is founded in civil law and the relations of individuals and enterprises in the private sector. As this field includes so many different areas of economic enterprise, it is not always straight forward determining what the applicable law is. In some cases there are exceptions for certain types of economic activity. In addition, because this question is one within the business field, transparency is not always evident as regards the practices.

It is apparent from the national reports that EU-10 and EU-2 Member States have made progress in reducing and eliminating nationality exclusions in access to employment but there are still problems. Tribunals in a number of Member States appear to perceive their role as that to uphold national law rather than to ensure EU law is properly applied. This creates problems for individuals seeking remedies against provisions of national law which are of dubious consistency with EU requirements. Language requirements in the private sector appear to be problematic only in some Member States. Generally they are applied in the regulated professions but in some Member States there are legal provisions regarding language requirements which apply to the private sector as well though these are more limited. Mainly in these cases a proportionality test limits the deterrence effect of such language obligations to an acceptable level. But in some states, as for instance Luxembourg, language requirements represent a substantial obstacle for EU migrant workers. Finally, a very mixed picture emerges regarding the transposition of the directive on recognition of diplomas. While some Member States seem to have successfully achieved the goal, others are only partially there or even have yet to start the process.

The following themes are dealt with specifically in this chapter:

- equal treatment in access to employment;
- language requirements;
- recognition of diplomas.

Of the three, the third has been the subject of substantial legislative activity as the transposition deadline for the new directive on recognition of diplomas (2005/36) passed during this reporting period. In this chapter we will consider each of the three areas in turn drawing together the key features of 2007.

EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

Austria: the law on employment agencies has no specific provision on non-discrimination though the general law on non-discrimination applies, it does not exclude discrimination on the basis of nationality.

Belgium: there has been no legislative activity on this subject in 2007 nor have any cases come before the courts.

Bulgaria: while the law prohibits discrimination on the basis of nationality there appears to be a gap in legislation where by EU nationals who reside for less than three months can get the assistance of employment agencies but after three months they can only do so if they have registered and no provision is made to issue registration certificates to job seekers.

Cyprus: there is a general prohibition on discrimination on the basis of nationality as regards EU nationals.

Czech Republic: the relevant labour legislation requires that EU nationals (and their family members) be assisted in their search for work in the same way as Czech nationals.

Denmark: the main law which prohibited discrimination on the labour market does not specifically mention nationality though this might be considered indirect discrimination under the existing Danish legislation. EEA nationals are entitled to register with job centres, to use the facilities and to receive guidance though the EURES centres which established at the beginning of 2007 are to be closed in 2008. Their tasks will be moved to 3 international centers which will include one with a special Polish speaking hotline. A new responsibility has been given to the Danish Institute of Human Rights to receive complaints on prohibited discrimination not only on the grounds of race or ethnic origin, but also on grounds of religion or belief, political opinion, sexual orientation, age, handicap and national or social origin. So far no case of an EU national has come before it on differential treatment in the labour market. Two cases of EU nationals have come before it regarding discrimination on the basis of ethnic origin – a Dutch national of Indian origin who was asked for further evidence of Dutch nationality beyond his passport – in principle the complaint was upheld but on the specifics it failed on the basis that there are too many forged Dutch passports in circulation thus making it reasonable for the potential employer to ask for more evidence; secondly, a German national was offered a holiday house at a higher rate because of his German address than would have been the case if he had a Danish address. The Committee held that the difference was objectively justified because the company had a wide discretion in its commercial activities.

Estonia: according to the legislation on wages and employment contracts discrimination on the basis of nationality is prohibited.

Finland: the law on employment contracts prohibits discrimination on the basis of nationality. A considerable number of EU nationals, however, arrive with existing job offers so few need the services of employment agencies.

France: as France has applied throughout 2007 the restrictions on workers permitted under the accession agreements 2004 and 2007, Member State workers are discriminated

against as regards access to employment. The exact provisions of the transitional restrictions have given rise to jurisprudence.

Germany: the Social Code does not distinguish between German and EU nationals thereby providing a level playing field.

Greece: a ministerial decision requires non discrimination between Greek and other EU nationals as regards new job opportunities.

Hungary: there are general provisions of law which require non discrimination in recruitment in the private sector and in wages and working conditions. A system of temporary work book employment permits a high level of labour market flexibility while the individual retains social security rights – it is open to both Hungarian and EU nationals. There is equal access to job placement services for EU nationals in accordance with the law.

Ireland: EU nationals are entitled to access to training and employment services on the same conditions as Irish nationals.

Italy: national law prohibits discrimination on the basis of nationality and national origin in respect of employment.

Latvia: according to national law, employers may not discriminate on the basis of nationality against nationals of other Member States. There has never been any provision allowing discrimination on the grounds of nationality regarding employment.

Lithuania: there is a general obligation of non-discrimination in employment. In light of labour shortages, Lithuanian employers have been advertising for workers across the EU but mainly in 2004 and 2007 Member States.

Luxembourg: one important improvement has been the withdrawal of obligations that third country national spouses of migrant EU nationals obtain work permits.

Malta: while there is legislation which prohibits discrimination in employment, nationality is not a prohibited ground. However, the definition provided by the Employment and Industrial Relations Act is not an exhaustive one.

Netherlands: there is general legislation which prohibits discrimination on the basis of nationality in employment.

Poland: EU nationals are entitled to take employment on the same basis as Polish nationals. Previous restrictions have now been removed. In principle employment agencies are under a duty not to discriminate against EU nationals.

Portugal: EU nationals are entitled to equal treatment with Portuguese nationals as regards access to jobs. However, some sectors are protected such as lawyers (including notaries).

Romania: there is a general requirement of non discrimination in employment including on the ground of national origin. This applies to EU nationals.

Slovakia: there is a general prohibition on discrimination against EU nationals as regards employment. There is a right to access to employment services which is also open to EU nationals on a non discriminatory basis.

Slovenia: there is a general non-discrimination requirement regarding employment which includes discrimination on the basis of national origin. The principle of equality applies to the

unemployed EU, EEA and Swiss federation citizens, too. The inconsistency can be traced between the provisions of different acts relating to the kind of permit which is provided for as a condition on the basis of which the unemployed EU, EEA and Swiss federation citizens may register in the evidence of unemployed persons in Slovenia.

Spain: employers are under a non-discrimination obligation as regards EU workers. Employment agencies are required to treat EU workers and their family members in the same way as Spanish nationals.

Sweden: nationality requirements in the private sector apply only if the post is regulated by the Security Protection Act which relates to protection against espionage, sabotage and other crimes against state security. Employment agencies are under no restrictions beyond these.

UK: the existing legislation prohibits employment agencies from discriminating on the grounds of nationality. New legislation provides a wider definition of indirect discrimination and harassment but does not apply to the grounds of colour or nationality.

LANGUAGE REQUIREMENTS

Austria: as regards the private sector there are no provisions on language requirements.

Belgium: no problems were recorded as regards language requirements in the private sector.

Bulgaria: there are no language requirements applicable to the private sector.

Cyprus: in the private sector there is no language requirement. However, there are language barriers to registration in regulated professions – real estate agents licences being a particularly contentious one. Legislation to remedy the problem was adopted. There are still problems as regards language requirements for building contractors and tourist guides.

Czech Republic: a language requirement can be made mandatory in the private sector depending on the profession to be exercised, but this is not regulated by law.

Denmark: a National Labour Market Authority circular states that language is a formally neutral requirement. However, a language requirement may constitute indirect discrimination when this requirement is not objectively justifiable. There is assistance for all foreigners, including EEA nationals, to learn Danish though they must pay a fee which depends on the length of stay in Denmark – the shorter the higher the fee.

Estonia: in the public sector there are strict requirements on language ability.

Finland: while there are no formal requirements for the private sector it is common for employers to require a knowledge of either Finnish or Swedish. However, in some sectors where English is the working language (for instance at IT firms such as Nokia) neither language is required. A state agency monitors job advertisements to check whether businesses are requiring too high language skills or nationality conditions.

France: there is a legal requirement that foreigners who plan to live in France have sufficient knowledge of French (article L.341-2 Code du travail). This can be important in the regulated professions and specifically medical ones. The mechanisms for proving language knowledge are set out in circulars.

Germany: there is no general information available on language requirements in the private sector – this is a matter of contractual freedom.

Greece: while language requirements are permitted by law they must be justified by genuine and determining occupational requirement.

Hungary: language requirements are permitted so long as they are proportionate and fulfil a genuine job requirement. Employers are free to set their own levels within this legal framework.

Ireland: in the private sector there is no legal requirement regarding language knowledge. This is a matter for employers. Exceptionally, all persons seeking to exercise a profession of law must have knowledge of Irish, and in the medical professions a knowledge of English. For teachers only those teaching Irish must be proficient.

Italy: while Italian is the official language of the country, special status is accorded in some regions to French, German and Slovenian. School teachers must prove their knowledge of Italian by submission of a certificate CELI 5 Doc but this is not required of teachers who attended primary or secondary school in Italy or at an Italian school abroad or graduated from an Italian university.

Latvia: there are high levels of language knowledge required for the regulated professions. There are different levels of language knowledge specified in the legislation and employers are required to ensure that employees have the necessary level commensurate to the job level. Where the job is not one regulated by legislation it is up to the employer to fulfil a legal requirement that the knowledge of staff is sufficient for the purpose of the job (consumer protection). The means by which the individual can satisfy a language requirement are inflexible: primary or secondary school certificates or a diploma issued by the state language proficiency examination commission.

Lithuania: there is a legal obligation for employees in some sectors to have sufficient knowledge of Lithuanian. This applies in the fields of communications, transport, health care and service provision to residents. Temporary service providers have some exemptions, even in health care.

Luxembourg: knowledge of three languages is a condition required by private sector employers. This results in problems for nationals of other Member States who may speak German and French but lack Luxembourgish. Only 48% of salaried workers state they use Luxembourgish on the labour market. Family members of EU civil servants often encounter problems.

Malta: there are no language requirements applicable to the private sector.

Netherlands: there are no language requirements applicable to the private sector but there have been complaints about jobs requiring 'native speakers'.

Poland: private sector employers are not required to check the language knowledge of employees unless the employee is in a regulated profession.

Portugal: there are no specific language requirements applicable in the private sector.

Romania: the private sector is not regulated as regards language requirements. However, in some areas such as regards credit institutions if none of the directors holds Romanian nationality at least one of them must speak Romanian as assessed by the Romanian National Bank.

Slovakia: the private sector is not covered by language knowledge requirements. However, in some regulated professions there is a language requirement such as in health care services and law.

Slovenia: language requirements are not applicable to the private sector unless the employee is in a regulated profession.

Spain: private sector employers are not under obligations as regards language facilities. In fact, many job advertisements require employees to be able to speak English!

Sweden: In the private sector language requirements are permitted, provided that they are in accordance with the principles of non-discrimination and proportionality.

UK: the private sector is not subject to any language knowledge requirements.

RECOGNITION OF DIPLOMAS

Austria: In December 2007 the transposition of Directive 2005/36 was enacted as regards lawyers and notaries. In the other professions covered by the directive a law was adopted in 2007. So far one administrative court decision (23.10.2007, 2006/06/0173) has considered the problem of recognition of diplomas outside the scope of the directives and found that other aspects of EU law were engaged.

Belgium: a mixed method of transposition was adopted regarding the directive – horizontal transposition through a basic law and vertical transposition as soon as the authorities are entitled to take enforcement measures for regulated professions. Between August and December the necessary legislation was adopted.

Bulgaria: there are two strands of recognition: academic and professional. Each strand is subdivided into numerous parts all with separate requirements. The new directive has been transposed. There is a substantial number of regulated professions in the country so the Ministry of Education and Science has a website to provide assistance and links to the competent authorities for each.

Cyprus: legislation was before parliament to transpose the new directive though the administration was already seeking to apply the new requirements.

Czech Republic: legislation has been introduced to implement the new directive which includes both provisions on general recognition and the specific professions. Problems have arisen before the courts regarding recognition of professional diplomas for service providers (as opposed to persons exercising establishment) and the attempt to make them register in the Republic (notwithstanding their existing registration in their country of origin). The Republic was condemned by the ECJ for failure to comply with EU law on recognition of diplomas and has now remedied the situation.⁶

Denmark: where the profession is regulated, the recognition of foreign diplomas under the directive includes registration with the relevant ministry or an agency, CIRIUS. Unregulated

⁶ See decisions No 3 As 12/2006-52, Supreme Administrative Court and no 419/2006 Coll of the Constitutional Court.

professions do not require any authorisation. The transposition of the directive permits the temporary or occasional practice of a profession without registration.

Estonia: the legislation requires all non Estonians to register if they plan to engage in regulated professions and for the state agency to assess the equivalence of the qualifications. There is no initiative to transpose Directive 2005/36.

Finland: recognition of qualifications applies almost exclusively as regards post secondary education. In the private sector, employers assess competence except as regards the regulated professions. Directive 2005/36 has been transposed for regulated professions.

France: a substantial number of regulated professions are included in this system. The new directive has been transposed. Romanian nurses, for instance, appear to be subject to heavy equivalence criteria in particular but in general the complexity of the system does not assist the individual in determining whether a specific decision is justified or not regarding his or her qualifications. A decree adopted in February 2007 provides that nationals of other Member States are entitled to take jobs in the management and direction of medical services establishments (clearly related to the substance of the *Burbaud* decision of the European Court of Justice) where they qualify on the basis of their diplomas and professional qualifications as set out elsewhere in legislation.

Germany: one key issue for the implementation of the directive is that this is a Länder responsibility. For some sectors and in some Länder the transposition is complete, in others less so. Where there is Federal competence the necessary measures have been adopted.

Greece: transposition of the directive is not yet complete in all areas. Problems continue to exist as regards the recognition of diplomas granted by foreign institutions in Greece.

Hungary: The transposition of the directive was not yet completed in 2007 though it had begun. Particular problems were encountered with the automatic recognition of Romanian health care diplomas as regards a so-called conformity date for which in 2007 none had been established for Romania.

Ireland: there is a variety of legislative acts which transpose the EU directives applicable before the new directive. A national agency seeks to facilitate the recognition of foreign diplomas which agency carries out its work free of charge for job seekers, employers and students. Work on transposition of the new directive was still under active consideration at the end of 2007.

Italy: there is some complexity to the situation in Italy. The act transposing Directive 2005/36 states that a document issued by a national authority of another Member State that recognizes an Italian diploma is not a professional qualification for the purposes of recognition in Italy. It is not clear what level of knowledge of Italian language is required by practicing various professions. There is, however, a procedure for recognition of qualifications where part of the study has taken place in Italy and part in another country but the diploma is issued by an EU based institution. For a substantial number of professions, this recognition is subject to an aptitude test or adaptation period, the cost of which the applicant must bear. The legal position on foreign (non-professional or academic) diplomas is that they are valueless unless

otherwise provided by law. Responsibility is shared between universities, which are entitled to decide on recognition for the purposes of studies and the state for other purposes. Elementary and secondary school diplomas from other EEA states are recognised subject to an Italian language and culture test. The equivalent of Italian upper secondary school diplomas are recognised only on the basis of an exam.

Latvia: the new directive has not been transposed by the end of the reporting period. The previous legislation has been transposed in the sectors covered.

Lithuania: recognition of diplomas is spread among a number of different legislative acts. Directive 2005/36 has been transposed into these acts. The Ministry of Social Security and Labour is responsible for the regulated professions under which there are a number of bodies responsible for different sectors and parts of the process. The majority of applications relate to qualifications from Russia, Belarus and Ukraine.

Luxembourg: sectoral amendments to legislation have brought into force the new directive. There is new legislation in particular on lawyers. Already there have been issues brought before the national courts.

Malta: it appears that the new directive has been transposed. A specialised centre has been established which is responsible for evaluating diplomas and assisting interested parties (among other duties). The system is divided into regulated and non-regulated professions which are dealt with separately.

Netherlands: most of the new directive has been transposed during the reporting period. There are two organisations responsible for evaluating foreign diplomas which are coordinated.

Poland: the new directive has not yet been transposed. Poland exercises the system of probationary periods in a number of the regulated professions.

Portugal: the law was amended in 2007 though it is not clear whether there has been full transposition of the directive as a result. In general, however, the system of recognition of diplomas seems to be straight forward and user friendly.

Romania: it is not apparent that the new directive has been transposed. The system of recognition appears fairly streamlined with deadlines in the region of 60 and 30 days for institutions to reach decisions.

Slovakia: the new directive has been transposed. The new legislation respects the procedural requirements of articles 23 – 20 of the directive.

Slovenia: the national legislation was amended in 2005 and establishes a system of recognition of diplomas which is free but cumbersome. The 2005 directive was transposed at the beginning of 2008.

Spain: legislation regarding recognition of diplomas was amended in 2006 establishing a new system which applies both to EU and foreign diplomas. The adequacy of the diploma is assessed and if deemed necessary complementary training is required of the individual. Further measures have been adopted in the field of private security to satisfy the European Court of Justice decision which found the Spanish system not in conformity with EU law. A

further ECJ judgment on the failure of Spain to regulate recognition of hospital pharmacists diplomas has not yet been rectified. The national courts have been active with cases by individuals whose claims to recognition of diplomas have been rejected but the results seem quite varied.

Sweden: the new directive has been transposed in all sectors except real estate agents and security guards which were still under consideration at the end of the reporting period.

UK: the new directive has been transposed. The Department of Education and Skills (now Department of Children, Schools and Families) provides advice on its website and links for further information from the regulatory bodies for the professions covered.

EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

1. WORKING CONDITIONS, SOCIAL AND TAX ADVANTAGES

Working conditions

In all EU Member States there exist legal obligations requiring formal equality of treatment between the nationals of the Member State and those of other Member States regarding working conditions. This equal treatment is mostly regulated in the constitution, general non-discrimination legislation or general labour legislation. In some countries equal treatment of EU citizens is also directly based on Regulation 1612/68. In *Spain* the principle of equality of treatment is in 2007 directly linked to Directive 2004/38.⁷ It also guarantees non-discrimination in Spain for reasons other than nationality.

The *Belgian* report pays under this chapter attention to case C-212/06 on the relationship between Regulation 1408/71 and article 39 EC, in which the question of social rights given by autonomous Communities in a Federal State has been answered by the ECJ. According to this report the question of equality of treatment between citizens within the State will become more and more important. A Flemish Code of Public Housing, containing the condition that access to social housing is dependent on the willingness to learn the Flemish language appears to be indirect discriminatory.

Greek citizens or people of Greek origin older than 68 years and not having sufficient resources are granted a special pension and free medical care.⁸ This pension and medical care are not granted to other EU citizens who reside in Greece, which can be seen as discrimination.

In the *UK* a number of problems as regards discrimination against EU nationals relate to EU 8 and EU 2 nationals. First, the application of the right to reside test has had a substantial impact on their ability to access social benefits. Secondly, some trade unions have expressed concerns about their exploitation in the labour market, mainly via employment agencies. Thirdly, the Worker Registration Scheme's application appears to be resulting in a number of troubling cases where employees appear to be having difficulties convincing their employers to sign forms to regulate the change of employment. According to information from the Trade Union Congress (TUC) a common problem for EU workers is being charged a fee by employment agencies simply for finding individuals a job or putting them on their books. Similarly there are problems of agencies withholding pay where the agency fails to receive

⁷ Royal Decree 240/2007.

⁸ Art. 1 of Law 1296/1982.

payment from the end contractor or where the end contractor has failed to sign the employees' time sheets. The TUC has also received complaints about the failure of agencies and employers to provide written particulars of the contract.

In *Denmark* there have been examples of exploitation of underpayment and poor working conditions for EU-8 workers, particularly in the construction sector. The *Finnish* authorities also discovered discrimination against employees from the new Member States, either directly employed by Finnish employers or working as posted workers.

In *The Netherlands* there was media attention on the fact that there is still a huge gap between formal equality and practical reality, especially for Portuguese and Polish workers who were characterised as the new slaves of Europe. In the *Czech* report reference is made to an inquiry of the Czech Public Defender of Rights (Ombudsman), which indicates that there is in some areas distinction between the working and salary conditions of temporary (Polish) employees and permanent (Czech) employees.

Trade unions and others attempt to improve the awareness of employment rights of workers from (a.o.) Poland and the Baltic States through the publication of handbooks in various languages and conferences in *Ireland* and the *UK*. Trade unions on *Cyprus* see serious problems as regard the procedures of considering applications, causing many daily problems for workers who are EU citizens: in most cases this procedure takes as long as a year and more, and as a consequence it creates various discrepancies, discrimination and disruption in labour relations, as this allows the employers not to comply with collective agreements and standard practices in Cyprus. The leeway provided by the law and the actual practice of one year delay in registering workers from EU countries "is causing problems for their smooth enjoyment of working life" in Cyprus.

An important legislative innovation in *Spain* is the establishment of a Statute of the Self-Employed Worker.⁹ This is the first example of a systematic and unitary regulation of self-employed work in the European Union.

Social advantages

Access to job-seekers' allowances for Union citizens have frequently been the subject of court decisions in *Germany* in 2007. Taking into account Directive 2004/38 and the case law of the ECJ in cases as *Grzelczyk* and *Collins*, a Union citizen cannot be excluded from access to job-seekers' allowances when he qualifies under the general provisions for entitlement.

The *French* report describes extensively the new 2007 legislation which limits the access of job-seekers from other EU Member States to single parent benefit, income support and universal health coverage.¹⁰

⁹ Official State Gazette, July 11, 2007.

¹⁰ Couverture Maladie Universelle (CMU).

In *Ireland* the application of the ‘habitual residence’ test, introduced in 2004 for access to social welfare payments has raised questions in relation to the equality principle. A published guideline on the Habitual Residence Condition¹¹ makes it clear that persons entitled to payments under EU law do not have to satisfy the habitual residence condition where this would conflict with EU rules. This guideline states that people who move in search of employment, only benefit from equal treatment under Regulation 1612/68 as regards access to employment. First-time job seekers do not qualify for equal treatment with regard to social and tax advantages within the meaning of Article 7(2) of that Regulation.

In *Italy*, Union citizens who enter Italy in search for a job are not entitled to social assistance for the first six months of their stay, unless these allowances are granted explicitly by the law. Inactive EU citizens are apparently denied free health care, because it is not clear whether they have the right to register with the health care system

In *Portugal* in the field of social security, a new 2007 law establishes the principle of non-discrimination on the grounds of nationality of the beneficiaries of the systems of social protection, subject to residence and reciprocity requirements.¹²

According to the *Latvian* report pregnancy, natal and maternity care is provided only to the spouses of Latvian citizens and non-citizens of Latvia who have a residence permit. Therefore this kind of social advantages is not provided on an equal basis to Union citizens and their family members.

In *Spain* 2007 regulation on loans to university graduates requires that, in order to be a beneficiary of these loans the applicant has to be resident in Spain during the two years immediately previous to the date of application.

Tax advantages

In general EU citizens who reside or work in another EU country are treated the same as the citizens of that country as far as the tax system concerned. Tax residents are taxed in respect of their worldwide income, while non-tax residents are taxed on the basis of the income earned in that specific EU country only. Regarding tax issues, see also section 3 of this Chapter, dealing with specific categories as frontier workers and others.

In *Denmark* as a consequence of the judgments in *Commission v. Denmark* and *van Lent*,¹³ the Danish Act on Registration Tax on Motor Vehicles¹⁴ has been amended in order to comply with these ECJ judgments.¹⁵

¹¹ See <http://www.welfare.ie/foi/habres.html>.

¹² The Law 4/2007 (Framework Law of Social Security)

¹³ ECJ judgments of 2 October 2003 *Hans van Lent* (C-232/01) and 15 September 2005 *Commission v. Denmark* (C-464/02).

¹⁴ Consolidation Act No. 977 of 2 December 2002, cf. the most recent Consolidation Act No. 804 of 29 June 2007 Section 1(4)-(7).

¹⁵ Bill No. L 225/2005-06. See also below Chapter VI.

The Swedish Government has advised in 2007 new rules in order to adapt Swedish tax legislation to the ECJ judgments in Cases C-150/04 *Commission v. Denmark* and C-522/04 *Commission v. Belgium*. The Government is expected to give a final proposal on the subject at the beginning of 2008. From the judgments it follows that a system for life assurance and pensions under which tax deductions and tax exemptions for payments are granted only for payments under contracts entered into with pension institutions established in one Member State, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States contravene Articles 39, 43, 49 and 50 EC.

In Greece the exemption for tax on transport of real estate for permanent living is dependent on the continuous work or residence in Greece for at least 12 months.¹⁶

2. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS?

This section contains a variety of obstacles.

In *Belgium* a case has been lodged by the Centre for Equal Opportunities and Combating Racism in front of the Industrial tribunal of Brussels against a firm that publicly alleged to refuse recruiting of Moroccan citizens as workers. If the case does not concern directly free movement of EU workers, it could affect EU workers who could be discriminated on a racial basis. It does also concern the agreements with the Maghreb countries. On 6 February 2007, the Industrial tribunal requested in this case a preliminary ruling from the ECJ (case C-54/07).

In the *Czech Republic* the preliminary ruling procedure in case *Sahin* C-551/2007 has been watched carefully by institutions involved. The ruling will be essential for further development of parallel existence of free movement of persons and migration/asylum policies in general which is not regulated by the Directive 2004/38/EC.

A number of EU citizens residing in *Cyprus* complained to the Anti-discrimination Authority that when they applied for a driving license, they were requested to present documents from the immigration authorities showing that they reside in Cyprus for at least six months.

The *Finnish* report raises the problems of posted workers, particularly from Estonia whose wages are below the wages paid for Finnish employees or even below the minimum wages. Supplementary payments, such as overtime pay, are not performed, and employers neglect their obligation to insure the employee and to arrange occupational health care.

Based on the provisions of the Hungarian Labour Code a manpower agency (employer) located in another Member State appears to be barred from the possibility to send workers to *Hungary* without having been legally established in the country. This might be an obstacle to free movement of workers. However, this question is extremely complicated because of its relationship to the free movement of services and the lack of harmonisation of EC law in this area.

¹⁶ This provision could give rise to questions as to its compatibility with Article 24 Directive 2004/38, although EU citizens do not lose there advantage definitively, but only have a 'waiting period' of a year.

The *Italian* 2006 Law exempting vendors born in Sardinia and their spouses, irrespective of the place of residence from taxation on the profit from the sale of residential buildings used as second homes, was repealed in 2007 after a judgment of the Constitutional Court.

For some professions a permanent domicile in *Romania* is mandatory. For example, this is the case for criminal experts.

The *UK* report emphasizes that migrant workers moving to the UK face the general problems of finding housing, particularly in the South East. This difficulty is exacerbated when workers new to the labour force have more difficulty accessing banking facilities and credit than domestic workers.

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

Frontier workers

Various reports mention tax problems for different categories of frontier workers.

The Administrative Court in *Austria* had to deal with the problem whether or not a Liechtenstein benefit for an Austrian frontier worker was tax exempted. In Austria there is a tax exemption for 'Wochengeld' (benefit on the occasion of giving birth). According to the court taxation of the similar Liechtenstein benefit in Austria would be a restriction of free movement of workers and therefore it has to be tax exempted according to Art. 28 EEA-Agreement.

In *Latvia* frontier workers and their children are not guaranteed equal rights to education.

In *Luxembourg* the biggest frontier workers discrimination issue is considered to be the lower wages they get paid in comparison to residents and the administrative practice of the employment administration to keep two separate lists of unemployed persons; one for Luxembourg residents, and one for frontier workers.

Joining the Schengen area and abolishing regular controls on *Poland's* border with other Member States may positively influence the development of cross-border-employment. There seems to be a growing tendency for Polish citizens to buy or rent flats or houses in German (close to the border) while keeping employment in Poland.

In *Portugal* in the course of 2007 several Spanish frontier workers, especially doctors and nurses working in Portuguese hospitals, were fined for using vehicles with Spanish registration plates in their daily travel to their working place. These workers can not benefit from the regime of temporary admission because they are exercising a professional activity in Portugal. In order to remove this obstacle to free movement of Spanish workers, an exemption was made by law for those Spanish cross-border workers, working within a distance of 60 kilometres from the border. As this did not solve the problem, the Portuguese Government has announced its intention to allow cross-border workers residing in Spain to circulate in the national territory, in order to reach their working place, without any distance limit.

In *Slovakia* tax bonuses on children are applicable only to citizens, who have permanent residence, which seems not to be in line with EU legislation.

In *Slovenia* still some problems appear regarding personal income tax of frontier workers, especially Slovenians (e.g. performing work in Austria on a daily basis).

The *Danish* and *Swedish* Governments have established in 2007 a working group analysing the possibilities to increased co-operation on matters concerning cross border commuting.¹⁷

UK benefits regulations have not permitted persons who live in Ireland but work in Northern Ireland to claim Working Families Tax Credit. The *UK* report also mentions some tax problems for the frontier workers who live in Spain and work in Gibraltar.

According to a *Dutch* commission on frontier workers the main problems are related to tax interest, premium for health care insurances based on double pensions and difference in qualifying period for disability benefit between Germany and The Netherlands.

Sportsmen/sportswomen

General

At an informal Council summit of Ministers of Sport on 25 October 2007, *The Netherlands* and *France* have presented a memorandum in which they plea for a better protection of sport and sportspersons within the EU. They invite the Commission to clarify the status of sport in Community law on a number of points, most notably: the composition of teams, the training of young talent, the status of players' agents, secure funding for sport and audiovisual rights.¹⁸

The *Dutch* and *Danish* governments want to make an exception for football (but other sports as well) in relation to the free movement principle. It wants to protect the national sports leagues.

In *Hungary* the sport federations' home-grown rules on consensual fee and compensation, agent, transmission consent and undertakings can be considered as indirect obstacles for free movement. Although there are no quotas for EU nationals the influence of sport federations – as important civil organisations – on internal sport rules can hinder the free movement of non-national sport experts and athletes' movements: these codes are not controlled by the government whether those are in harmony with EC law and ECJ case law.

In *Italy* a decree states that starting from the 2006/2007 season more than 50% of team players competing at national level, have to be home grown. The regulations of the Italian Sport Federations of (amateur) football, basketball, cycling, volleyball, water polo and ice-hockey are complex and discriminate on the basis of nationality.

Latvian football clubs and ice-hockey clubs must pay a registration fee for each foreign player, which may create an obstacle for free movement. According to the *Lithuanian* report, the restrictions applied in the basketball and football competitions (quotas and registration fees) concerning foreign players are not compatible with the Community law and the judgments of the European Court of Justice in *Bosman* and *Simutenkov*.

¹⁷ A declaration from the Swedish Ministers in charge of labour market and social security, May 9, 2007. Information is available on the Government's website: <http://www.regeringen.se/sb/d/8566/a/82192>.

¹⁸ See http://www.minvws.nl/images/s-2808263b_tcm19-154391.pdf.

Luxembourg adopted in 2007 an Act creating specific residence permit categories for among others third country national sportspersons.

The *Austrian* report mentions a violation of EC law regards basketball, fistball and tennis.

In *Slovenia* regarding ice-hockey and basketball, the number of the registered foreign players may be unlimited, but the rules fix a minimal number of Slovenians that have to take part in a match.

Football

In *Austria* any club applying for subsidies from the Austrian Football Association is forced to restrict the number of non-Austrian EEA-citizens. Only very rich clubs are able to have a team with a majority of non-Austrians.

Germany: national quotas affecting EU nationals and nationals of countries with which the EU has agreements including working conditions non-discrimination clauses have been abolished however it has been replaced by a local player rule which requires a relevant connection with the football club.

Greece: there is no discrimination against EU nationals in professional football as players but in the capacity of trainers there are aspects of concern – particularly the need for permission from the General Secretary of Sport.

In *Sweden* a football team with 16 players should have at least 7 players being “home grown”, i.e. registered in a Swedish football club for at least three years, during the period when the individual player was between the age of 15 and 21 years. The consequence of the home-grown players rules on *Malta* is that no more than three “foreign” players (including EU citizens) can play during a football match.

In *Slovenia* a football player, not having reached the age of 18 years of age, is only allowed to be transferred to a club abroad if his family has moved abroad for reasons not connected with football.

The *Spanish* rules of the football association have no quota restrictions on EU citizens any more for male footballers, but there are still in force for female footballers. For Romanian and Bulgarian footballers it appears that the possibility is opened not to have an employment contract but a contract to provide services.

Ice-hockey

According to the rules of the *Danish* authorities on ice-hockey tournaments, a maximum of 10 players without Danish citizenship may be added to the match report’s player list in a tournament match or cup match.¹⁹

¹⁹ *Danmarks Ishockey Union, love og turneringsbestemmelser, juli 2007, Turneringsbestemmelser, Part III: Kampe, Section 8*, available at www.ishockey.dk/website/pdf/DIUs_love_og_turneringsbestemmelser_JULI_2007.pdf.

In *Finland* the teams playing in the National Ice-Hockey League, Basket Ball League and Volleyball league applied in season 2007-2008 'gentlemen's agreements' that limited the number of foreign players in the playing line-up. In Ice-Hockey and Volley Ball the quota for foreign players (including EU citizens) is two players, and in Basket Ball three players. In each of these three cases players from the other EU states are included in the quota.

The *Latvia* Ice Hockey Federation has adopted the Regulations of the Samsung Supreme League for season 2007/2008,²⁰ which provide that each club can register five foreign players and an unlimited number of foreign players who are EU citizens.

The *Dutch* ice-hockey association is trying to diminish the amount of foreign players in the highest division. At this moment half of the 150 players have a non-Dutch nationality.

In *Poland* in the 2007/2008 season nationality quotas for ice-hockey players were abolished. In *Slovakia* there are also no formal quotas anymore, but the governing body can limit the participation to two foreign players in a championship game.

Basket-ball

For the season 2007/2008 a basket-ball team in the highest division in *The Netherlands* must contain at least four Dutch players. In *Spain* a team has to consist of 5 Spanish players at least as well. In *Bulgaria* the team list for each game within the National Championship or Bulgaria Cup for men and women has a limit of a maximum of six foreigners, only three could have a nationality outside Europe. In *Latvia* the number of non Baltic foreign players is limited to four per game.

Volleyball

In *Bulgaria* a volleyball club from the prime league should not have more than three players with foreign nationality, and only two of them can play in a game at the same time. There are no exceptions provided for EU citizens. In *Slovakia* there are no restrictions in the prime league but clubs have to pay a progressive registration fee for foreign players. In the second league there is a limit to one player with foreign nationality.

The Maritime sector

According to ECJ cases C-405/01 (*Colegio de Oficiales de la Marina Mercante Española vs Administración del Estado*) and C-47/02 (*Albert Anker and others vs Bundesrepublik Deutschland*) a Member State may restrict the posts of master and chief mate of ships flying that Member State's flag to its nationals only if the rights under the powers conferred by a public law on masters and chief mates are actually exercised on a regular basis and do not represent

²⁰ Homepage of Latvia Ice-Hockey Federation
www.lhf.lv, http://www.lhf.lv/public/?id=142&ln=lv&std_id=686.

a very minor part of their activities. The legislation of some Member States is still not in line with this case-law. *France* adopted early 2008 legislation to incorporate the case-law of the ECJ.

In reaction to an infringement procedure by the Commission brought before the European Court of Justice in November 2007, the Czech Ministry of Transport presented a draft law which will change the current Law on Sea Navigation probably in 2008. The change stipulates that the captain of the ships must be either a Czech citizen or a citizen of another EU Member State and at the same time must prove certain knowledge of the Czech language so that he/she can exercise the relevant powers.

The Commission also started an infringement procedure against *Italy* on this issue in 2007 (case C-447/07).

During 2007 the *Greek* Government made proposals in order to bring the national rules into conformity with Community law. However it is not certain that these proposals are in conformity with the community rules as interpreted by the Court.

In *Spain* there are also still doubts whether the practical application of the relevant provisions cannot give rise to obstacles for citizens of the EU or the EEA.

In *Denmark* the problem regarding Polish seafarers who have not the same rights as Danish seafarers with regard to membership of labour unions, wages and other working conditions has still not been solved.

In 2007 the captain of a *Finnish* commercial ship still has to be a Finnish national.²¹ The Government Proposal amending the Act to abolish this condition was not given by the end of 2007. For crew members there is a requirement concerning language proficiency, which may in practice impede the access of citizens of the other Member States to the Finnish maritime sector.

Seafarers on *Irish*-flagged ships are entitled to equal treatment in terms of pay and other terms and conditions of employment irrespective of nationality. Irish Ferries decided to reflag its vessels to be able to reduce the wages. A number of vessels are currently flagged in Cyprus and its most recently acquired vessel is flagged in the Bahamas.

The maritime navigation act of *Slovakia* does not contain a requirement that captains have to be Slovak citizens, but there is one provision in this act that implies that Slovak citizens are preferred above other EEA citizens.

The *Bulgarian* Merchant Shipping Code was amended in 2007 to adapt national legislation to the EC law on free movement of workers in the maritime sector. In spite of the amendments, however, Art. 88 (4) of the Merchant Shipping Code stipulates that "in all cases, the captain and the chief engineer officer of the ship shall be Bulgarian nationals".

In 2007 the President of *Lithuania* has vetoed amendments concerning reduction of social insurance contributions for sailors working on ships with Lithuanian flags as being in conflict with the principle of equality under the Constitution.

²¹ Merilaki 674/1994, 6 luku 1 §, Sea Act, <http://www.finlex.fi/fi/laki/ajantasa/1994/19940674>).

Luxembourg and *Denmark* transposed Directive 2005/45/EC on the mutual recognition of seafarers' certificates issued by the Member States.²²

In the *UK* the question of discrimination against EU nationals in wages on UK registered ships has been the subject of controversy.

Researchers/Artists

EU nationals exercising professional activities as researchers and artists are considered to have the same legal status as national researchers and artists. Although there is almost no specific legislation, problems occur mainly regarding tax and social security issues.

The British organisation "On The Move" has published in 2007 a revised version of its basic guide about tax and social security for performing artists. The aim of the basic guide is to help artists and arts professionals understand better the main issues that affect how and what they are paid when they work abroad in Europe. The basic guide can be found on www.on-the-move.org/documents/TaxandSocialSecurity.pdf.

In *Germany* the tax authorities have repeatedly been challenged before the ECJ on the practice to impose withholding tax on both the fee and expenses of non-resident artists. In the *Scorpio*-judgment,²³ the Court decided that Germany must allow the deduction of direct expenses before the performance so that withholding tax is only levied on the net profit. In response to the *Scorpio*-decision of the European Court, the Federal Office for Finances in a circular letter to the tax authorities of the *Länder*²⁴ has enacted provisional guidelines to be observed by the tax authorities until the German legislator has passed new regulations.

Withholding tax on non-resident performing artists was also abolished in the *Netherlands* in 2007 for artists who are resident in a country with which the Netherlands has a bilateral tax treaty.

Alien artists are not liable to taxation in *Denmark* under the Act on Pay-as-you-earn Taxation²⁵ unless the length of the stay in Denmark exceeds 6 months.

In *Hungary* there are special rules on taxation and social security for artists. Access to the Hungarian labour market is complicated. Income earned by artists, writers, composers and sculptors from the sale of their works is in certain cases exempt from tax in *Ireland*.²⁶

²² Règlement grand-ducal du 5 mars 2007 transposant la directive 2005/45/CE du Parlement européen et du Conseil du 7 septembre 2005 concernant la reconnaissance mutuelle des brevets de gens de mer délivrés par les États membres et modifiant la directive 2001/25/CE, et modifiant le règlement grand-ducal du 16 novembre 2001 transposant la directive 94/58/CE du Conseil du 22 novembre 1994 concernant le niveau minimal de formation des gens de mer telle que modifiée par la directive 98/35/CE du Conseil du 25 mai 1998, Memorial A- N° 43 du 28 mars 2007, p. 789. See <http://www.legilux.public.lu/leg/a/archives/2007/0432803/index.html>.

²³ Judgment of 3 October 2006, Rs. C-290/04, *Scorpio/Finanzamt Hamburg-Eimsbüttel*.

²⁴ IV.C 8-S 2411/07/002.

²⁵ Consolidation Act No. 1086 of 14 November 2005 and amendments.

²⁶ <http://www.revenue.ie/index.htm?/leaflets/artinfo.htm>.

4. RELATIONSHIP BETWEEN REGULATION 1408/71 AND ARTICLE 39 AND REGULATION 1612/68

Most reports give a short overview of the main aspects of their social security system, in relation to Regulation 1408/71. There is not very much specific information on the relation between this Regulation and article 39 EC and Regulation 1612/68.

In *Cyprus* a 2007 law replaced all previous legislation regarding social security, incorporating (a.o.) Regulations 1612/68.²⁷

In *Portugal* also in 2007 a new Basic Law on Social Security was adopted, establishing the principle of equality.

The *Dutch* social security system includes foreign pensions for the calculation of the height of premiums, which is not in line with the ECJ judgment in the *Nikula* case (C-50/05, 18 July 2006). For a follow up on the *Hendrix* case (C-287/05) see Chapter VI.

The most important question in *Estonia* that arises in social security is the question about guaranteeing parental benefit for EU citizens, who have no permanent resident.

Lithuania has finally signed in 2007 the agreement with the Government of Estonia concerning calculation of the insurance periods acquired in the territory of former Soviet Union in order to avoid duplication of insurance periods.

²⁷ These include EEC Directives 64/221; 68/360; 72/194; 73/148; 75/34; 75/35; 90/364; 90/365; 93/96 and regulations 1251/70; 312/76; and 2434/92.

EMPLOYMENT IN THE PUBLIC SECTOR

1. ACCESS TO PUBLIC SECTOR

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

Member States are only allowed to restrict public sector posts to their nationals if they involve the exercise of public authority and the responsibility for safeguarding the general interest of the State.²⁸

According to some rapporteurs, it is almost impossible to give a good picture of the employment situation for EU citizens in the public sector. There are no figures available.

In most Member States there exist specific rules (Constitution, laws, royal or presidential decrees) regarding the public sector posts which are reserved for nationals. Several national reports list posts reserved for their nationals (*Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Romania, Slovakia, Slovenia, Sweden*). The employment in the public service in *Lithuania* remains restricted to Lithuanian citizens except a few jobs that are available to foreigners under labour contracts without performing the function of public administration. Civil servants have better working conditions. The situation in *Latvia* and *Romania* is very much the same as in *Lithuania*.

In 2007 the list in *Hungary* was reduced deleting the nationality requirement for members of the National Accreditation Board and Accreditation Body,²⁹ workers in administration of justice, such as (candidate) experts in judicial/forensic sciences, typist or physical worker,³⁰ typist or physical worker at Public Prosecutor Offices,³¹ administrator as public officials,³² if s/he has a necessary knowledge in Hungarian to his/her task.

The national legislation of some other Member States provide a general clause that access to public service can be made dependent upon nationality if the tasks so require, working this out in criteria or guidelines for the posts or sectors concerned. This system makes a case-by-case decision necessary (*Austria, Belgium, Denmark, Germany, Greece, United Kingdom*). *Luxembourg* still allows the access of EU nationals as civil servants in principle only for the six sectors³³ that have been decided by the European Court of Justice to be open to other EU citizens and only for rather minor positions. It appears that in practice Luxembourg citizenship

²⁸ See K. Thienel & Th. Böhm (eds.), *Cross-Border Mobility of Public Sector Workers*, Austrian Federal Chancellery, 2006.

²⁹ Amending the Act LXXVIII of 2005 on National Accreditation Body.

³⁰ Amending the Act LXVIII of 1997 on legal standing of workers in administration of justice.

³¹ Amending the Act LXXX of 1994 on public prosecutors' legal status and data protection in Public Prosecutor Office.

³² Amending the Act XXIII of 1992 on legal status of public officials.

³³ These sectors are research, education, health, inland transport, posts and telecommunications and the water, gas and electricity distribution services.

is still required for posts, most notably in the areas of teaching, ground transport and water, gas and electricity distribution, as well as generally for the posts referred to as local government. In the *Italian* legal system it is impossible to distinguish posts implying concretely the exercise of public authority and responsibility of safeguarding the general interests of the State from those posts involving administrative tasks, technical consultation or maintenance, which have to be opened to EU citizens. The Italian public administrations' practice does not appear always in line with Community law.

In *Poland* an extensive list of legislation for posts in the public and uniformed service contains a nationality condition. Since 2007 nationals of EU Member States, EFTA States which are party to the EEA agreement and nationals of the Suisse Confederation can be employed as teachers on equal footing with Polish nationals. But to become a state labour inspector Polish citizenship is required. On *Malta* there is a list of posts which meet the criteria of exercising public authority and responsibility for safeguarding the general interest of the State has been drawn up centrally and determines when a Maltese-only nationality requirement is inserted in a call for applications.

After adapting its legislation already in 2005, the conditions for access to the public sector in *France* have been brought even further in line with Community law by a Decree, which came into force in February 2007.

Also in *Spain* in 2007 new legislation, applying in general as well as in the Autonomous Communities concerning the access to the public sector came into force. This legislation require firemen to be Spanish.

The *Belgian* rules applying to the working conditions of civil servants in the Belgian Institute for telecommunication and postal services were modified in 2007, requiring Belgian nationality only when the position occupied by the civil servant involves a direct or indirect participation in the exercise of powers conferred by the public law.

In *Bulgaria* 'state servants' have to be Bulgarian. Bulgarian nationality is also required for occupying any post under the responsibility of the Ministry of the Interior (including policemen and firemen). This is valid not only for civil servants (employed according to an administrative act), but also to labour contract employees.

Notary

In many Member States notaries are self-employed persons and therefore do not fall under Article 39 EC. However in some Member States notaries are working as employed in the public sector. The judgments of the ECJ on notaries will most likely be of interest for the application of Article 39(4) EC.

The European Commission decided in 2007 to bring *Luxembourg* (and *Austria, Belgium, France, Germany, Greece* and *Portugal*) before the Court of Justice on the grounds that these Member States permit only their own nationals to practise as notaries.³⁴ The *Luxembourg*

³⁴ Action brought on by the Commissions early 2008. See C-47/08, C-50, 51, 52, 53 and 54/08.

Minister of Justice declared that Luxembourg does not share the view of the European Commission and that the tasks delegated to notaries by the State are related to the exercise of Luxembourg's sovereignty. According to the Portuguese rapporteur there is no nationality requirement for notaries in *Portugal*.

In *Slovenia* notaries also have to have Slovenian nationality.

In *the Netherlands* in 2007 a Bill was introduced to abolish the nationality requirement for the appointment of a notary completely.³⁵ This Bill also introduced an explicit statutory requirement as to the knowledge of the Dutch language for appointment as a notary.

1.2. Language requirement

Although this is not always explicitly laid down in regulation, in all countries it is taken for granted that persons working in the public sector command the language of that country. Some Member States (*Latvia, Malta*) even promote the use of the national language.

If a EU citizen wishes to apply on *Cyprus* for a job in the Public Service for which knowledge of Greek is required, he/she has to provide the necessary documentary evidence that they possess the knowledge required in the same way as a Cypriot national.

In *Estonia* there exists the requirement of language proficiency on three different levels (basic, intermediate and advanced). The requirements concerning linguistic competence of professors and other teachers at universities are not as strict as the requirements concerning civil servants. Persons who have passed an Estonian language proficiency examination receive a certificate.

In *Greece* and *Poland* knowledge of the language is a formal condition for employment in the public sector.

In *Slovakia* the knowledge of the language is also one of the conditions for admission to the civil service, but there are no specific provisions how this knowledge has to be examined.

The *Austrian* legislation requires "good command in word and writing; if the job requires less, an adequate command has to be shown."

In *Finland* the requirements concerning language proficiency are rather rigid and they may constitute an impediment for the access of citizens of the other EU States to the Finnish public sector. Often proficiency of both national languages, Finnish and Swedish, is required. The requirements concerning linguistic competence are bound to the qualification requirement (for example university degree) and not, for example, to the post and tasks in question, which would be a more flexible approach.

In *Germany* as a general requirement for appointment as a civil servant the respective laws and regulations of the federation and the *Länder* require full command of the German language.³⁶

³⁵ In the Netherlands a notary is a civil servant, who has public authority.

³⁶ See Sec. 20a of the Federal Law on Civil Servants: "Die Beherrschung der deutschen Sprache in Wort und Schrift ist Voraussetzung für die Zulassung zur Laufbahn"; see also Sec. 28a of the Law on Civil Servants of the State of Baden-Württemberg: "Die Beherrschung der deutschen Sprache in Wort und Schrift ist Voraussetzung für die Zulassung zur Laufbahn."

In Bavaria new legislation provides for the possibilities to prove the required German language skills for teaching professions by a specific diploma of a Goethe-Institut.³⁷ Generally speaking, good German language knowledge is required for employment in the public service³⁸ or within the framework of the recruitment procedure.³⁹ According to the special profile of the employment in the public service (police, universities) additional language requirements may be considered as desirable or necessary according to the practice or regulations. In some Länder the existing rules on language requirements for access to the public sector are in the process of amendment.

Although EU candidates are exempted from the nationality condition for jobs in some public sectors in *Luxembourg*, the knowledge of all three national languages (Luxembourgish, French and German) is still required for these jobs.

The *Spanish* report extensively describes the requirement of Castilian Spanish but also of the language of the Autonomous Communities (Catalan, Galician, Valencian) for several posts. A 2007 high court decision prohibited this requirement for specific posts which do not require a direct relation with citizens.

Also the *Italian* report special attention is paid to the fact that although the official language is Italian in some regions other languages like French, German and Slovenian have a special status. In these regions besides Italian the knowledge of the other language concerned for that region is a condition required for posts in educational institutions (French and Slovenian) or even for all posts in the public service (German).

With respect to the profession of notary public, the *Dutch* government is of the opinion that the language requirement is in conformity with the *Groener* judgment (Case 379/87).

1.3. Recruitment procedures

In *Germany* employment in the public sector is a matter of competence of the Länder with regard to their civil servants and employees, and of the federation with regard to the federal civil servants and employees. Even with regard to the federation, there is no uniform administrative code or guideline concerning the recruitment procedures

³⁷ Para. 14: "Nachweis der deutschen Sprachkenntnisse".

(1) Bestehen Zweifel hinsichtlich des Vorliegens der für die Berufsausübung erforderlichen deutschen Sprachkenntnisse, können entsprechende Nachweise gefordert werden.

(2) Der Nachweis der erforderlichen deutschen Sprachkenntnisse wird durch das "Große Deutsche Sprachdiplom" eines Goethe-Instituts erbracht. Bewerber mit einer Fächerverbindung, die Deutsch enthält, müssen das erwähnte Sprachdiplom mit dem Prädikat "sehr gut" erworben haben. Bewerber mit einer Fächerverbindung, die eine (oder zwei) Fremdsprachen enthält, mit dem Prädikat "gut"; Gleiches gilt für Bewerber, die auf Grund der Organisationsstruktur der betreffenden Schulart im Fach Deutsch oder in einer Fremdsprache eingesetzt werden können.

(3) Das Staatsministerium für Unterricht und Kultus oder die von ihm bestimmte Stelle können die Anerkennung eines bestimmten Nachweises der deutschen Sprachkenntnisse davon abhängig machen, dass durch Fertigung eines Aufsatzes (Klausur, Dauer: drei Stunden) über ein Thema, das keine spezielle Vorbereitung erfordert und durch Ablegung einer mündlichen Prüfung (Dauer: bis zu 60 Minuten) entsprechende Deutschkenntnisse nachgewiesen werden.

³⁸ For teachers see for instance in Bavaria Dritte Verordnung zur Änderung der EG-Richtlinienvorordnung für Lehrer of 10 January 2008, *Bayerisches Gesetz- und Verordnungsblatt* of 10 January 2008, p. 17 at section 14.

³⁹ Information by the Ministry of Interior, Sport and Integration of Lower Saxony of 29 May 2008.

The Hungarian report emphasises at the outset, that *Hungary* will introduce a similar entry exam as used in the *Burbaud* case for applicants of public officials in 2009.

In *Luxembourg* admission to a post as civil servant depends on an examination, a *concours*.

In *Portugal* EU citizens who are already fully qualified in the field of activity concerned do not have to participate in a competition procedure which gives access to a training and afterwards to a post in the public sector open for EU citizens.

In *Sweden* a 2007 public investigation presented a proposal introducing a kind of “trainee” system for the education for a position as a judge.⁴⁰

In *France* new 2007 legislation concerning the recognition of diplomas includes the right to enter competitions leading to recruitment into the French public sector. The recognition of diplomas represents a precondition for entry to these competitions.

Dutch legislation does not provide for a system of recruitment of civil servants or employees in public service, comparable to the system of the *concours* applied in France.

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. 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.

1.4. Recognition of diplomas

In most Member States there are no special statutory rules on the recognition of diplomas in relation to posts in the public sector in comparison to posts in the private sector. See for a general overview on recognition of diplomas, the paragraph on implementing Directive 2005/36 in Chapter II. In general, the same professional qualification requirements and the same rules of recognition apply in both cases.

In *Austria* the provision regarding the recognition of foreign diplomas for access to employment in the public sector refers since 2007 to Art. 3 of Directive 2005/36/EC.

The Greek National Academic Recognition and Information Center (DOATAP) does not recognize the diplomas granted by foreign universities collaborating with private Institutes operating under licence on a franchise basis in *Greece*.

In *France* in 2007 detailed legislation entered into force regarding the conditions for access to three branches of the public sector (State public sector, territorial public sector and hospital public, enabling the inclusion of professional experience both by French candidates and by nationals of the other Member States.

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

Although most Member States have rules on the recognition of professional experience for access to the public sector, there is an absence of specific rules concerning the way

⁴⁰ Official report Ds 2007:11 En mer öppen domarutbildning.

professional experience acquired in another Member States should be taken into account (except for *Austria, Denmark, France, Germany, Italy*). Some reports (*Estonia, Finland Portugal, Sweden*) stress that this should happen in a similar manner as corresponding experience acquired in the Member State itself.

In *Cyprus* seniority is a prerequisite for someone to apply for a promotion position within the public service.

In *Denmark* previous employment in other Member States shall be taken into account to the same extent as had it been employment in Denmark.⁴¹

According to the more recent regulations or laws in the *German* Länder in implementing the Directive 2005/36/EG the competent authorities make an assessment whether a certificate or diploma on a professional training is comparable to a German certificate on professional experience.

In *France* a 2007 Decree enables explicitly to take into consideration professional experience for both French candidates and EU nationals.

On *Malta* in cases where the Public Service post concerned requires candidates to possess specific qualifications or to have carried out specific training programmes, recruitment to virtually all posts allows for the recognition of comparable qualifications. In *Italy* the issue of taking into account teaching experience acquired in another Member State still leads to court cases.

2. EQUAL TREATMENT

2.1. Recognition of professional experience for the purpose of determining the professional advantages

According to the information of the Commission services many Member States (10 of the EU-15 and at least 6 of the EU 10+2) have statutory rules on the issue of recognition of professional experience for the purpose of determining working conditions (e.g. salary, grade etc.). The national reports, however, do not give much information on these rules and on their application in practice. Equal treatment legislation forms usually an obligation to take into account the professional experience and seniority acquired in another Member State.

Regarding salary, the *Danish* Guidance on Personnel Administration, 2007 and 2008 explicitly states that professional experience obtained in another EU/EEA country has to be accounted for in the same manner as had the occupation been in Denmark.⁴²

The Administrative Court of *Austria* asked in 2007 for a preliminary ruling regarding the recognition of Swiss working periods under the Austrian Salary (see ECJ C-332/07, recently removed because the disputed decision was withdrawn).

⁴¹ Guidance on Personnel Administration, 2004, Chapter 18.

⁴² Circular No. 6633 of 16 July 1987 on Salary Seniority contains the detailed rules on determination of advantages.

The *Bulgarian* legislation contains no provisions on the recognition of professional experience in another EU Member State.

In *Slovakia* the salary level in civil service is not dependent on professional experience at all, it depends just on the position of the person concerned and on assessment of the work of the person concerned by his/her superior officer.

In *Slovenia*: there is no explicit legal provision on the recognition of professional experience in another EU Member State, but according to the call of the Ministry of Public Administration, addressed to all ministries, Government's services, local administration, in practice the length of service accomplished in an EU Member State must always be taken into account for determining certain professional advantages (supplement for the years of service, the calculation of the length of annual leave).

In *Sweden* this issue is mainly regulated through individual employment agreements, normally concluded within the framework of collective agreements.

The *French* report mentions in detail a court case regarding not taking into account the professional experience in the salary of a Belgian deputy railways station manager.

MEMBERS OF THE FAMILY

INTRODUCTION

The reports show interesting differences in Member States' approaches. These issues are discussed under six headings: "Scope of the family", "Applying *Akrich*", "Reverse discrimination", "Visa requirements", "Character of the card proving the residence right for longer than three months, duration of legal residence" and "Miscellaneous".

SCOPE OF THE FAMILY

The system of Directive 2004/38 of two provisions defining the scope of the family, one being mandatory (Article 2(2)) and the other optional as to the way in which entry and residence are facilitated (Article 3(2)), led to a variety of transpositions. Apart from this twofold definition, differences in family law conceptions among the Member States played a role.

All Member States transposed Article 2(2), but some did not include the registered partner, apparently because of problems recognising such partnerships under national law. Seven Member States (*Latvia, Estonia, Slovenia, Poland, Hungary, France and Slovakia*) did not include the registered partner as member of the family. *Italy* did include the registered partner in the definition, but it is reported that *Italy* neither regulates registered partnerships nor equates them to marriage, which means that the scope of the provision is unclear.

Bulgaria does include the registered partner but excludes direct descendants and direct relatives in the ascending line of registered partners. In contrast, with regard to spouses, their grand children and grandparents are included in the definition.

Though all Member States include spouses in the definition of family members, problems may rise recognising same sex marriages. *Italy* reports that such weddings are devoid of effects in this Member State as being contrary to public order.

Further, many varieties show up in the way Member States dealt with Article 3(2) requiring the Member States to facilitate entry and residence of other family members and of the non-registered partner.

Six Member States (*Latvia, Slovenia, France, Hungary, Poland and Spain*) did not transpose Article 3(2). *Hungary* however did introduce a general extra category of family members: those whose entry and residence as a family member is permitted by the competent authority.

Ten Member States (*Netherlands, Portugal, Sweden, Ireland,*⁴³ *Lithuania,*⁴⁴ *Cyprus, Czech*

⁴³ The Irish Regulations refer to family members defined in Article 2(2) of the Directive as "qualifying family members" and to those covered in Article 3(2) of the Directive as "permitted family members".

⁴⁴ A proposal amending the Lithuanian Aliens' Law in 2006 to expand the definition of EU family member was not yet adopted in 2007.

Republic, Finland, Bulgaria, Romania, Slovakia) appear to have included the non-registered partner in the circle of family members as eligible for the same rights of entry and residence as family members meant in Article 2(2) of the Directive.

Eight Member States (*Netherlands, Czech Republic, Denmark, Estonia, Finland, Bulgaria, Romania and Portugal*) also include other family members as mentioned in Article 3(2).

From the reports of *Germany, Greece, Luxembourg* and *Malta* on the year 2007 it is not clear how Articles 2(2) and 3(2) are implemented. *Malta* reports a distinction between 'family members' and 'other family members'.⁴⁵

In some Member States additional qualifying requirements, not mentioned in Directive 2004/38, are added.

In *Latvia*, for members of the core family, dependence and a common household in the country of previous residence are required.

In *Slovenia*, children are only included in the definition of family member as long as they are unmarried. Further, for all third country family members to receive a residence permit they must have more resources for maintenance than the threshold provided for the entitlement to social assistance, they must have a suitable health insurance, and they must have legally entered the territory of Slovenia.

With respect to the national legislation implementing Article 3(2) on the unmarried partner some Member States report restrictions.

Italy added to the words "the partner with whom the Union citizen has a durable relationship duly attested", the specification that the attestation should be done "by the Union citizen's State".

The *UK* reports that the Home Office position remains unchanged in relation to durable relationships. It is required that the couple have to have resided together for two years before their relationship can be said to be durable.

Under *Bulgarian* law there is a problem of proving partnership. The law does not elaborate on the issue *how* the factual partnership should be proven or certified or under what circumstances it is recognised as such.

APPLYING "AKRICH"

Even in the "pre-*Metock* era" most Member States appear to have abstained of introducing any condition of previous lawful residence in another Member State in their legislation. From the reports on *Austria, Italy, Latvia, Portugal, Sweden, Belgium, Estonia, France, Bulgaria, Poland, Spain, the Netherlands* and *Romania* it can be learned that no "Akrich-provisions" were drafted or applied. *Spain* is reported not to apply "MRAX" either. The *Netherlands*, while

⁴⁵ With regard to other family members, section 3 (5) of the Maltese Immigration Act provides that the Director for Citizenship and Expatriate Affairs shall give due and proper consideration in relation to the admission and residence of an other family member, by undertaking an extensive examination of the personal circumstances. Any denial of entry or residence to such other family member shall subsequently be justified to the said family member.

not having any inserted “*Akrich*” provision in its legislation, pleaded a “*pro-Akrich*” position in procedures before the Court of Justice.

*Ireland, Denmark, Lithuania*⁴⁶ and *Finland* did apply an “*Akrich*” approach.

Further, the *UK* reports that the distinction between third country family members applying to join an EEA national in the UK who are inside the EEA and those who are outside and therefore have to comply with the UK national immigration rules remains problematic. This is particularly so, for those categories of third country nationals who have rights under the Citizens Directive but who are unable to bring themselves within a category under UK immigration law (e.g. children over 18, grandchildren etc).

In *Cyprus*, the *Akrich* principle is used in favour of the family members: Under the new legislation, family members who are not citizens of an EU Member State can enter Cyprus upon producing a valid passport. However, the passport requirement does not apply if the family members are in possession of a residence permit issued in another EU country.

REVERSE DISCRIMINATION

The *Akrich* and *Metock* discourse is not only pertinent to questions of former lawful residence of a family member in another Member State. Its roots are to be found in the phenomenon of reverse discrimination. From the reports, it becomes clear that there are remarkable differences between the Member States as to how they treat their own nationals with respect to family life.

The *Netherlands* report that difficulties for Dutch nationals to meet conditions under Netherlands immigration law for family reunification with third country nationals led to the phenomenon of the “Belgium route”, according to which Dutch nationals settle in a neighbouring Member State as a worker or a self-employed person. Likewise, *Denmark* reports that a number of Danish citizens who were unable to fulfil the requirements under Danish law for being reunited with family members, in particular spouses, were hoping to rely on the EU rules on free movement as these rules allow for persons exercising the right to free movement to bring with them their family. In *Slovakia*⁴⁷ family members of own citizens have to meet more strict conditions than family members of EU citizens using their right to free movement.

On the other hand in *Belgium*, the position of the family members is reported to be strengthened in Belgium by the refusal of reverse discrimination for family members of Belgian citizens. In *Finland*, family members of Finnish citizens, according to the main rule are registered under the rules on freedom of movement. The family member is thus treated as a

⁴⁶ According to the Lithuania report, Article 101(2) of the Aliens Law requires that a third country national family member of Lithuanian citizen (the rule does not apply to other EU nationals) who applies for EU residence permit has exercised the right to freedom of movement in the EU or has arrived from another EU Member State’s territory .

⁴⁷ The conditions for granting of the permit are still harder for family members of Slovak citizens, than for family members of EEA citizens. Apart from the conditions for the family members of EEA citizens mentioned above, the family member of Slovak citizen has to prove that he/she has no criminal record, and needs to have his/her stay financially secured, which has to be proved by the sum of at least approximately 3.000 EUR.

Union citizen entitled to freedom of movement.⁴⁸ *Hungary*⁴⁹ also applies criteria derived from Directive 2004/38 to family members of Hungarian citizens

In *Belgium* it proved difficult to apply the *Chen*-approach to parents of a Belgian child. A Belgian Court decided on 10 October 2007, not to cancel a decision which refuses to recognise the right of residence to a Belgian child's mother. Basing its decision on the application of the *Baumbast* and *Chen* cases, the Court considered that the refusal of residence permit did not concern the Belgian child. Additionally, the Court reminded that the right of residence of the Belgian child is a consequence of his Belgian nationality but not a consequence of any EC provision. Moreover, the situation of the Belgian child is different from the *Chen* case as the child never used his free movement right since he has always be resident in Belgium. Consequently, he is not entitled to allege the EU rights protection as beneficiary of the EU citizenship.

VISA REQUIREMENTS

From the reports it appears that most Member States facilitate the issuing of visas, but some do not.

Portugal reports that visas are given free of charge, under a special accelerated procedure. *Sweden* also reports that, if there should be a demand for visa for family members of an EU citizen, the administrative procedure should be speeded up. According to the reports on *Hungary*, *Slovakia* and *Malta*, visas are issued free of charge. In *Lithuania*, draft amendments to the Lithuanian Aliens Law were pending by the end of 2007, providing that the family member of an EU national who is a third country national, but is in possession of EC residence permit, will be entitled to arrive to Lithuania and stay there up to three months within half a year without a visa. In *Cyprus*, "every effort" is made to facilitate the obtaining of a visa free of charge by such persons and no fee is required.

Finland reports that an appeal to an administrative Court is offered against refusal of a visa.⁵⁰

Complications are reported from *Italy*: Apart from a visa, an entry clearance must be issued no more than 6 months earlier. Unmarried partners cannot apply for a visa for family reasons and must apply for a visa for 'elective residence', requiring amongst others documented and detailed guarantee of substantial and steady private income private income (pensions or annuities) from property, stable economic and commercial activities or from other sources and availability of adequate lodgings in Italy.

⁴⁸ However, if the Union citizen family member does not meet the requirements laid down for practicing the freedom of movement, (s)he can be issued with a Finnish citizens' family member's residence permit under the general rules of the Aliens Act.

⁴⁹ A family member of a Hungarian national in paid employment shall be entitled to residence for more than three months, if s/he or the Hungarian national has sufficient resources for said family member not to become an unreasonable burden on the social assistance system, and has adequate insurance cover for taking advantage of health services as defined under separate legislation, or shall see to covering these themselves as provided for in law.

⁵⁰ Third-country national family members of EU citizens, who are required to have a visa to enter Finland are exempted from the fee for the visa and from the requirement concerning travel insurance. In contrast with visa decisions regarding other third country nationals, a decision concerning a visa of a Union citizen's or Finnish citizen's family member, may be appealed to an administrative court.

The most extensive report on requirements for providing visas is from *Ireland*:

The Irish Department of Justice, Equality and Law Reform issued lengthy guidelines on documentation required for applying for a visa. In relation to visa applications generally, it is provided, amongst other matters, that:

- the fully completed form must be signed by the applicant, save where he/she is under 18 where the parent's may sign on the applicant's behalf;
- all documents submitted must be in English, or where in another language, a notarised translation must accompany the original document;
- at the time of the application, the passport must be valid for 6 months after the date on which it is proposed to leave Ireland. For long-term stays, it is advised that the passport be valid for at least 12 months;
- all visa applicants must be able to show evidence that they can support themselves during their stay in Ireland without recourse to public funds or resources. A detailed bank statement showing sufficient funds – and covering the immediate 6-month period prior to submitting the application should be submitted. Lump-sum lodgements made in the run-up to the application are not taken into account; and
- details should be included of any other family members presently in Ireland, or any other EU State.

In relation to the “Spouse of Irish/EU Visa”, which covers spouses of Irish nationals and nationals of other EU Member States, the additional requirements are as follows:

- a fully completed and signed application form;
- a passport valid for at least 12 months;
- a clear copy of the other spouse's passport;
- a marriage certificate;
- for recent marriages, and marriages where the couple have not yet resided together, the applicant is asked to give a full account of the relationship history – when and where the couple met and evidence of this such a visas, entry/exit stamps on passport of Irish/EU national;
- evidence of Irish/EU national's employment in Ireland (P60 form, payslips);
- if other spouse is not in employment, details of how the applicant intends to support himself /herself; and
- accommodation details.

CHARACTER OF THE CARD PROVING A RESIDENCE RIGHT FOR LONGER THAN THREE MONTHS, DURATION OF LEGAL RESIDENCE

Most Member States appear to grant one type of residence card to all family members regardless of whether they are referred to in Article 2(2) or in Article 3(2) of Directive 2004/38. However some Member States make distinctions between the categories. *Austria* and *Denmark* give a specific right under national law to residence to unmarried non-registered partners and

Austria gives specific rights under national law to other dependent family members. *Austria* gives a residence card to family members under Article 2, a quota free settlement permit for partners and a quota space within the quota system for other family members. In *Italy*, Article 10 of the Legislative Decree 2007 no. 30 establishes the residence card for non-EU family members *stricto sensu*. Other family members and unmarried partners may be granted an 'elective right to stay'.

Further, there are some differences reported in the duration of the residence card. Many Member States grant a residence card for five years or for the envisaged period of residence of the Union citizen, if this period is less than five years. *Austria* gives family members under Article 2(2) a residence card for ten years. Some Member States make mention of a "temporary residence permit".

MISCELLANEOUS

In *Estonia*, the use of freedom of movement maybe considered abuse. A temporary residence permit will be refused if the family member or the citizen of the European Union with whom the family member wishes to reside has abused the rights prescribed by this Act or used deceit in order to achieve the aim of the family member obtaining temporary right of residence in Estonia. Among other things, the following will be considered as the abuse of rights, or deceit: obtainment by the citizen of the European Union of temporary right of residence in Estonia in order to achieve the aim of the family member obtaining temporary right of residence in Estonia.

Article 48 of the *Latvian* Regulation No. 310 provides that if one of the parents is a foreigner, the child can leave Latvia only with a document of assent of the parent who is a citizen of Latvia. Article 50 of the regulation provides that a parent who is a foreigner may leave Latvia with his/her child only with the authorisation of the other parent who is a citizen of Latvia.

RELEVANCE/INFLUENCE/FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGMENTS

INTRODUCTION

The national experts were requested to give an in-depth analysis and interpretation of the importance and potential impact of the Court's recent judgments. For the 2007 edition the Commission considered the following judgments of special interest:

- C-212/05 *Hartmann*
- C-213/05 *Geven*
- C-287/05 *Hendrix*
- C-291/05 *Eind*
- C-208/05 *ITC*
- C-1/05 *Jia*
- C-97/05 *Gattoussi*

In the *Estonian, Greek, Maltese, Slovenian and Spanish* reports any reference to, let alone an in-depth analysis of the above mentioned (or other) cases is lacking.

Follow up to: *Hartmann* (C-212/05) and *Geven* (C-213/05)

Both judgments concern the German child-raising allowance ("Erziehungsgeld") to a cross-border worker. In the *Hartmann* case the ECJ declared that a full-time employment is a valid factor of integration into the society of Germany and thereby Mr Hartmann's children are entitled to be granted child-raising allowance. However, in the *Geven* case the ECJ accepted the reasoning of Germany that a minor employment does not constitute a sufficiently close link with Germany, the refusal is proportionate and thereby justified. Consequently, Ms Geven's children could not receive the benefits.

As to the consequences of the Court's decision in *Hartmann* no legislative action has been taken in *Germany*. The competent social authorities in Bavaria have simply been requested to apply the judgment. In the *Belgian* report both decisions are not mentioned. According to the *Austrian* rapporteur these decisions did not ask for any amendments. While both cases involved the category of 'frontier workers' this as such is – according to the *Cypriot* rapporteur – unlikely to have any bearing on Cyprus. According to the *Finnish* Social Insurance Institution, the *Hartmann* and *Geven* judgments have not had and are not likely to have any impact on the domestic system in Finland because it is already regarded to be in line with it. In *Denmark* too no follow-up actions of the *Hartmann* and *Geven* judgments were identified. Also in *Romania* both decisions did not play a role (yet). According to the *Portuguese* rapporteur

Hartmann should have a particular impact in Portugal or vis-à-vis Portuguese citizens who exercise their rights of free movement. As a matter of fact, there is already a significant number not only of Portuguese nationals who maintain their employment in Portugal and have transferred their residence to Spain, but also of EU citizens who maintain their residence in Spain and obtained an employment in Portugal. In this context, questions concerning the allocation of social advantages similar to those in *Hartmann* may arise.

More in-depth analyses are provided in the other reports.

According to the *Czech* rapporteur the problem of whether a cross-border worker and/or his/her spouse fall within the scope of the Regulation 1612/68 appears in the *Czech* legal context as unlikely. One of the reasons is the non-existence of a social benefit comparable to the German "Erziehungsgeld" in the Czech social system. Furthermore under Czech law governing social benefits, EU citizens are entitled to social benefits pursuant to Regulations 1612/68 and 1408/71. Thus the issue of frontier workers is regulated in the Czech Republic by direct application of Regulations 1408/71 and 1612/68. Therefore as regards to the classification of a person as a migrant worker it can be assumed, that under legislation applicable in the Czech Republic, a national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can also claim the status of migrant worker for the purposes of Regulation No. 1612/68. Taking into account this conclusion, also family members of a migrating worker would be entitled to social benefits under the Regulations stated above. From this it follows, that also the question of granting a social benefit to the spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State, would be in the Czech legal context most probably resolved in conformity with the *Hartmann* and *Geven* judgments.

The same applies to *Hungary*. According to Hungarian labour law every person who is in legal employment qualifies as a worker. Every EEA national who exercises economic activity on the basis of a legal employment relationship falls within the ambit of Reg. 1408/71/EEC. In addition, Article 2(d) of the Family Act explicitly lays down that the residence condition is waived for frontier workers. In sum, if a union citizen works in Hungary in a legal employment relationship (irrespective of the duration of the work), s/he will fall within the ambit of Reg. 1408/71/EEC and if s/he resides in another Member State will be exempted from evidencing his/her Hungarian residence. The person will be entitled to claim family benefits as a Community worker for himself and for his family. In this regard, Hungarian law is more favourable than the ECJ in *Geven* because it grants benefits for the workers even if they have no real and sufficiently close links to Hungary.

There has been no explicit recognition in *Irish* practice that a frontier worker who does not fall within the regime of Regulation 1408/71 is able to claim the benefits of Article 7(2) of Regulation 1612/68 in the circumstances that obtained in the *Hartmann* case. There is a general recognition in relation to Supplementary Welfare Allowance, which is affected by Article 7(2) of Regulation 1612/68, that workers within the meaning of Article 39 EC do not

have to establish habitual residence. This approach should extend to cover the *Hartmann* and *Geven* scenarios. However, in discussions with an official in the Department of Social and Family Affairs, it appears that the issues in *Hartmann* and *Geven* have not arisen in the Irish context, but that if they did, those cases would be applied in deciding whether to dispense with any residence condition.

The same applies to *Lithuania*. Family benefits may be paid to a person on the basis of the work place and not residence. The responsible country is the country of the workplace even if one of the parents is unemployed. If the allowance is higher in the country of residence, then the later pays the difference.

Less clear is the situation in *Latvia*. Article 4 of the Law on State Social Allowances provides that the right to the social allowances is enjoyed by persons residing in Latvia permanently. Union Citizens and their family member who have not obtained the status of permanent residents are entitled to the child-raising allowance only if this follows from Regulation 1408/71. As explained by the State Social Insurance Agency, if the child-raising allowance is claimed by a frontier worker employed in Latvia but living with his/her family in another EU Member State, Latvia will provide child-raising allowance to the frontier worker as an individual right. If, however, his/her spouse living in another EU Member State is also employed there, then the state responsible for the provision of child-care allowance is the Member State where the child lives. In addition, both Member States are under the obligation to compare the amount of child-care allowances, and in case the amount of allowances differs they must compensate the difference. It follows that the Social Insurance Agency takes into account Regulation 1408/71 only. It is clear that under Latvian law the unemployed wife of a frontier worker residing outside of Latvia would be denied the right to Latvian child-care allowance, because the right to child-care allowance in Latvia is an individual right. However taking into account the *Hartmann* decision, especially paragraphs 25-26, where in substance the ECJ gave the interpretation of the scope of an individual right to social advantages for a frontier worker by extending it to the spouse as an indirect beneficiary, the understanding of an individual right to child-care allowance under Latvian law in the light of Article 7(2) of the Regulation 1612/68 also has to be extended.

In *Sweden* there is a proposal to introduce a certain child-care allowance. According to the proposal the benefit should come within Regulations 1612/68 and 1408/71. In principle this should mean that a Swedish child-care allowance will be co-ordinated with the corresponding benefit in other Member States. Referring to the *Hartmann* and *Geven* cases the public investigation presenting the proposal for a future Swedish child-allowance has dealt with the matter and the committee has noted that it is important to provide for an exception to a strict application of settlement requirements.

The relationships between *Luxembourg* and the neighboring states in the social security field are mainly provided by the Regulation 1408/71. Nevertheless, due to its specific geographical location Luxembourg is one of the European countries that welcomes a large number of cross-border workers from France, Belgium and Germany, Luxembourg's legislators have decided to go beyond the European text and offer the members of a cross-border worker's family the same choices as the worker would receive. With its far-reaching legislation,

Luxembourg anticipated a right that will be recognized for all European cross-border workers once the amended European coordinating Regulation 883/2004 enters into force. Nevertheless, there are still examples of residence clauses in the Luxembourg's social security legislation that could be contrary to the jurisprudence of the Court of Justice in *Hartmann*, as they imply discrimination against cross-border workers. On the one hand, there is the maternity allowance ("allocation de maternité"), which was considered compatible with Community law (Case C-43-99). On the other hand, the "forfait education" established by the Law of 28 June 2002 on pensions for parents who do not work at all and who take care of a child under four years, with the condition that both the parent and the child reside in Luxembourg, thus excluding cross-border workers, was considered incompatible.

On the other hand, strict residency requirements are still applied by *France* (Article L 512-1 of the "Code de la sécurité sociale"), which could be considered as contrary to the *Hartmann* decision. In *Italy* too, comparable child-raising allowances as in *Hartmann* and *Geven* are subordinate to the condition of residence in Italy.

The same applies to *Poland*. The comparable benefit (child-raising allowances) is provided by the Act on family benefits, but the benefit is only provided for those migrants (EU nationals included) who reside in Poland during the period of receiving the benefit, unless provided otherwise by rules on co-ordination. Thus, it can be stated that with regard to child-raising benefits the Act requires residence within the territory of Poland. The prerequisite of residence in Poland needs to be fulfilled. There are no other provisions concerning frontier workers and their families. It seems incompatible with Community law, while there are no provisions on evaluating potential connections of the beneficiary with the Polish society. Instead, residence in Poland is required.

In *Slovakia* too almost all social and tax advantages are conditioned with permanent residence in the country, or at least temporary residence. Therefore, individuals in a similar position as in the *Hartmann* case would not be entitled, according to Slovak legislation, to any social benefits contrary to the wording of Article 7 (2) of the Regulation 1612/68 in the light of abovementioned decision.

In the *United Kingdom* the main consequence of these judgments has been in Northern Ireland. In relation to child benefit and child tax credit the cross-border issue does not seem to have been problematic. However, in relation to Working Families Tax Credit (a means-tested benefit for families on lower incomes) UK benefits regulations have appeared not to permit persons who live in Ireland but work in Northern Ireland to claim.

Following the ECJ's decision in *Hartmann* the Cross-Border Mobility website (www.crossbordermobility.info) recognises that this requirement should be amended and advises individuals who are affected by the regulations (a) that they are entitled to the social benefits irrespective of the apparent residence requirement; (b) that many people resident in Ireland are in receipt of the benefit (i.e. that the UK authorities have accepted the principle that they are obliged to pay the benefit). The rapporteurs however are not aware that the requirement in Regulations has yet been changed formally. There is a requirement that the

applicant or partner for the benefit should be working 16 hours a week (but there does not seem to be a minimum remuneration amount). This kind of requirement in principle seems to be compatible with the Court's judgment in *Geven*.

For the *Dutch* situation, *Geven* is of particular interest. Wendy Geven lives in the Netherlands but works after her pregnancy leave during the first year of her son's life between 3 and 14 hour a week in Germany. Before the Court could decide on the entitlement to a children's allowance it should be decided whether Geven is a worker in the meaning of Regulation 1612/68. The referring court had already "established that during the period in question Ms Geven was in a genuine employment relationship allowing her to claim the status of migrant worker for the purposes of Regulation No 1612/68." Obviously the Court agreed. Dutch policy and jurisprudence follow a rather different and much more restrictive approach. Since the nineties the Aliens Circular applies for genuine and effective employment the criteria of 40% of the fulltime equivalent. This criterion is leading for the jurisprudence as well, although recently District Court Amsterdam rejected the argument that employment is only effective and genuine when it is at least 40% of the full time equivalent. Nevertheless, another District Court (Haarlem) is still of the opinion that 6 hours where 38 is the full time equivalent does not constitute effective and genuine employment. This approach clearly contravenes the *Geven* judgment. *Geven* implies also that the wording of the Aliens Circular should be amended.

Concluding

As far as the *Hartmann* and *Geven* cases are mentioned in the national reports: in *Austria* the decisions did not ask for any amendments. The *Finnish* situation seems also in line with the judgments. No follow-up was noted in *Denmark*, while in *Romania* the decisions did not play a role yet. The Portuguese rapporteur considers both decisions extremely important for *Portugal*, while according to the Cypriot rapporteur the decisions have no bearing on *Cyprus*.

The *Czech*, *Hungarian*, *Irish* and *Lithuanian* rapporteurs argue with arguments that legislation and practise in their Member States are most probably in line with both decisions. Less clear is the situation in Latvia and Luxembourg.

Openly contrary to the judgments is the situation in *France*, *Italy*, *Poland* and *Slovakia*, while strict residency requirements are still applied.

The Regulations in the *UK* and *the Netherlands* need still to be amended. Future relevant legislation in Sweden will most probably make an exception to a strict application of settlement requirements in this respect. No legislative action has been taken in Germany itself.

Follow up to: Hendrix (C-287/05)

This case is about a Dutch frontier worker who worked and lived in the Netherlands. While continuing to work in the Netherlands, he transferred his residence to Belgium. Before his removal he was entitled under Dutch legislation to a benefit for handicapped people which is listed in Annex IIa of Regulation 1408/71 as a non-exportable special non-contributory benefit. Therefore, once Mr Hendrix had left the country, the Dutch competent institution stopped

paying that benefit applying the said provisions of Regulation 1408/71. However, as Mr Hendrix continued to be active as a worker in the Netherlands, the ECJ was asked whether the withdrawal of the benefit is not contrary to Article 39 or Article 18 EC Treaty.

The ECJ stated that Article 39 EC and Article 7 of Regulation 1612/68 must be interpreted as not precluding national legislation, meaning that a special non-contributory benefit listed in Annex IIa to Regulation No 1408/71 may be granted only to persons who are resident in the national territory. However, implementation of that legislation must not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings which goes beyond what is required to achieve the legitimate objective pursued by the national legislation.

According to the *Austrian* and *Romanian* rapporteur this decision has not been a topic in both countries. The decision is not mentioned in the *Belgian, French, German, Luxembourg's, Portuguese* and *United Kingdom's* reports. In *Denmark* too no follow-up action of the *Hendrix* judgments was identified. According to the Finnish Social Insurance Institution, the *Hendrix* judgment has not had and is not likely to have any impact on the domestic system either. In *Ireland* too there is no benefit which is strictly analogous to the benefit in the *Hendrix* case and the situation in that case has not apparently arisen in the Irish context. The same applies to *Italy, Latvia* and *Slovakia*.

According to the Czech rapporteur the *Czech Republic* listed/submitted social benefits which are granted on the basis of the State Social Support Act in Annex IIa of Regulation 1408/71. Benefits to disabled persons in general, however, are in the Czech legal system regulated by the Act on Social Security. Nevertheless, in the Czech Republic, a special non-contributory benefit payable to young persons suffering from total or partial long-term incapacity for work before joining the labour market does not exist.

Hendrix may have some bearing on *Cypriot* courts. Moreover, the fact that the ECJ stated that the provisions of Regulation 1408/71 must be interpreted in the light of the objective of Article 42 EC, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers is significant for a potential case in Cyprus on the subject of freedom of movement. Moreover, the ruling that the residence condition can be applied only if it is objectively justified and proportionate to the objective pursued is again a significant authority for future court cases in Cyprus.

Hungarian social law contains three types of special non-contributory benefits in terms of Reg. 1408/71/EEC: non-contributory old-age allowance, invalidity annuity and benefit for motor-disabled persons. Pursuant to the Social Act persons being entitled to exercise the right to free movement can claim these benefits if they possess a Hungarian residence that is evidenced by an address card issued by the local authority. The address card (registry) is usually issued for indefinite period in case of Hungarian nationals and for one year in case of EEA nationals. Both Hungarian and EEA nationals are obliged to notify the authorities of their change in residence and they are legally liable for the damage caused by the omission of the notification. Reading these provisions together it must be stressed that Hungarian law sets the objective criteria of Hungarian residence for these special non-contributory benefits that must be

evidenced by a valid address card. The lack of lawful residence results in the withdrawal of the benefit – just in the way as the law of the Netherlands provided for in the Hendrix case. The authorities are not allowed to exercise discretion in cases of persons who leave Hungary. The Act does not contain any general clause for persons in possible hardship who maintain their economic and social links to Hungary, which most probably contravenes the Hendrix judgment.

The *Lithuanian* legislation may be problematic too, because benefits for handicapped persons are related to the permanent residence in Lithuania.

Following the judgment of the ECJ, the Central Appeals Tribunal in *The Netherlands*, who asked for the preliminary ruling, came up with a decision on 7 February 2008. The Central Appeals Tribunal could not apply the ‘unacceptable degree of unfairness’-clause as suggested by the ECJ in this case because this provision was only introduced in the relevant legislation in 2001, while the issue at stake was situated in 1999. However, the circumstances in this particular case do not fulfil the condition of paras 54-56 of the ECJ judgment that the legislation must not entail an infringement of rights, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. The Central Appeals Tribunal referred to the fact that Mr. Hendrix stayed employed in the Netherlands after he moved to Belgium and the close relation between his working activities and receiving the benefit. So therefore the appeal was granted.

In *Poland* a benefit of the kind in Hendrix is provided by the Act of on social pension. A Social pension (*renta socjalna*) is a non-contributory benefit for persons who became incapable to work before reaching maturity or graduating studies. No prior employment is required. The characteristic of the Polish “*renta socjalna*” is in principle the same in The Netherlands. For Polish and EU/EEA nationals there is a requirement of residence in Poland to be eligible for the benefit. According to the point 38 of the *Hendrix* judgment the residence requirement to reside in Poland seems to be compatible with Community law. Nevertheless, it seems that the reasoning of the ECJ is relevant to Polish law as well (especially points 57 and 58 of the judgment). Thus, when deciding on the entitlement to a social pension in case of residence in another country the economic and social links of beneficiary should be analysed. It should be noted, however, that the issue of “economic and social links with the state of origin” has not yet been analysed by Polish courts.

The corresponding benefit in *Swedish* law is the disablement allowance (*handikappersättning*), and this benefit is listed in the Social security Act as a benefit based on residence only. Hence, a preliminary conclusion is that in accordance with Swedish law the disablement allowance should not be paid if, for instance, a frontier worker living and working in Sweden was moving to Denmark for residence but continued to work in Sweden.

Concluding

As far as the Hendrix case is mentioned in the national reports: in *Austria* and *Romania* the decision hasn’t been a topic. No follow-up was noted in Denmark and the decision is not likely to have any impact on the Finnish situation. Situations comparable to Hendrix have not yet arisen in the Czech, Irish, Italian, Latvian and Slovakian context. According to the national

rapporteur the decision could have some bearing on *Cyprus*. Due to permanent residency clauses the relevant legislation in *Hungary, Lithuania, Poland* and *Sweden* most probably contravenes the Hendrix judgment.

Follow up to: *Eind* (C-291/05)

In February 2000, Mr Eind moved from the Netherlands, of which he is a national, to the United Kingdom, where he worked as an employee and where, in December of that year, he was joined by his daughter Miss Eind (born on 29 April 1989), she having come direct from Surinam, of which State she is a national. By letter of 4 June 2001, the United Kingdom authorities informed Mr Eind that he was entitled to reside in the United Kingdom by virtue of Regulation No 1612/68. By letter of the same date, Miss Eind was informed that she was entitled to reside in the United Kingdom in her capacity as a member of a Community worker's family. On 17 October 2001, Mr Eind and his daughter entered the Netherlands. On 9 November 2001, Miss Eind registered with the police authorities and asked them to issue a permit for a specified period to enable her to reside with her father in the Netherlands. The State Secretary for Justice rejected Miss Eind's application on the ground that she did not hold a temporary residence permit, adding that she could not be granted a residence permit on the basis of her status as a member of the family of a 'Community national'. On the latter point, it was stated in the decision that Mr Eind could no longer be regarded as a 'Community national' since, after residing in another Member State and returning to the Netherlands, he had not carried on any effective and genuine activities in the Netherlands and could not be considered to be economically nonemployed within the meaning of Community law.

In its preliminary questions the Judicial Division of the Council of State asked, essentially, whether, when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Community law to reside in the Member State of which the worker is a national, even where that worker does not carry on effective and genuine economic activities. The Court ruled that, in circumstances such as those in the case before the referring court, Miss Eind has the right to install herself with her father, Mr Eind, in the Netherlands, even if the latter is not economically active. This finding is not affected by the fact that, before residing in the United Kingdom where her father was gainfully employed, Miss Eind did not have a right of residence, under national law, in the Netherlands.

This decision is not mentioned in the *German, Lithuanian and Luxembourg's* reports. According to the *Austrian* rapporteur the decision didn't ask for any amendments. In *Finland* and *Romania* no information on possible impact of this judgment was obtained. On the other hand, *Eind* is important for *Cyprus* in the way it deals with the right to family reunification, since *Cyprus* applies in general a very restrictive approach to family reunification which may be conceded to have a deterrent effect on the freedom of movement. *Eind* did not have any impact in *Latvia*, because a minor child of Latvian parents has a right to a permanent residence permit

The *Belgian* report did not mention *Eind*, but it addressed the related *Jia* case (C-1/05). The

implementation of *Jia* into the judicial practice is not a problem in Belgium, as the Alien Act does not require any residence in another Member State to recognize free movement to EU citizens and their family members. This ruling was obvious in Belgium, as the Alien's Act contains an assimilation principle towards third country national family members of a Belgian citizen. While *Jia* did not prove to be a problem, it can be assumed that also the implementation of *Eind* will not be problematic in Belgium. According to the French rapporteur the same applies to France. The implementation of *Eind* will not be a problem in *France* as well.

Family members of EU citizens are under *Czech* law granted the right to entry and to obtain temporary residency permit on the grounds of the mere fact, that they enjoy the status of a family member of an EU citizen. Therefore it appears that Czech legislation is in the context of *Eind* in conformity with the conclusions of the Court.

In early 2008 an adjustment was made in the administrative practice concerning the right of residence for third country family members of *Danish* citizens returning from a stay in another Member State on the basis of the EU rules on free movement. As a result of the ECJ judgment in *Eind* the Ministry of Refugee, Immigration and Integration Affairs adopted new guidelines according to which the returning Danish citizen will be entitled to bring his or her family back to Denmark even if he or she is not employed or carrying out other economic activity at the time of the return from abroad.

According to *Hungarian* law, if a person proves his/her family ties (spouse, children, ancestor) with a Hungarian national and wishes to settle in Hungary, the same rules apply to his/her situation then those applicable to an EEA migrant's family member. It means that Hungarian law diminished reverse discrimination by placing EEA nationals and Hungarian nationals on the same footing. It also encompasses that it is not necessary to leave Hungary and to return in order to activate EC law and to become entitled to invoke the benefits contained in Dir. 2004/38/EC. The same legal effect can be generated by simply referring to the implementing Act and submitting the necessary documents.

Non-EU members of the family of *Italian* nationals are within the scope of the provisions of Legislative Decree 2007 no. 30, implementing Directive 2004/38/EC. Therefore, if Miss *Eind* had been the daughter of an Italian national coming back to Italy after staying in another Member State for working reasons, the right to stay would not have been refused to her, since she would have claimed the benefit of the Legislative Decree which entrusts a family member with the right to stay.

In *Slovakia* the legislation in this regard is considered fully in line with the *Eind* judgment.

It seems that under *Polish* law the Act of 14 July 2006 (on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members) would be applicable by analogy to a situation as considered in *Eind*. This Act refers to EU nationals moving to Poland and the rights of their relatives. However, since the rules on free movement of EU nationals should be interpreted broadly, it seems it would be possible to apply the Act of 14 July 2006 to establish rights as well of a Polish national who took advantage of free movement rules and enjoys the status of a "migrant worker" under art. 39 EC Treaty.

The situation considered in *Eind* – which was concerned with the application of Article 10 of Regulation 1612/68 – does not appear to have been considered in *Ireland* in respect of the period prior to the coming into force of the Free Movement Directive on 30 April 2006. In relation to the period since 30 April 2006, to which the principles in *Eind* would also appear to apply, it should be noted that the 2006 Regulations implementing the 2004 Free Movement Directive do not apply to Union citizens who are Irish nationals. This appears to exclude even free-moving Irish citizens, which appears to be contrary to what is envisaged in the Directive. At present, the right of a free-moving Irish citizen to be joined by third-country national family members on the former's return to Ireland appears to be dealt with by the Minister as part of his executive functions. It is not clear that any account would be taken of the position under *Eind* if the same factual circumstances arose in Ireland.

According to the *Portuguese* rapporteur *Eind* has a sure impact on Portugal. It is well known that a significant number of Portuguese citizens are gainfully employed in another Member State and frequently constitute here family with third-country nationals who did not have a right to reside in Portugal under national law. This judgment clarifies that when a Portuguese worker returns to Portugal after being employed in another Member State, a third-country national who is a member of his family has the right under Community law to reside with him in Portugal even where that worker does not carry on any effective and genuine economic activities and even where that third-country national did not have such a right of residence under Portuguese law.

In *Swedish* migration law no rules exist that prevent an effective application of the *Eind* case. However, a factual situation on which the Dutch authorities decided the case has yet not been tried before a Swedish migration court (or by the Migration Board).

The *UK* rapporteurs are concerned that the most recent judgments in *Eind* (and *Jia*) have left the law in a state of uncertainty that is unhelpful and open to divergent interpretation by National Courts. The rapporteurs have concerns that this situation is a potential source of inconsistent and divergent practice in different Member States and moreover that the practice currently prevailing in the UK is highly unsatisfactory.

Concerning The *Netherlands*, at the time of the writing of this report (October 2008) the Aliens Circular still contains the following wording: "Community national is also the Dutch national who had been established in another Member State to carry on economic activities and who has returned to the Netherlands to continue here his economic activities" (B10/1.5) This wording is in clear contradiction with the judgment of the Court in the *Eind* case.

Concluding

As far as the *Eind* case is mentioned in the national reports: in *Austria* and *Latvia* the decision did not ask for any amendments. In *Finland* and *Romania* no information on possible impact was obtained. The decision could be important for *Cyprus*. The legislation and practice in *Belgium*, *France*, *the Czech Republic*, *Denmark*, *Hungary*, *Italy*, and *Slovakia* seem in line with the *Eind* judgment, and most probably in *Poland* too. The situation in *Ireland*, *Sweden* and the *UK* is unclear. The regulations in *The Netherlands* still need to be amended.

Follow up to: ITC (C-208/05)

According to the ECJ judgment, the provisions of the EC-Treaty concerning free movement of workers “prohibit national legislation, which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking employment in respect of that person’s recruitment is subject to the condition that the job found by that agency be subject to compulsory social security contributions in that State”.

The ruling concerned the refusal to pay by the German State Employment Agency a compensation to a private sector recruitment agency (ITC) in respect of a staff recruitment voucher. The refusal was justified by the fact that the job found by ITC for the person seeking employment (in another Member State) was not covered by compulsory social security contributions in Germany itself.

This decision is not mentioned in the *French, Luxembourg’s, Portuguese* and *UK* reports. According to the *Austrian* rapporteur the decision didn’t ask for any amendments. In *Belgium* the decision was published in a national law review only. The decision is one that is crucial for *Cypriot* courts dealing with the subject: so far Cypriot courts were reluctant to disapply any provision of domestic law which is contrary to provisions of the EU acquis.

The probability that a question of non-compliance of a national legislation such as the one at issue in the *ITC* case with the relevant EU law appears in the *Czech* legal context as low. As far as the possible relevance of the *ITC* judgment in *Denmark* concerned, no information was made publicly available. In *Finland* and *Romania* too no information on the possible impact of this judgment was obtained. There does not appear to be any legislation or other measure in *Ireland, Latvia, Lithuania, The Netherlands* and *Slovakia* corresponding to the German legislation considered in the *ITC* case. The same applies to Poland, the *ITC* ruling has no relevance for the Polish legal system. Contrary to German law, *Italian* law does not provide for a “recruitment voucher” in favour of an employee who is seeking work. On the contrary, under Italian legal system private-sector recruitment agencies are expressly not allowed to receive, directly or indirectly, any kind of payment from workers for their services.

In *Hungary*, the *ITC* case is of special interest in the field of active labour market measures. Albeit there is no equivalent instrument in Hungary like a recruitment voucher, there are other active labour market measures where similar issues might arise. The Unemployment Act contains several incentives. In these cases the Unemployment Act is silent on the place of employment meaning that in theory an employment in another Member State does not per se exclude the employed or the employer from the benefits. By now foreign elements did not occur. Therefore, it is not possible to tell what would happen in such a situation.

In response to the *ITC* judgment the Federal Labour Agency in *Germany* has reacted by changing the administrative orders to make lump sum payments for commissioning employment also with respect to jobs within other EU Member States provided that the employment is taken up by German citizens or Union citizens having their ordinary residence within Germany.

Concluding

The *ITC* judgment mainly concerns *Germany* itself.

Follow up to: Jia (C-1/05)

The *Jia* case concerned the interpretation of Article 43 of the Treaty and Directive 73/148/EEC. A Chinese mother to a Chinese national who lived in Sweden with his German wife (self-employed) applied for a residence permit, on the basis that she was related to a national of a Member State. The Swedish Migration Board rejected her application on the ground that there was insufficient proof of the situation of financial dependence. Ms Jia appealed against that decision at the then Utlänningsnämnden (Aliens Appeals Board). The Utlänningsnämnden referred several questions to the European Court of Justice, asking inter alia whether Community law, in the light of the judgment in *Akrich* (C-109/01), required Member States to make the grant of a residence permit to a national of a non-Member State, who was a member of the family of a Community national who had exercised his right of free movement, subject to the condition that that family member had previously been lawfully resident in another Member State.

The Court held that no such requirement followed from Community law in general or from the *Akrich* judgment, more specifically. The Court furthermore held that Directive 73/148 required that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they had come at the time when they applied to join that Community national.

The Court argued that Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support might be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.

The *Jia* decision is not mentioned in the *German* and *Luxembourg's* reports. According to the *Austrian* rapporteur the decision didn't ask for any amendments. The *Jia* decision hasn't been a topic in *Austria*. At the time of writing of the *Danish* report the Ministry's assessment of the impact of the *Jia* judgment, if any, was not known either. In *Romania* too the decision did not play a role yet.

The *Jia* case makes it clear that *Cyprus* is not entitled to implement a blanket requirement for previous lawful residence in another Member State as a condition precedent for the grant of a residence permit to a non-Member State dependent relative seeking to remain on the basis of their dependency on an EEA national exercising free-movement rights in the UK. This can have an important effect in the immigration law and practices in Cyprus.

The implementation of the *Jia* case into the judicial practice is not a problem in *Belgium*, as the Alien Act does not require any residence in another Member State to recognize free movement to EU citizens. The *Jia* ruling was obvious in Belgium, as the Alien's Act contains an

assimilation principle towards third country national family members of a Belgian. In *France* too, the *JIA* decision is not supposed to have any impact on the French legislation and regulations.

The legal provisions in the *Czech Republic* do not make the grant of a residence permit to nationals of a non-member State subject to condition of previous legal stay in another member State. In this matter, Czech law is in conformity with the relevant EU law and ECJ judgments. The same applies to *Slovakia*.

A confrontation between the *Portuguese* legislation on free movement of workers and the case law of the European Court of Justice does not reveal any inconsistency of the former vis-à-vis the latter. From another perspective, the relevant Portuguese legislation can be interpreted according to inter alia the *Jia* judgment, without difficulties for the national administration and courts.

In the relevant *Polish* legislation there is no requirement of previous lawful residence in another Member State. There is also no definition of “dependency” of a family member. Thus, all appropriate means to prove the situation of being dependant can be invoked. Polish law seems to be compatible with the *Jia* ruling.

On the other hand, according to the *Finnish* rapporteur the Ministry of Interior is of the opinion that the *Jia* case does not preclude the application of the requirement of previous lawful residence in case of third country national family members. Therefore the national legislation and practice are not expected to be amended in this respect (yet).

According to the Lithuanian rapporteur, there should be no similar problems in *Lithuania* as those analysed in the *Jia* case, except that it may affect the family members of the Lithuanian national, because in case of a family member of a Lithuanian national the Aliens Law requires residence in another Member State before joining the family member in Lithuania.

While the *UK* Immigration (EEA) Regulations 2006 could be interpreted as requiring in this respect first lawful residence in another Member State, there is a great deal of uncertainty in the present position of the UK.

In Ireland too – based on *Akrich* – the 2006 Immigration Regulation 3 (2) “shall not apply to a family member unless the family member is lawfully resident in another Member State”. According to the rapporteur it is clear that the *Jia* ruling of the European Court of Justice limiting the scope of the *Akrich* ruling means that Regulation 3(2) will need to be reviewed and, if necessary, deleted/amended. Nevertheless, the High Court in May 2007 still held that the 2006 Regulations correctly implemented the 2004 Directive, so that a third-country national who had lived unlawfully in the UK prior to coming to Ireland and getting married to an Estonian national in Ireland could be refused a residence card under Regulation 3(2). The Judge considered that *Jia* case was not intended to disturb the approach of the Court of Justice in *Akrich*.

In The *Netherlands* the government interpreted the *Akrich* judgment as allowing for the introduction of long term visa requirements and integration obligations, if the third country national family member of an EU migrant has not been admitted under the national immigration rules of another Member State. Nevertheless, the government decided to postpone the extension of the integration measures and long term visa requirements to third-country family members of EU nationals until the judgment of the ECJ in the *Jia* case. Due to the *Jia* ruling

that “Community law does not require Member States to make the grant of a residence permit (to third country family members) of a Community national who has exercised his or her right of free movement, subject to the condition that those family members have previously been residing lawfully in another Member State”, it may be expected that the government will not stick to its restrictive interpretation of *Akrich* and will refrain from extending long term visa requirements and integration obligations to third country national family members of a Community national who has exercised his or her right of free movement, even when those family members have not previously been residing lawfully in another Member State.

It seems that the approach of Hungarian law to the question of dependence is rather different from the approach applied by Sweden and thereby probably the *Jia* case, and the implications contained therein are not of real significance for *Hungary*. Swedish law focuses on the fact of real dependence of the family member on the Community national as a precondition to judge an application. If dependence is appropriately proven, as a second step, the Community national is to evidence that none of the family members will be an unreasonable burden on the social security system of *Sweden*. However, in Hungary, dependence is rather treated as a guarantee towards the state that somebody – the Community national or the family member – will personally provide for the financial means necessary for covering the costs of stay. The whole concept of the supporting declaration sees as a primary target to appoint the person who is legally liable for the possible costs occurred in connection with the stay. In this sense it might be said that the real dependence of the family member on the Community national is not relevant. Consequently, the elements of dependence are not of practical relevance in Hungary either.

The *Italian* legislation requires that in order to be issued with a residence card, the non-EU family member shall submit a document certifying his/her being dependent on the EU citizen (see Article 10(3)(b) of the Legislative Decree 2007 no. 30). Neither the Legislative Decree nor the implementing circulars make it clear what means of proof of the status of ‘dependent’ family member are acceptable, or when a family member shall be considered dependent.

There is no administrative or judicial practice on application of the provisions of *Latvian* law in situations like the *Jia* case. Regulation No. 586 may be interpreted in a way that it requires actual dependency on an EU or EEA citizen when he/she moves to reside in Latvia.

The *Swedish* rapporteur concluded that the interpretation of the word “dependent” in the national legislation is within the boundaries of the Court’s judgment in *Jia*.

Concluding

As far as the *Jia* case is mentioned in the national reports: in Austria the decision did not ask for any amendments. In *Denmark* and *Romania* no information on possible impact was obtained. The decision could be important for *Cyprus*.

The implementation of the *Jia* decision into the judicial practice is not a problem in *Belgium*, *France*, *the Czech Republic*, *Poland*, *Portugal* and *Slovakia*.

On the other hand the requirement of previous lawful residence is still an issue in *Finland*, *Ireland*, *Lithuania*, *United Kingdom* and (at the time) *The Netherlands*.

Only a few reports addressed the issue of dependency (*Hungary, Italy, Latvia, Poland and Sweden*). In these Member States no problems of implementation of the *Jia* decision in this respect are foreseen.

Follow up to: *Gattoussi* (C-97/05)

In *Gattoussi* the Court decided in line with *El Yassini* (C-416/96) that the non-discrimination clause of Article 64(1) of the Euro-Mediterranean Agreement EC-Tunisia may have effects on the right of a Tunisian national to remain in the territory of a Member State in the case where that person has been duly permitted by that Member State to work there for a period extending beyond the period of validity of his permission to remain.

While *Gattoussi* had married a German citizen, he was granted on 24 September 2002 a residence permit valid for three years. On 22 October 2002 the Employment Office granted *Gattoussi* a work permit of indefinite duration. His contract of employment was still valid till 31 March 2005 when in April 2004 his relationship with his wife ended and the authorities withdraw his residence permit. According to the Court *Gattoussi* could claim a right of residence based on the non-discrimination clause of Article 64 while Germany had previously granted him specific rights in relation to employment which were more extensive than the rights of residence conferred on him. Therefore his residence permit should be extended for the entire period during which he has that employment, although the initial reason for the grant of his leave to stay no longer existed by the time at which his residence permit was withdrawn. The Court made it clear that the situation would be different only for reasons related to public policy, public security or public health. And the public policy exception presupposes – as for Community citizens in general – the existence of a genuine and sufficiently serious threat to one of the fundamental interests of society.

The *Gattoussi* decision is not mentioned in the *Belgian, French, Luxembourg's, Portuguese, Slovak and UK* reports. According to the *Austrian* rapporteur this decision didn't ask for any amendments. The *Cypriot* rapporteur foresees serious effects on immigration law and routine practice of third country nationals in Cyprus. As far as the possible relevance of the *Gattoussi* judgment in *Denmark* concerned, no information was made publicly available. In *Finland*, the decision did not have any impact on the domestic law and practice either. In *Ireland* too Article 64(1) of the Euro-Mediterranean Agreement has not been considered in the Irish context yet. The same applies for Romania. The consequences of *Gattoussi* in *Latvia* and *Poland* are unclear. It is uncertain if the situation can arise at all when applying *Swedish* law. Therefore the *Swedish* rapporteur finds it difficult to give an opinion on the position of *Swedish* law on this point

The *Gattoussi* judgment has not had any effect in *Lithuania* so far. A third country national whose residence permit expired or was terminated is not able to extend his stay on the basis of a work permit, because the precondition for issuance/extension of a work permit is a valid residence permit. Work permits in *Lithuania* are being issued with a two-year validity only.

According to the *Czech* rapporteur the *Gattoussi* decision has no meaning for the *Czech*

Republic. Under Czech law, the work permit is accessory to the residence permit. Pursuant to the Employment Act the validity of the work permit expires with the expiration of the residence permit. Therefore the validity of a work permit for a Tunisian national would be from the point of its issue limited by the validity of the residence permit. More or less the same applies in *Hungary*, but just the other way around. From the wording of the law it can be deduced that the residence permit is issued after the submission of the work permit, hence its duration shall be accorded to the validity of the work permit. Although it is common practice that the issuance of the work permit precedes the issuance of the residence permit, the end-validity of the both permits shall, however, be the same.

Contrary to German law, *Italian* law does not provide for “a work permit” issued by the public administration as an authorization different from a residence permit. On the contrary, under Italian law there are different kinds of residence permits depending on the purpose for which they are issued. A residence permit for working reasons usually lasts as long as the employment contract which it is connected to, but in any case it cannot last more than two years (even if the employment contract is concluded for an unlimited period). Given the strong link between the residence permit for working reasons and the employment contract under Italian law, the residence permit is renewable almost automatically if there is an ongoing employment contract.

Had a situation like that involved in the *Gattoussi* case occurred in Italy, a regime totally different from the German one would have regulated the case. Italian citizen’s family members who are not Italian nationals are treated as EU citizen’s family members who are non-EU nationals.

The relevance of the *Gattoussi* judgment for *The Netherlands* can be illustrated by a 2006 District Court decision. The case concerned a Macedonian national who was granted a residence permit due to his marriage with a Dutch national. When the relationship ended he requested a residence permit for employment. It is not clear from the decision of the court whether the applicant was already employed at the time when his residence permit was withdrawn. If so, the *Gattoussi* judgment could have been relevant while the applicant due to his marriage was entitled to employment for an indefinite period. Actually his request was rejected and his appeal was considered unfounded. Any reference to the (non-discrimination clause in the) Association Agreement with Macedonia is lacking in the decision of the court.

In contrast to *The Netherlands* the *Gattoussi* decision played already an explicit role in several court decisions in *Germany*. In its decision of 29 June 2007 the Administrative Appeal Court had to deal with a Moroccan national who had received due to the marriage with a German national a residence permit until 31 December 2004. Her application for prolongation has been refused leading to a separation from her husband. The applicant argued since she was in possession of an unlimited residence permit and an unlimited labour contract she was entitled to prolongation of her residence permit under Art. 64 of the Europe Agreement with Morocco relying upon the *Gattoussi* judgment of the European Court. The Court argues that the *Gattoussi* judgment cannot be interpreted as an expansion of the residential status of Tunisian or Moroccan workers in comparison to the *El Yassini* decision. In this decision the

European Court had stated that the prohibition of discrimination under Sec. 40 para. 1 of the Cooperation Agreement with Morocco could be exceptionally interpreted as an entitlement to a prolongation of a residence permit provided that the national court previously determined that the state of residence had granted the Moroccan worker with respect to the exercise of a profession more extensive right than with respect to residence. Therefore, the Court argues that the European Court's jurisprudence must still be interpreted as granting the national court the final decision of whether under national law a Moroccan national can be granted more extensive employment rights as his/her residence permit would indicate.

Following the *Gattoussi* judgment of the European Court the Administrative Appeal Court of Baden-Württemberg 27 September 2007 has decided that an unlimited work permit entitles an Algerian national due to the prohibition of discrimination in Art. 67 of the Europe Agreement EEC/Algeria to a residence right which may, however, be restricted in duration. Whether the entitlement to a residence permit exists also for nationals of other third states with which the European community has concluded Europe-agreements, containing, however, different interpretative common declarations, has been left open by the Court.

Concluding

From all the cases mentioned by the Commission *Gattoussi* is the great unknown. As far as the *Gattoussi* case is mentioned in the national reports its consequences are unclear in *Austria, Cyprus, Denmark, Finland, Latvia, Poland* and *Sweden*. The *Czech, Hungarian* and *Lithuanian* rapporteurs argue with arguments that the *Gattoussi* decision has no meaning for their Member States. Had a situation like that involved in *Gattoussi* occurred in *Italy*, a regime totally different from the German one would have regulated the case. Italian citizen's family members who are not Italian nationals are treated as EU citizen's family members who are non-EU nationals.

As an earlier District Court ruling illustrates *Gattoussi* could potentially be very relevant for *the Netherlands*. The decision played already an important role in German case law.

POLICIES, TEXTS AND PRACTICES OF A GENERAL NATURE WITH POSSIBLE REPERCUSSIONS ON THE FREE MOVEMENT OF WORKERS

INTRODUCTION

The principal policies, texts and practices addressed by the national rapporteurs in this chapter cover, in large part, similar issues to those discussed in previous reports. The following topics are most likely to have repercussions on the free movement of workers.

- Reverse discrimination
- Application of the “Community preference principle” regarding access to the labour market;
- Association Agreement with Turkey;
- Economic/ labour migration of third-country nationals and their treatment after admission;
- Developments in integration policy;
- Nationals policy plans on migration;
- Measures to prevent irregular migration unauthorized employment;
- Transposition of Directives concerning third-country nationals.

Some miscellaneous issues pertaining to individual Member States are also listed at the end of the chapter.

REVERSE DISCRIMINATION

Reverse discrimination whereby nationals are subject to less favourable rules than EU citizens resident in the Member State concerned is referred to in two reports in respect of family reunification. In *Austria*, the Constitutional Court ruled that the differentiation applied in family reunification rules between EU citizens residing in Austria with third-country national family members and Austrian nationals who have not exercised their free movement rights is not unconstitutional and is justified by the need to have a coherent law on foreigners and to preclude potential misuse of its provisions. In *Denmark*, the less favourable family reunion regime applicable to Danish citizens reuniting with or marrying third-country nationals, which has been described in previous reports (and which only underwent minor amendments in 2007), has meant that Danish nationals are resorting to Community law to circumvent the restrictive national rules.

APPLICATION OF THE COMMUNITY PREFERENCE PRINCIPLE

The reports for the following Member States describe the application of the so called “Community preference principle” regarding access to the labour market⁵¹: *Czech Republic, Finland, Ireland, Poland, Portugal, Slovenia*. In the *Czech Republic*, explicit provision is made for the application of this principle in the Employment Act. Third-country nationals are required to hold a work permit, with the exception inter alia of family members of EU citizens, foreigners who have been issued a permanent residence permit, family members of officials of diplomatic missions and persons granted international protection. In *Finland*, the principle is applied by the employment office which examines whether suitable labour is available for the work in question in the labour market and ensures that issuing a work permit to a third-country national will not adversely affect a person already in the labour market from finding employment. Third-country nationals lawfully resident in Finland are considered as being already in the labour market together with Finnish nationals and EU citizens. In *Ireland*, the Employment Permits Act 2006, which entered into force on 1 February 2007, contains a number of provisions to ensure that the preference principle is applied. An employer who applies for an employment permit for a third-country national must provide evidence that the job vacancy was advertised with the FÁS/EURES employment network and in local and national newspapers for three days to ensure that an Irish, EU/EEA or Swiss national is unavailable to fill the vacancy. Moreover, the application must confirm that at the time of the application more than 50 per cent of employees in the company are Irish, EU/EEA or Swiss nationals. While transitional measures are in place in Ireland for Bulgarian and Romanian nationals, they are to be given preference over third-country nationals in the issue of employment permits. In *Poland*, the law on the Charter of a Polish National (“*Karta Polaka*”) was adopted in September 2007. This legislation allows third-country nationals from countries to the east of Poland (including countries in the Caucuses and Central Asia), if they are able to demonstrate affiliation to the Polish nation, including the possession of a basic knowledge of the Polish language, to obtain a number of privileges in Poland, such as inter alia free access to salaried employment and self-employment. Therefore, the question arises whether this new legislation is in conformity with the preference principle as understood above. In *Slovenia*, the preference principle is addressed in the rules on permits for employment found in the Employment and Work of Aliens

⁵¹ This is understood broadly as the principle whereby preference is to be provided to nationals, EU citizens and permanently resident third-country nationals over other third-country nationals with regard to access to the labour market of the Member State concerned. This principle finds a narrow legal basis in the 2003 and 2005 Accession treaties, which oblige Member States applying transitional arrangements to give preference to nationals of new Member States over third-country nationals, and in Decision 1/80 implementing the EEC-Turkey Association Agreement, where Turkish workers lawfully employed in Member States for a period of four years are no longer subject to restrictions regarding access to the labour market and should therefore be granted preference over other third-country nationals. However, in the non-binding Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment (OJ 1996 C 274/3), Member States supported a broader preference principle, which is clearly reflected in labour market tests in Member States and which also finds expression in a number of Commission communications: e.g. see Commission Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (COM(2007) 637 final of 23 October 2007) at p. 10.

Act 2000 (as amended in 2005 and 2007), which, as a rule, are only issued to third-country nationals if there are no nationals seeking work in the sector concerned or third-country nationals who enjoy equal status to Slovenian nationals regarding access to employment and are registered in the records of the Employment Service. Finally, in *Portugal*, a new Immigration Act passed in 2007 also enshrines the Community preference principle.

ASSOCIATION AGREEMENT WITH TURKEY

The position of Turkish nationals under the EU Association Agreement with Turkey is a subject of attention in both the reports of *Germany* and the *Netherlands*. In 2007, there were a number of cases in *Germany* decided in the favour of Turkish nationals, most notably that the enhanced protection against expulsion in Article 28 of Directive 2004/38/EC is also applicable to them, a position that is based on the judgments of the Court of Justice in C-467-02, *Cetinkaya*. In the *Netherlands*, the European Commission's infringement proceedings are now before the Court of Justice (C-92/07, *Commission v. The Netherlands*) in which the Commission disputes the higher level of fees charged to Turkish nationals for issue of a residence permit as compared to the fees charged to EU citizens and EEA nationals. The Commission argues that the higher fees are incompatible with the standstill clause and non-discrimination clauses of the Association Agreement, the Additional Protocol and Decision 1/80.

ECONOMIC MIGRATION OF THIRD-COUNTRY NATIONALS AND THEIR TREATMENT AFTER ADMISSION

There is an evident need in a number of Member States to fill labour shortages in both skilled and less-skilled sectors of the national economy and it appears that these shortages are not being adequately met by EU citizens from other Member States. With regard to skilled workers, a new system of "green cards" has been proposed in the *Czech Republic* that will facilitate access for third-country nationals who are qualified (i.e. those with university-level education and key personnel") and skilled workers (i.e. apprentice-level education) to fill shortages in the labour market. This system should come into effect in 2009 and aims to replace the pilot project on the "Selection of Qualified Foreign Labour", discussed in previous reports, which enables successful applicants to obtain permanent residence more quickly but which appears to have been not as successful as originally anticipated due to a low take-up rate and complexities in the administrative procedure. In *Ireland*, the new employment permit arrangements came into effect in January 2007. The new system is aimed at attracting third-country nationals with high-level skills which are strategically vital to the development of the economy and which cannot be found in the EEA. The arrangements aim to fill job vacancies in skills shortage areas and are based on a Green Card system. They also comprise an Intra-Company Transfer Scheme and a Work Permit Scheme. An Immigration, Residence and Protection Bill was also introduced in April 2007 with a view to replacing the current immigration legislation in a single measure, but it lapsed with the decision to call a General Election one month later and there was no attempt to revive the Bill during the remainder of

2007.⁵² In the *Netherlands*, the regulation on knowledge migrants (described in the 2005 and 2006 Reports) was simplified in December 2007 and the admissions procedure applies to family members who do not enter the country with the migrant but who join him or her at a later date. Moreover, third-country national students who complete their studies are now able to seek employment for a period of one year (replacing the previous period of three months) and can also take up employment at a lower income threshold. In the *United Kingdom*, the details of Tier 1 of the new points-based system, which is aimed at highly skilled migrants from third countries, were announced at the end of 2007 and are being brought into effect during 2008. Tier 1 will cover four categories of migrants: a general category for the highly skilled to enable them to seek employment or establish themselves in self-employment in the UK; entrepreneurs; investors; and a post-study category permitting students who have completed their studies to work in the UK for up to two years. As a result of the reforms being introduced under the points-based system, knowledge of the English language has become central to admission.

With regard to other developments relating to the economic migration of third-country nationals, the Dutch Government published a policy paper, "Towards a Modern Migration Policy" ("*Naar een Modern Migratiebeleid*"), which aims to orient policy more than ever before towards the need for migrants in Dutch society, but with an emphasis on temporary migration. In November 2007, the Advisory Committee on Aliens Affairs (ACVZ) published an advisory report on this policy document viewing it as a useful first step towards the development of a new policy on the admission of foreigners other than asylum-seekers. It approved the principle that admission should be based largely on the contribution migrants are able to make to Dutch society but also proposed a number of adjustments to the recommended migrant categories for admission. In *Poland*, the rules relating to access to the labour market for nationals of three neighbouring non-EU countries (i.e. Belarus, Russia and Ukraine) were relaxed in July 2007. Citizens of these countries can now take up employment in Poland for a period not exceeding three months within a six-month period without the need to obtain a work permit.

During 2007 in *Italy* a draft law was presented to Parliament, which, if adopted, would have changed the planning for the immigration quota to a system that operates on a three-year basis and would have enabled third-country nationals to enter *Italy* to look for work provided they possessed sufficient income for the duration of their stay and were supported by an Italian, EU citizen or a long-term resident willing to provide an economic guarantee. However, this draft law was abandoned by the new Parliament that was elected in 2008.

The three Baltic EU Member States continue to report labour shortages. In *Estonia*, employers remain interested in hiring third-country nationals to fill shortages in the construction and IT sectors, although their attempts to do so are hampered by the complex work permit regulations. The rapporteur observes, however, that employers do not appear to be exerting

⁵² However, the Bill was re-introduced in January 2008.

much effort to employ workers from other new Member States. In *Latvia*, an Immigration Concept was elaborated by the Ministry of Interior exploring the option of liberalizing the immigration rules relating to third-country nationals. However, no changes to immigration policy were adopted as the labour shortages in the country were not as significant as before due to the downturn in the economy. In comparison to the other two Baltic EU Member States, *Lithuania* contains the most foreign workers from third countries, with a significant majority originating from the neighbouring countries of Belarus and Ukraine and working mainly in the construction and transport sectors. Given continuing labour shortages in the country, discussions have also taken place on whether the rules relating to the admission and employment of third-country nationals should be relaxed.

In other Member States, however, the demand for migrant workers from third countries appears to be relatively small, and thus relatively restrictive measures are in place. In *Austria*, labour migration from third countries is limited with only 1,565 skilled migrants or “key personnel” permitted to enter for employment purposes in 2007. A further 7,500 temporary work permits and 7,000 permits for seasonal work were issued. A restrictive approach to the admission and employment of third-country nationals is also observed in *Slovakia*, which is exacerbated by the statements of politicians and the nature of the draft legislation presented.

Concerns were expressed in a number of Member States in 2007 regarding the treatment of EU citizens from other Member States, third-country national family members and other third-country nationals. In *Cyprus*, the treatment of the third-country national family members of Cypriot nationals and EU citizens was particularly problematic in relation to such issues as unjustified delays in the examination of applications for a residence permit, rejections of such applications, prohibitions on entry, arrests and deportations (including the deportation of asylum-seekers married to Cypriot nationals or EU citizens as soon as their claims are rejected), and declaring their marriages null and void. In *Ireland*, the Employment Permits Act contains a range of important safeguards for migrant workers, including the granting of the employment permit directly to the employee rather than the employer; a statement in the permit of the rights and entitlements of the migrant worker; the right of migrant workers to change employment by obtaining a permit for another employer; the prohibition of employers from deducting expenses associated with recruitment and from retaining personal documents belonging to migrant workers; and significant fines as well as imprisonment for individuals for breaches of the legislation. However, the treatment of migrant workers from third countries as well as the new Member States continued to remain a concern in Ireland in the light of some highly publicized incidents of alleged exploitation and despite the applicability of employment protection laws to all persons irrespective of their nationality. The Irish Government is committed to setting up a new employment rights body in order to secure compliance with employment rights legislation and in February 2007 established the National Employment Rights Authority (NERA) on an interim basis with the functions of information, inspection, enforcement, prosecution and protection of young persons.

In *Greece*, a Consultative Migration Committee has been established in every district of the country. The Committee comprises four officials from the Alien and Migration Service in the region and a representative of the police authority. Its purpose is to decide on the issue or renewal of residence permits for third-country nationals on the basis of the presentation of all the necessary documents and the character of the individual concerned.

In *Malta*, the provisions of the April 2004 agreement with Libya on the facilitation of entry, exit and movement of nationals of both countries is described in some detail. In essence, the Agreement provides for facilitated access to business and professional persons on the basis of a Business Multiple visa valid for six months. In respect of Libyan nationals, this visa is valid only for Maltese territory and is thus in conformity with Schengen rules. A multiple-entry visa valid for three months can also be issued to frequent visitors from both countries.

DEVELOPMENTS IN INTEGRATION POLICY

Integration of migrants is discussed in the reports of *Finland*, the *Netherlands* and *Portugal*. Only the report on the Netherlands refers to compulsory integration provisions, although these are not applicable to EU/EEA/Swiss citizens. Moreover, despite earlier intentions, these arrangements do not apply to third-country nationals who are family members of EU/EEA/Swiss citizens. In *Finland*, no significant developments have taken place in regard to the voluntary personal integration plan aimed at foreign permanent residents, including EU citizens and their family members, which has been discussed in previous reports. The integration arrangements in the *Netherlands*, both pre-admission and post-admission, were described in some detail in the 2006 Report. These arrangements do not apply to EU citizens, EEA nationals, Swiss citizens or third-country nationals who are family members of EU citizens. The Act on Integration (*Wet inburgering*) of 7 December 2006 entered into force on 1 January 2007 and applies to migrants after their admission requiring them to pass a further integration test on language and society at a higher level within a period of five years. Failure to do could result in migrants having their benefits reduced, being subject to fines and not having a permanent residence permit issued. In September 2007, the new Dutch Government also presented a "Delta plan Integration" which builds on the criteria of the current legislation on integration but emphasizes better cooperation between the partners involved, more flexibility for municipal authorities and the introduction of "dualistic" integration programmes linked to education, employment or social participation. In *Portugal*, the Government approved the Plan for immigrants' integration, which formulates a national strategy concerning the reception and integration of immigrants. It includes measures in such fields as employment and vocational training, residence and health, education, culture, sport, social benefits and justice.

NATIONAL POLICY PLANS ON MIGRATION

A number of reports describe national policy plans or strategies on migration. The report on *Romania* refers to the National Strategy on Migration, which was first adopted by the Government in 2004. With the accession of Romania to the EU, this strategy has been replaced by a new consolidated strategy covering the period 2007-2010, which focuses solely

on the migration of third-country nationals and covers the following areas: controlled migration, prevention and combating of irregular migration, asylum and the social integration of non-nationals. Based on this strategy, annual action plans are elaborated containing precise objectives, defining the competent authorities and setting implementation dates. It is also expected that migration from third countries to Romania will increase in the near future.

In *Slovakia*, as in previous years, the report discusses the Migration Policy Conception of the Slovak Republic, which was adopted by the Government in 2005. This document was prepared by the Migration Office of the Ministry of Interior and thus focuses mainly on asylum for which the Ministry is responsible as well as irregular migration. Other issues are covered in passing and only a small part of this document is devoted to legal migration and the social integration of immigrants.

The report on *Slovenia* refers to the Resolution on Migration Policy of the Republic of Slovenia adopted by Parliament in November 2002. One important view espoused in this document is the “long-term macroeconomic advantage of relatively free migration” and its principles and objectives have informed the formulation of amendments to the legislation concerned with the admission of third-country nationals to Slovenia for the purpose of employment.

MEASURES TO PREVENT IRREGULAR MIGRATION AND UNAUTHORIZED EMPLOYMENT

The report on *France* refers to a December 2007 decree approving the establishment of a database on foreigners who are subject to expulsion measures. The database will also contain statistics on expulsion measures and their implementation. While it is expected to have a limited impact on the free movement of EU citizens, it will nonetheless contain data on *all* foreigners subject to expulsion, who may of course include EU/EEA citizens and members of their families.

In the *United Kingdom*, consultations were held during 2007 on the new framework for employer sanctions set out in the Immigration Asylum and Nationality Act 2006, which was introduced in February 2008. This framework is based on a system of administrative sanctions for employers who hire migrant workers without authorization rather than on criminal law penalties. The fines are determined in accordance with a Code of Practice and the maximum fine per worker is set at GBP 10,000, which is GBP 5,000 more than under the previous regime of criminal sanctions, although reductions in the fine are possible for a first breach in certain specified circumstances. Given that these are administrative rather than criminal penalties, the court will only become involved if the employer contests the sanction and any legal dispute will be assessed on the balance of probabilities rather than on the basis of proof beyond reasonable doubt which is the criminal law standard of proof.

TRANSPOSITION OF DIRECTIVES CONCERNING THIRD-COUNTRY NATIONALS

The Directives concerning third-country nationals (i.e. on family reunification, long-term residents, students, researchers, victims of trafficking)⁵³ were transposed in a number of Member States

in 2007. Indeed, in *Portugal*, the new Immigration Act transposed all of these measures. In *Italy*, amendments were introduced to the consolidated law on immigration during 2007 as a result of the implementation of the Directives on family reunification, long-term residents and students. The provision in the law regarding the issue of a residence permit for humanitarian reasons aimed essentially at protecting victims of trafficking was also amended. The transposition of the Directive on researchers in *Hungary* resulted in the establishment of a register of research organizations interested in third-country national researchers, which contained 38 organizations as at the end of 2007 (this number grew to 72 as of May 2008). However, not a single third-country national entered into a hosting agreement with a registered research organization in Hungary during 2007. In the *Netherlands*, the new procedure for the admission of third-country national researchers came into force in October 2007. Researchers and their families are exempt from work permit obligations as well as from the long stay visa requirement when in possession of a residence permit in another Member State. They are also not subject to the integration obligations discussed earlier.

MISCELLANEOUS ISSUES

In *Bulgaria*, a fundamental conceptual change in the law with important repercussions on free movement of workers is the explicit provision in the foreigners' legislation that EU citizens, EEA nationals and Swiss nationals are no longer to be considered as "foreigners", which means that a number of limitations imposed on foreigners, including those in the human rights field, are not applicable to EU citizens, EEA nationals and Swiss nationals. The latter can also enjoy stronger substantive and procedural guarantees against expulsion (see Chapter I).

In *Belgium*, the high number of French students enrolling in studies (30-50% in some disciplines, particularly medical studies) in the French-speaking part of Belgium is giving rise to concerns especially as France is applying a *numerus clausus* in these studies whereas Belgium is not. However, a decree was adopted in Belgium in 2006 to ensure that only 30 per cent of students who have not been residing in the country for the previous three years could access such studies. This decree has been challenged before the Constitutional Court, which in February 2008 requested a preliminary ruling from the Court of Justice.

The relationship between migration and security is also of interest in some Member States. In *Bulgaria*, the State Agency for National Security (SANS) was established in December 2007 and its functions include the exercise of control over the stay of migrants in the country, which appear to include EU citizens and their family members.

In *Greece*, a Migration Observatory has been established by the Labour Institute of the Confederation of Greek Workers in the framework of the EQUAL programme. Its aim is to provide support to migrants and refugees in Greece and to observe the migration phenomenon.

In *Germany*, the amended Nationality Act abolishes the general requirement to give up a

⁵³ See, respectively, Directives 2003/86/EC, 2003/109/EC, 2004/114/EC, 2006/71/EC, 2004/81/EC.

previous nationality when acquiring German nationality with the general purpose of avoiding dual nationality. This also means that it will be easier for EU citizens to obtain German nationality even though they already had privileged status in maintaining a previous nationality provided there was reciprocity. However, the German courts experienced considerable difficulties in interpreting foreign nationality law and practice.

In *Hungary*, a number of potential obstacles to the free movement of EU citizens have been identified in the complaints submitted to the national Ombudsman. These include complaints concerning access to health care and social allowances for a Hungarian child born outside of Hungary; the inability of an Italian national resident in the country to open a bank account and obtain a mobile telephone contract without a Hungarian ID card; and unreasonable delays in the procedures for registering a vehicle in Hungary from another EU Member State.

The report of *Spain* lists a number of national measures, mainly in the employment and social fields, which were adopted in 2007 and which, according to the rapporteur, have repercussions on the free movement of workers, although no elaboration is provided. The report on *Sweden* refers to the fact that there were seven different pieces of legislation on discrimination in Swedish law in 2007 and to an ongoing debate on proposals to adopt a single new act on discrimination (finally presented by the Government to Parliament in January 2008). Such an Act would be applicable not only to the employment situation, in both the private and public sphere, but also membership in trade unions and other associations, access to education, services and accommodation, social security, including unemployment benefits, healthcare services, study loans, etc.

The lifting of internal border controls on 21 December 2007 is also identified in the reports of a number of new Member States as a significant development (e.g. *Malta*) with clear repercussions on the free movement of workers.

EU ENLARGEMENT

2007 was an important year for the EU from the perspective of enlargement. The year began with the accession of Bulgaria and Romania to the EU. The accession agreements with these two new Member States permit the 25 other Member States to apply transitional arrangements as regards free movement of workers which are identical in content to those applicable to the 2004 Member States (excluding Cyprus and Malta whose nationals have free movement rights as workers from accession. In this chapter we will refer to the 2004 Member States in respect of which transitional arrangements are permitted as the EU-8 2004 Member States) but in respect of which the timeline is of course different starting from 2007. So the possibility of temporarily limiting access to the labour market for nationals of these two states commenced on 1 January 2007; those Member States which apply a restriction must notify the Commission if they intend to continue to apply the arrangement by 31 December 2008. By 31 December 2011 those Member States which are still applying transitional arrangements as regards workers from the two countries must either lift them or justify why their continued application is necessary in accordance with the provisions of the accession treaty.

Regarding the EU-8 2004 Member States, 2007 was an important year in relation to free movement of workers not least because a number of pre 2004 Member States ended their use of the transitional arrangements permitting access to their labour markets. The number of Member States still applying transitional restrictions has diminished. The next deadline for a consideration of the remaining transitional arrangements which a few Member States are still applying will be on 30 April 2009 when the full first five year period will finish. At this time, the possibility of triggering the further two year period of transitional arrangements (until 30 April 2011) becomes an important question. The scope for use of the further two year period is much more limited than in respect of the three year period which preceded it. In the 2008 report we will focus on the movement towards this final point.

In 2007, two key issues emerge, on the one hand an increasing number of Member States ended their use of the transitional arrangements altogether thus bringing a close to an increasingly complex set of calculations on the temporal acquisition of rights by individuals in apparently similar situations. Secondly, a number of questions began to emerge regarding the proper application of the right of workers from the 2004 Member States to full free movement of worker rights after 12 months employment in any Member State still availing itself of the transitional arrangements.

This section will be divided into three parts:

- Changes to the regime regarding workers from 2004 Member States;
- Problems encountered in relation to transitional arrangements;
- Treatment of workers from the 2007 Member States.

CHANGES TO THE REGIME REGARDING WORKERS FROM THE A8 2004 MEMBER STATES

Austria: this state continues to apply to the full extent the transitional arrangements for workers from the 2004 states. No substantial changes were made to the law. In the health sector both EU-8 2004 Member State nationals and 2007 Member State nationals are given a work permit if their income exceeds 1,125 € per month. Agricultural workers from countries in both enlargements may work in Austria for nine months per year.

Belgium: continues to apply the transitional arrangements for EU-8 2004 Member State workers. There has been no change in the law.

Bulgaria: no transitional arrangements on a reciprocal basis as permitted in the accession treaty have been adopted.

Cyprus: never made use of the transitional arrangements.

Czech Republic: no transitional arrangements were applied.

Denmark: political agreement was reached to phase out the use of the transitional arrangements for EU-8 2004 Member State workers – the legislation entered into force in May 2008. However, these arrangements do not remove completely the restrictions while they do open up the majority of the labour market to EU-8 workers (ie any job covered by a collective agreement and some others).

Estonia: does not apply any transitional arrangements.

Finland: no transitional arrangements have been applied since 2006.

France: although transitional arrangements were applied, there has been a gradual relaxation of the regime to permit more and more sectors to be included in free movement of workers. In July 2008, on taking up the Presidency of the EU, France ended the transitional arrangements for EU-8 2004 Member State workers.

Germany: transitional arrangements have been extended until 2009 (also for services in the sectors listed in the accession agreements). The seasonal worker arrangements have been extended as well. New provisions to facilitate skilled workers from the EU-8 2004 Member States have been introduced and the labour market test for the issue of work permits dropped. Students who finish their studies in Germany are able to obtain a three year work permit.

Greece: transitional arrangements were abandoned in 2006.

Hungary: while no transitional arrangements regarding other 2004 Member State nationals have been applied, there is a duty on employers to register their employment. 93% of these workers come from Slovakia. As regards the pre 2004 Member State workers, Hungary continued to apply the principle of reciprocity to workers from Austria, Germany, (Liechtenstein and Switzerland) who must obtain work permits. Workers from Denmark, Norway, Belgium, France and Luxembourg must also obtain work permits but without a labour market test during the reporting period.

Ireland: notwithstanding political pressure to introduce restrictions in 2007, the authorities have not done so.

Italy: the transitional arrangements were lifted in 2006.

Latvia: no transitional arrangements or reciprocal arrangements have been adopted.

Lithuania: no transitional arrangements or reciprocal arrangements have been adopted.

Luxembourg: lifted the transitional arrangements in September 2007 for some sectors and completely from 1 November.

Malta: For a period of seven years after membership, Malta will be able to apply safeguards on the right of EU nationals to work in Malta. The seven-year safeguard will apply until 2011 and essentially allows Malta to withhold the issue of work permits in the event of a potential disruption to its labour market which is of an urgent and exceptional nature. Restrictions can be imposed if an inflow of EU workers may put a strain on the local labour market, even if in certain sectors only. In such cases, it is up to Malta to determine when such cases arise and when restrictions may be imposed. So far this arrangement has not been invoked

Netherlands: in this reporting period the transitional arrangements were lifted. The arguments in favour of this were related to labour market shortages.

Poland: no transitional arrangements or reciprocal arrangements have been adopted.

Portugal: transitional arrangements were lifted in 2006.

Romania: transitional arrangements applied to workers from other states on a reciprocal basis until March 2007 when they were lifted.

Slovenia: reciprocal arrangements were lifted in 2006.

Slovakia: no transitional arrangements have been adopted.

Spain: transitional arrangements were lifted in 2006.

Sweden: no transitional arrangements were adopted.

UK: two small legislative changes were applied regarding diplomats and family members. Transitional arrangements were only applied in so far as EU-8 2004 Member State nationals must register when they take employment in the UK. If they do not they are not lawfully resident and according to the UK courts unable to enjoy free movement rights such as equal treatment, social benefits and the lifting of the 12 months restriction.

ISSUES AND PROBLEMS ENCOUNTERED IN RELATION TO TRANSITIONAL ARRANGEMENTS

Austria: no specific problems have surfaced regarding the treatment of workers from the EU-8 2004 Member States. However, work which nationals of the EU-8 2004 and 2007 Member States undertake in the context of a limited partnership of which the national is a general partner is classified as self-employment.

Belgium: no specific problems or issues were signaled in the report.

Bulgaria: no transitional arrangements on a reciprocal basis as permitted in the accession treaty have been adopted.

Cyprus: as this country did not use the transitional arrangements there are no issues.

Czech Republic: no issues arise.

Denmark: concern about protection of Danish social welfare has been central to decisions

on access to the labour market for EU-8 2004 Member State nationals which led to the introduction of residence requirements to some benefits. Under the terms of the agreement to lift the transitional arrangements, all workers covered by collective agreements and some other fields enjoy free movement rights. There is a power to the Minister to extend the regime to other workers.

Estonia: does not apply any transitional arrangements.

Finland: no transitional arrangements have been applied since 2006. The wage and tax treatment of posted workers has been problematic – national law now applies on the same basis as to Finnish temporary agency workers. The supervision of posted workers continues to be problematic from the perspective of health and safety – according to inspections, between 20 and 30% of posted workers are not receiving minimum wages or there are incomplete health and safety arrangements.

France: problems regarding the lifting of restrictions by sector appeared in 2007.

Germany: the refusal of social benefits resulting in expulsion action to an EU-8 2004 Member State worker has been considered and rejected by the courts on grounds of automaticity contrary to EU law.

Greece: a number of complaints were brought to the Ombudsman regarding the treatment of EU-8 2004 Member State nationals.

Hungary: there are no reported problems regarding the application of the transitional arrangements.

Ireland: there have been press reports about exploitation in the labour market of EU-8 2004 Member State nationals.

Italy: no problems have been reported.

Latvia: no problems were reported.

Lithuania: no problems were reported.

Luxembourg: as a result of discussions in parliament the transitional arrangements were lifted. A court in Luxembourg considered the arrangements and upheld national law.

Malta: the work permit procedures applicable to all EU nationals have been onerous but in the reporting period there were improvements particularly in the length of time it takes to process an application.

Netherlands: there have been press reports about labour exploitation in wages and working conditions, sub-standard housing and claims of unjustified use of social security. Integration has been an issue in so far as EU nationals cannot be required to follow integration programmes as foreigners can be. There has been some judicial activity in particular regarding fines on employers in respect of minimum wages.

Poland: no problems were reported.

Portugal: no problems were reported.

Romania: no problems were reported.

Slovenia: no problems were reported.

Slovakia: no problems were reported.

Spain: the High Court held that EU nationals cannot be tried for the criminal offence of clandestine immigration. This decision also applies to 2007 Member State nationals.

Sweden: the main issues which have arisen are in respect of posted workers and the provision of services. This has been particularly politically problematic in Sweden not least because of the decision of the European Court of Justice in *Laval* in 2007.

UK: a series of problems emerged in 2004, relating to family members' access to employment, non EU national family members' access at all to the territory, the 12 month exemption: unless the individual is registered and notifies the registration scheme of any change in employment he or she does not accumulate time towards the 12 month exemption according to national tribunals.

TREATMENT OF WORKERS FROM THE 2007 MEMBER STATES

Austria: applies the transitional arrangements available under the accession agreement to restrict access to the labour market. However, the exceptions which have been made for EU-8 2004 Member State nationals are also being applied to 2007 Member State nationals.

Belgium: has used the transitional arrangements to exclude 2007 Member State nationals from the labour market. Provision has been made to protect the position of all 2007 Member State nationals who were lawfully working in Belgium on the date of accession and in particular those who had completed 12 months employment. There have been a number of cases of 2007 Member State nationals seeking social benefits during a short period of residence. These applications have been refused and the individuals treated on the basis that their stay in Belgium is irregular.

Bulgaria: no transitional arrangements apply to Romanians.

Cyprus: no transitional arrangements have been applied to 2007 Member State nationals.

Czech Republic: no transitional arrangements were applied to nationals of the 2007 Member States. A change was made to the law to permit the Republic, in light of further enlargements to apply transitional restrictions only on a reciprocal basis. The numbers of Bulgarians and Romanians working in the Republic tripled from 2006 to the end of 2007.

Denmark: the position of 2007 Member State nationals has been assimilated to that of EU-8 2004 Member State nationals. So effectively only in respect of jobs not covered by collective agreements or specified in the legislation are closed to them.

Estonia: does not apply any transitional arrangements. Indeed, it is seeking workers.

Finland: no transitional arrangements have been applied to the 2007 Member State nationals.

France: transitional arrangements have been applied which mirror the restrictions on EU-8 2004 Member State workers – access to some sectors but not others. But the key problems relate to expulsion in particular of Romanian nationals and the extent to which these are consistent with EU treaty obligations.

Germany: 2007 Member State nationals have been subsumed into the regime application to the EU-8 2004 Member State nationals by and large.

Greece: in applying the transitional arrangements regarding 2007 Member State workers.

Hungary: transitional arrangements are applied but there is a partial lifting of restrictions of 219 job categories which are subject to simplified and accelerated work permit processes.

Ireland: transitional arrangements have been introduced for 2007 Member State nationals. There have been questions about the dividing line between self employment to which 2007 Member States nationals are entitled and work which is subject to limitations. There have also been very high profile expulsions of Romanian nationals from Ireland in 2007.

Italy: transitional arrangements have been introduced. Italy has withdrawn its alerts in the SIS against 2007 Member State nationals except where based on an expulsion issued by a judge on grounds of public policy. There has been substantial case law on Romanian nationals, in particular, regarding the legality of the application to EU nationals of criminal laws relating to foreigners.

Latvia: no transitional arrangements have been adopted in respect of the 2007 Member State nationals.

Lithuania: no transitional arrangements have been adopted in respect of the 2007 Member State nationals.

Luxembourg: there has been a lack of clarity on the application of transitional arrangements for Bulgaria and Romania. Indeed, it was not certain whether the lifting of restrictions on the EU-8 2004 Member States also applied to these two. It appears, however, from further clarification from the authorities that transitional arrangements still apply to them.

Malta: transitional arrangements are being applied in respect of the 2007 Member State nationals.

Netherlands: transitional arrangements have been applied to the 2007 Member State nationals. The argument used was the difference in GDP between the Netherlands and the 2007 Member States.

Poland: no transitional arrangements have been adopted in respect of 2007 Member State workers.

Portugal: transitional arrangements apply to the 2007 Member State nationals. Romania and Bulgaria have been removed from the list of 'target' countries for the purpose of identifying irregularly present persons.

Romania: no transitional arrangements were applied to Bulgarian workers.

Slovenia: no transitional arrangements were applied to 2007 Member State nationals.

Slovakia: no transitional arrangements were applied to 2007 Member State nationals.

Spain: transitional arrangements are being applied as regards Bulgarian and Romanian workers. There is substantial jurisprudence on the rights of these nationals primarily around expulsion decisions where the courts seem by and large to find the administration not to be correctly applying EU law.

Sweden: no transitional arrangements have been adopted in respect of 2007 Member State nationals.

UK: transitional arrangements have been adopted in respect of 2007 Member State workers. There has been a drop in the number of 2007 Member State workers coming to the UK since accession.

STATISTICS

The availability, the quality and the level of detail of the statistical data varies considerably between Member States. Several national reports provide more detailed statistical data than in previous years. The data in this chapter should be considered as additional information against the background of general information on the total population and the total non-national population in all Member States, provided by Eurostat in its Yearbook and other publications such as Statistics in Focus no. 8/2006. Hereunder we focus on the main trends, both new developments and trends that were observed in previous years.

The absolute **number of residents who are nationals of other EU Member States** and the relative share of those EU nationals in the total non-national population of Member States varies highly between Member States. The absolute number varies between 2,615 registered EU nationals in *Latvia* and 3,618 registered EU workers in *Bulgaria* and almost 2,2 million nationals of other Member States living in *Germany* and 1,5 million registered EEA nationals in *Spain*. In some states the total number of EU nationals almost doubled with the accession of *Bulgaria* and *Romania*. In *Italy* nationals of *Romania* make up for more than half of the 606,000 EU nationals and in *Spain* nationals of *Bulgaria* (127,000) and of *Romania* (604,000) together are almost half of the registered EEA nationals. Romanian nationals in the first years after accession made up a considerable share of the EU nationals living in the *Czech Republic*, *Germany*, *Greece*, *Hungary*, *Malta*, *Portugal*, *Slovakia*, *Sweden* and to a smaller extent in *Austria*, *Bulgaria*, *Netherlands* and the *UK*. Nationals of *Bulgaria* are present, in far smaller numbers, predominantly in the *Czech Republic*, *Greece*, *Italy*, *Latvia*, *Poland*, *Slovenia* and, as mentioned before, in *Spain*.

In three Member States, *Belgium*, *Luxembourg* and *Ireland*, EU nationals are the large majority of the foreign population. In most Member States EU nationals count for between one fifth and one third of the non-national population: In a third group (e.g. the *Baltic States*, *Greece*, *Poland* and *Slovenia*) EU nationals make up only a tiny minority of the total non-national population.

The traditional pattern that in most Member States the majority of resident EU nationals originates from the neighbouring Member States, persisted in 2007. But migrants from *Poland* and the *UK* are no longer the only exception to this rule. We have seen above that large numbers of nationals of *Romania* are living in *Germany*, *Portugal* and *Spain*. Migrants from *Poland* count for a large share of the EU immigrants not only in neighbouring states as *Czech Republic* and *Slovakia*, but also in *Austria*, *Cyprus*, *Greece*, *Ireland*, *Italy*, *Netherlands* and the *UK*. *British* nationals are the largest EU immigrant groups not only in *Ireland*, but also in *Portugal* and *Malta*; they are the third largest group in *Finland*.

The Italian report presents information on the duration of the residence of the nationals of other Member States in *Italy*: almost half of the EU-14 nationals and 20% of the EU-12 nationals have at least eight years of registered residence in Italy; 137,000 EU-12 nationals resident in 2007 received their first residence permit in 2002 the year of the last big amnesty in Italy. The report also presents information on the 1,5 million Italian nationals living in other Member States, primarily in *Germany, France, Belgium* and the *UK*.

The data on **immigration and emigration** in the national reports indicate that in most Member States the immigration of EU nationals increased in the year before (2006) or after the accession of Bulgaria and Romania (2007). This increase is most visible in *Cyprus, Finland, Ireland, Netherlands, Spain* and the *UK*. In *Ireland* in 2007 the number of immigrants from the EU-14 declined, but the number of immigrants from the EU-12 increased, predominantly (60%) from *Poland*. In the *Netherlands* the immigration from the EU-14 is almost equal to the emigration to those Member States, but the immigration from *Poland* and *Romania* increased considerably in 2007. In the *Czech Republic* the number of EU nationals resident in the country doubled (from 74,000 to 145,000) between 2004 and 2007, mainly due to immigration. In *Finland* the registered immigration in 2006 was almost double the number in the previous year, immigrants were coming mainly from *Estonia, Sweden, the UK* and *Germany*. In *Germany* in 2006 there was a net emigration to the EU-14 (-7,500) and a net immigration from the EU-12 (+54,200). In *Lithuania* the immigration from other EU Member States was only marginally higher than in the previous year: 6,456 in 2006 and 5,880 in 2005; but 11,422 Lithuanian nationals were recorded as emigrants (10% more than in 2006), whilst only 6,141 were returning to their country. A total of 108 EU nationals were refused entry in Lithuania, mostly Latvia nationals without travel documents; 18 Latvians were refused entry on the basis of a registration in SIS or on other public order grounds. In the *UK* we see a clear immigration surplus from other Member States, but a gradual slowdown of the number of immigrant workers from Poland.

Some Member States have a clear emigration-surplus: the Baltic States, Poland, Romania and the Netherlands. In the first five states emigration to EU-15 Member States far outnumbers the limited immigration from those states (both returning nationals and nationals of the EU-15). The reports on *Estonia, Latvia, Lithuania* and *Poland* mention an increasing replacement migration from third countries, either states just across EU external borders (Russia, Ukraine, Belarus) or from more distant countries such as China and Turkey. In *Estonia* the mass emigration has triggered an upward pressure on salaries in order to make it more attractive for Estonian workers to remain in the country and for emigrant workers to return to the country.

A considerable part of the intra-EU migration from and between the EU-10 will not appear in migration statistics, because the workers come and go for short periods of employment, seasonal or cross border work without the need to register in the population registers of the host Member State. In *Luxembourg* cross-border workers from *France, Belgium* and *Germany* account for almost one third of the total labour force of the country, whilst non-national (75% nationals of other EU Member States) and Luxembourg nationals each make up approximately

one third of the labour force. The importance of cross-border employment across internal EU borders is noted in other reports as well: e.g. across the border between *Germany* and *Poland* (see the German report), between *Hungary* and *Slovakia* and between *Hungary* and *Romania* (see the Hungarian report).

Data on **residence documents** are available for less than half of the Member States. This is mainly due to implementation of Directive 2004/38. In some Member States EU nationals no longer need to apply for a residence document (*France* and *Germany*). In other Member States there is no systematic collection or publication of data on the registration of residents of other Member States. In several Member States data on residence or work permits are only available concerning nationals of EU-8 and EU-2 Member States that are still subject to transitional measures.

In *Denmark* the number of EU residence certificates issued in 2007 was 14,600, i.e. 10% higher than the previous year; 6,000 of those registered were for students, 4,500 workers or self-employed persons, 3,000 family members and 1,000 persons with sufficient means. A similar pattern is visible in *Sweden* where a total of 17,655 registered EU immigrants in 2007, was made up of 47% workers, 3% self-employed and service-providers, 28% family members and 16% students. Students made up 28% of the registered EU-14 nationals in Sweden. The number of residence documents issued to EEA nationals in *Hungary* in 2007 was considerably higher than in the previous year: 38,500 EEA residence permits and 22,400 EEA registration certificates. Not a single EEA registration was refused and only eight applications for registration of a permanent residence right were turned down.

At the beginning of 2007 in *Italy* a total of 538,000 EU nationals had been issued with valid residence documents. More than half of those residence documents (55%) were issued to workers, 5% to self-employed persons, 27% to family members, 2% to jobseekers and 1% both to students or for religious purposes. Apparently, the share of students in Italy is far smaller than in Denmark and Sweden, or EU students register far more often in those two countries than in Italy. In *Lithuania* 1,141 residence permits were issued to EU nationals (none refused): 43% to workers or self-employed persons, 34% to students or trainees, 15% to family members and 8% to persons with sufficient means; 228 permanent residence permits were issued to EU nationals. In 2007 in *Luxembourg* 27,000 residence permits were issued or renewed for EU nationals as opposed to a mere 8,100 for nationals of third countries. The report on *Romania* mentions 9,100 valid EU residence permits and 2,500 valid EU registration certificates at the end of 2007. The majority of those documents were issued for persons with "commercial activities" or to family members of Romanian nationals. Italian nationals were the largest group of EU nationals in Romania. The report on *Slovakia* mentions 60 EU nationals, mainly but not exclusively from the EU-12 countries, having a "tolerated" residence status. That status is not provided for in Directive 2004/38.

France in 2006 issued residence documents to 5,800 EU-8 nationals: 2,500 to workers, 2,100 to family members and 730 to students. In the *UK* almost 28,000 applications for

registration certificates were filed by nationals of Bulgaria and Romania. The refusal rate was 7% in the first quarter of 2007 but had more than doubled in the last quarter. The largest proportion of applications is for registration certificates confirming that the applicant is exercising a Treaty right as a self-employed person.

Where information on the number of EU residence documents issued to **third-country national family members** is available in the national reports, the numbers are surprisingly low; 5 in *Finland*, 152 in *Hungary*, 18 in *Latvia*, 37 in *Lithuania*. *France* is the exception on this issue, having issued approximately 1,450 residence document for third-country nationals each year in 2004-2006. Possibly, the number of those family members is so small indeed in most Member State. Lack of awareness of their special status could be an alternative explanation for the small numbers.

The data on **work permits** relate mainly to EU-8 workers in EU-15 Member States or to nationals of those Member States employed in the EU-10. In *France* in 2006/2007 3,200 work permits were issued to EU-8 nationals and 1,800 to EU-2 nationals. In *Germany* 235,000 exceptional work permits were issued for seasonal work in 2006, 94% for Polish nationals; 45% of the 20,000 temporary work permits were issued to Polish workers and 13% to Romanian workers. Of the regular work permits 3,800 were granted to Romanian workers and 1,150 to Bulgarian workers. The German report contains detailed statistical data on the practice of several schemes for temporary and cross-border employment applied by the German government, partly on the basis of bilateral agreements with other EU member states or with third countries. *Greece* granted work permits for 10,300 EU-25 nationals and 7,300 to nationals of Bulgaria and Romania. Bulgarian workers received the majority of those permits. *Hungary* issued 1,334 work permits to EU-15 nationals under the transitional measures and 17,000 to Romanian nationals having full access to the Hungarian labour market. In *Ireland* between the May 2004 and February 2008 a total of 447,400 social security numbers were issued to EU-12 nationals, 60% to nationals of Poland and 15% to nationals of Lithuania. Most of those workers came for temporary employment and stay in Ireland. Only half of the workers who arrived in 2004 were also employed in Ireland in 2006. Luxembourg granted 428 applications and denied 75 applications for work permits for EU-8 workers in 2006.

In the *Netherlands* 32,000 work permits were issued to EU-8 nationals in the first four months of 2007, before the transitional measures for those workers were abolished in May 2007. In the whole year 2007 only 2,700 work permits were granted for workers from Romania and 1,000 for workers from Bulgaria. The numbers of permits granted for workers from those two countries started to increase already before the accession of the two countries. In *Poland* 810 work permits were issued to EU-15 nationals from those Member States still applying a transitional regime to Polish workers. In *Slovenia* 3,400 EU-workers were registered, mostly Slovak nationals employed as posted workers.

In the *UK* in 2006 a total of 234,300 registrations of EU-8 workers were recorded, 10% more than in the previous year. The number of employed workers is considerably lower, since

each time an EU-8 worker changes his job he has to register again. 66% of those registered were Polish nationals, 10% Lithuanian nationals. In 2007 5,080 applications by EU-2 nationals for an accession worker cards were filed, the majority by workers from Romania; 3,715 applications were granted.

As to the **branches of employment and the level of the jobs** performed, it appears from the national reports that the same four general patterns mentioned in our previous report can be observed in 2007 as well. Firstly, the employment pattern of EU-15 nationals in other EU-15 Member States is fairly similar to that of the nationals of the host country, although the EU migrants may be overrepresented in some branches. In *Spain* 60% of the EU workers are employed in service related jobs, 24% in construction, 9% in industry and 8% in agriculture. 50% of the EEA nationals are employed at high professional level, whilst 44% of the Spanish workers and only 10% of the workers from third countries are employed at that level.

The second pattern is the widespread underutilisation of the qualifications of EU-8 and EU-2 workers employed in the EU-15 Member States. The reports on *Denmark, Ireland, Lithuania, Netherlands* and the *UK* mention clear indications for this pattern. In *Denmark* most of the EU-8 workers are employed in agriculture, gardening, forestry and construction. More than two third of the Lithuanians registered as working elsewhere in the EU were working in the packing industry or agriculture. In the *Netherlands* more than 90% of the EU-8 workers are employed in jobs shorter than one year, mostly in seasonal jobs in horticulture, construction, manufacturing and the food industry. Of the Romanian workers 80% are employed in agriculture or horticulture, 10% in inland shipping and only 3% in academic, IT or consultancy jobs. In the *UK* only 60% of the EU-8 workers declared at the time of registration that they expected their stay to last for more than three months. They are mostly employed in seasonal jobs. The development noted already in 2006 that the share of EU-8 workers registered as working in 'administration, business and management' increases and has overtaken the category 'hospitality and catering', formerly the dominant category, continued in 2007.

The third pattern, we observed, is that EU-15 nationals in EU-8 Member States are employed mainly in jobs requiring high qualifications, as technical experts, managers in commercial, financial or real estate jobs or self-employed person in the liberal professions. This is the case in *Estonia, Hungary, and Poland*. In *Slovenia* the workers from Bulgaria, Romania and Slovakia are employed mainly in construction and manufacturing. The Italian nationals in *Slovenia* are working mostly in business and trade.

The fourth pattern is that EU-8 workers employed in other EU-8 Member States often are employed on short term contracts (Polish workers in *Slovakia*), in cross border employment (Slovak workers in *Hungary*) or as posted workers (Slovak nationals in *Slovenia*). In the *Czech Republic* almost half of the 100,000 Slovak nationals is employed in manufacturing jobs. In *Hungary* the EU-15 nationals work mainly in finance and processing industry, whilst nationals of Romania are employed predominantly in building and Slovak nationals in industry and construction; only 10% of the Slovak workers is employed in white collar jobs.

The large majority of EU migrants is of working **age** (20-64 years). In Spain more than three quarter of the EEA nationals is of working age. Young children are underrepresented among EU migrants as compared with their share among third-country nationals. In Spain 7% of EU nationals and 16% of third-country nationals is under 15 years of age. In Austria 11% of the EU nationals and 18% of the third-country nationals is under 15 years of age. The share of young EU nationals is also small in comparison with the share of minors in the total population of the host country: in Malta only 16 % is under 25 years of age and in Slovenia only 17% of the EU nationals in that age group.

The gender composition of EU migrants varies considerably between the Member States and between the migrants from different Member States in the same host Member State. We have summarized the information from the national reports in the table below.

From this table it appears that women are underrepresented among Community workers (40% in *Greece* and 43% among EU-8 workers in the *UK*). Free movement to the EU-8 Member States is predominantly a male business for the time being: only 17% of the EU workers in *Slovenia*, 20% in *Latvia* and 30% in the *Czech Republic* are female. .

In the EU-15 states mentioned above the share of resident female EU nationals resident in the host country is between 45% (*Ireland* and *Spain*) and almost 50% (*Austria*, *Germany*, *Portugal* and *the Netherlands*). Italy is an exception with 58% female EU nationals.

Clearly, women are overrepresented among migrants from the EU-8 and EU-2 Member States in the EU-15: see *Austria*, *Germany* and *Italy*. Female Romanian migrants by far outnumber their male compatriots in *Austria* and *Italy*. According to the Dutch report in the *Netherlands* among the residents from *Greece*, *Italy*, *Portugal*, *Ireland* and the *UK* male migrants outnumber their female compatriots, but among residents from the *Scandinavian* countries, *Belgium* and the *EU-12* it is the other way round: female migrants outnumber the male ones. Apparently, gender plays an important role in determining migration even under conditions of free movement.

Host Member State	Percentage of female EU nationals or workers
Austria	49% of EU-14 nationals
	55% EU-10 nationals
	41% Italian nationals
	62% Czech nationals
Czech Republic	30% registered workers
Germany	48% EU-26 nationals
	40% EU-8 nationals with exceptional work permits
	66% Czech nationals
	60% Romanian nationals
	57% Bulgarian nationals
Greece	40% EU-26 workers
Ireland	45% resident EU-26 nationals
Italy	58% registered EU-26 nationals
	72% Romanian nationals
Latvia	20% EU-26 workers
Netherlands	50% resident EU-26 nationals
Portugal	47% registered EU-26 nationals
Romania	24% EU-26 nationals with valid residence permit
Slovenia	17% EU-26 nationals with valid work permit
Spain	45% registered EU-26 nationals
UK	43% EU-8 workers

Data on **naturalisation** are mentioned explicitly in four national reports only. The trends mentioned in our previous report are visible in 2007 as well. Firstly, EU nationals relatively seldom and only after long residence in the host Member State apply for naturalisation. The absolute numbers and naturalisation ratios are low. Nationals from the EU-8 in some host Member States are an exception to this trend. In *Finland* in 2006 a total of 476 EU nationals acquired Finish nationality by naturalisation, 70% were citizens of Estonia or Sweden. In *Lithuania* the total number of persons naturalised in 2007 was 370. Only two of them were EU nationals both from Poland. Most of the persons naturalised were either stateless (184) or had Russian nationality (113).

In the *Netherlands* in 2006 less than 1% of the resident EU nationals acquired Dutch nationality by naturalisation: 2,000 naturalisations in a total resident EU population of 245,000. The naturalisation ratio among resident third-country nationals was four times higher. The largest absolute numbers of naturalisations were recorded among nationals from Germany, UK, Poland and Romania. The total number of residents of the first two Member States is far greater than from the latter two. The absolute number of naturalisation of British and Romania nationals was almost equal, whilst the total number of British nationals with residence in the Netherlands is 14x times higher than the number of Romanian residents. This is a clear

indication of the second trend: a great difference in the propensity to apply for naturalisation, depending on the Member State of origin of the migrants.

The third observation is that the naturalisation policies vary considerably between Member States. The absolute numbers of naturalisation in e.g. *Finland* or *Lithuania* are rather low, whilst the clear reduction in the number of EU nationals resident in *Belgium* in 2007 in comparison with the previous year (40,000 less), is probably partly due to a liberal naturalisation policy in Belgium

The fourth trend is that among the few Member States with an official policy opposing dual nationality, some in practice are more liberal in the actual application of their national legislation or they apply more liberal rules on the basis of reciprocity to the nationals of some Member States or, generally, to the nationals of all other Member States. The *German* report mentions that in 2006 almost 100% of the nationals of Greece, Italy and Poland were permitted to keep their first nationality upon acquisition of German nationality, whilst only 3% of the Romanian nationals were allowed to keep their first nationality. From the report on the *Netherlands* it appears that the number of nationals from Belgium, Germany, Great-Britain and Italy resident in the Netherlands also having Dutch nationality (dual nationals) equals the number of nationals of those four Member States resident in the Netherlands having one nationality only. Hence, the number of persons originating from those four Member States is twice as high as would appear from the population data based on non-Dutch nationality only.

MISCELLANEOUS

Under this heading, many Member States reported studies, seminars, legal literature, legislation links and other links to important sources of information. Not everything mentioned in the reports will be referred to here. Some reporters took the opportunity to highlight specific issues deemed important.

For instance, in *Cyprus*, the existence of a cease fire line, which cuts across a de facto divided country is reported to have repercussions on the freedom of movement of workers. A “Green Line regulation,” regulates problems deriving from “the de facto partition of Cyprus.” According to the Cyprian report, authorities are allowed some discretionary power as to whether to allow to EU citizens living in the northern territories to exercise their rights under the directive.

In *Bulgaria*, literature and reports mainly concentrated on *emigration* tendencies in Bulgaria and the access to the labour market of the EU Member States and on harmonization of Bulgarian legislation in the field of recognition of diplomas and professional qualifications.

In *Hungary*, emigration also seems to attract attention: the Labour Public Foundation (OFA) launched a research on Hungarian labour migration. Furthermore a project aims to contribute to combating irregular migration and irregular employment of migrants in Belgium, Finland, Germany, Ireland, Spain, Hungary, Poland and Romania. The Hungarian Academy of Sciences launched a comprehensive assessment of enlargement and European integration how its impacts appear on the Hungarian society, economy and policy.

In the *Czech Republic*, third country nationals are the issue which is publicly discussed and most of the academic and political energy focuses on it. Two conferences are mentioned: a conference on “European Justice on the Constitutional Crossroad”, and a conference on “Migration and Development”.

Estonia and *Malta* pay attention to their nationality legislation and the topic of dual nationality.

Poland reports a number of conferences on migration, and free movement of persons, organised by three Universities, the Ministry of Labour and Social Policy, and Association of Offices for Citizen’s Advise.

Integration was an issue mentioned by *Germany* and *Greece*. In a representative German survey published in 2008, Turkish, Greek, Italian and Polish nationals as well as nationals from the former Yugoslavia have been interviewed in a large survey in order to identify integration problems. The Greek Ombudsman in February of 2007 organised an International Conference titled “Integration of immigrants and mechanism for intervention and consultation”.

In the *UK*, there have been five seminars and workshops dedicated to free movement of persons in EU law in the UK in 2007. The main provider of these training opportunities has

been the Immigration Law Practitioners Association. They have been well attended by practitioners in the field and provide an important source of information regarding the current state of the law.

The *Netherlands* reports one course by Leiden Institute of Immigration Law of two days on European Migration Law in The Hague for lawyers, civil servants, judges and other professionals. Furthermore, it is reported that EU students will have to pay tuition fees in the Netherlands to the educational institute where they follow a course if a pending bill will be adopted by the Dutch parliament. The same will however apply to Dutch students.

In *Belgium*, a colloquium was held on 6 and 7 February 2007 in Leuven relating to the reform of the Alien's Act called "La Belgique en alignement sur le droit communautaire".

In *Ireland*, seminars were organised by the Law Society of Ireland on Employment Rights of Immigrants and Other Issues and on New Rules for the New Irish.

In *Finland*, the Central Organisation of Finnish Trade Unions (SAK) and its partner organisations have in Tallinn a Finnish Working Life Information Point that provides information and advice about working in Finland.

Finally, *Italy* draws attention to the unclear consequences for national law of the fact that providers and recipients of services are not referred to in Directive 2004/38. Italian law does not deal with providers or recipients of services. A Legislative Decree states that, subject to special regulations in line with the EC Treaty and EC laws, Union citizens and their family members staying in Italy for up to three months, are subject to the same obligations as Italian nationals in the exercise of allowed activities. According to the Italian report the scope and the content of the provision do not seem clear. In fact, if Union citizens provide services in Italy, to be subject to Italian law on the same footing as Italian nationals might amount to a breach of Article 49 EC.

The report can be ordered from:
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This report can be downloaded from: www.prio.no/cyprus



Free Movement of Workers in Cyprus and the EU

This study draws on the two Reports on Cyprus for 2007 and 2008-2009 conducted by the author as a national expert for the Network of Experts on Free Movement of Workers. Since the enactment of Law 7(1)/2007, which purported to transpose Directive 2004/38, there is a clearer view as to the effects the new legislation and the practices relating to transposition. The study examines the situation, the obstacles and challenges for free movement of workers in Cyprus. It illustrates the five key problematic areas and challenges ahead: there are currently 138,000 non-Cypriots legally residing in the areas under the control of the Republic of Cyprus, out of whom over 70,000 EU citizens. The system is working but there are issues to be dealt with such as: the considerable backlogs in the applications; problems with working conditions and pay; problems of reverse discrimination resulting from the operation of the directive, as EU citizens who exercise their rights under the directive can benefit but these rights are not always for Cypriots and their families; the discrimination against lesbian and gay persons resulting from the failure to regulate same-sex marriages and registered relations in Cyprus; the problems generated from the territorial application of the implementation of the Directive given the de facto division of Cyprus and the Green Line Regulation.

The publication also includes a paper by Kees Groenendijk, Equal Treatment of Workers Under EC Law and the Synthesis Report of the Network of Experts for 2007, entitled European Report on Free Movement of Workers in Europe in 2007, which compares law and practice across the European Union by the rapporteurs of the network Professors Kees Groenendijk, Roel Fernhout, Elspeth Guild, Pieter Boeles, Ryszard Cholewinski and Paul Minderhoud

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