



By email to: [A2Enquiries@homeoffice.gsi.gov.uk](mailto:A2Enquiries@homeoffice.gsi.gov.uk)

10 September 2007

Dear Sir/Madam,

**ILPA Response to Consultation on Controlled Access to UK Labour Market for Romanians and Bulgarians**

ILPA is a professional association with some 1000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on a wide range of government and other public body stakeholder and advisory groups.

There is a limit to the information ILPA can usefully provide in response to this consultation, whose timing over the summer month of August also presents us further practical difficulties.

This is because we are concerned that the questions raised in the consultation paper would most properly be answered by the funding of a empirically based research study, or by a literature review of those studies already undertaken, which would also be in keeping with the reference in the notice of the consultation to 'robust, quantitative evidence'. Reliable respondents, other than those who have undertaken substantial empirical work in this area, will be reluctant to respond to the questions on the basis of anecdote. We are concerned that the consultation provides an opportunity for less reliable respondents to substitute speculation and anecdote for hard evidence on the points mentioned and to fuel hostility toward Bulgarians and Romanians in the UK.

If you are undertaking a literature review then we should highlight the following studies on the experiences of A8 nationals, albeit under a different regime, as being among those of importance:

- COMPASS, University of Oxford *Fair Enough? Central and Eastern European Migrants in low wage employment in the UK* 1 May 2006.
- Joseph Rowntree Foundation *Central and Eastern European Migrants in low wage employment in the UK* April 2006
- Commission for Rural Communities *A8 Migrant Workers in Rural Areas* January 2007
- COMPASS, University of Oxford for the TUC *New EU members: Migrant Workers Challenges and opportunities to UK Trade Unions, a Polish and Lithuanian Case Study* 3 September 2007

The Home Office's Online Report 03/06 on the use of migrant labour<sup>1</sup> is also a useful reference document.

For our part, we should like to use this opportunity to highlight some questions arising out of the UK legal framework for A2 nationals that are relevant to the question of the experiences of these migrants. We focus on matters specific to A2 nationals, rather than on our more general concerns arising out of the transposition of Directive 2004/38/EC into UK law, which have already been communicated to those dealing with European Policy in the Border and

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<sup>1</sup> Home Office Online Report 03/06, by Sally Dench, Jennifer Hurstfield, Darcy Hill and Karen Akroyd (Institute of Employment Rights).

Immigration Agency, including those who attended ILPA's 19 June 2007 seminar *Implementing Free Movement of Workers in the EU*.

## Principles

The two principles that govern the treatment of Bulgarians and Romanians are that:

- they must be treated no less favourably than third country nationals<sup>2</sup>; and
- they must be treated no less favourably than they were at midnight on the eve of Accession<sup>3</sup>.

In addition Articles 2 and 3 of the EC Treaty place social protection, social cohesion and solidarity between member States within the material scope of Community law.

The fifth recital in Regulation 1612/28 (the 'Workers Regulation') emphasises the importance of equal treatment for workers and for the removal of obstacles to the mobility of workers. Article 7(2) of the Workers Regulation provides an express entitlement to the same social advantages as national workers, and European Court of Justice (ECJ) case law makes clear that the concept of social advantage extends far beyond rights within the workplace<sup>4</sup>.

Any analysis of the experience of workers from the accession states should take as its starting point the rights of those workers and their family members under Community law. It should also be informed by the UK's stated commitment to tackling trafficking in human beings<sup>5</sup>. Trafficking is too often thought of as a practice that has some connection with unlawful immigration, but it is exploitation not illegality which is at the core of the trafficking and A2 workers' vulnerability to such exploitation merits careful study.

We highlight the following concerns.

## Accession Worker Card

Elements of the Accession Worker Card regime are more onerous than the work permit regime for third-country nationals or than the regime that applied to A2 nationals prior to accession. There is a same-day service for visa applications in Romania and Bulgaria, just as

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<sup>2</sup> Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union, Annexe VI, OJ L 157/104 (21.06.2005). Paragraph 14. '...Bulgarian migrant workers and their families legally resident and working in another Member State or migrant workers from other Member States and their families legally resident and working in Bulgaria shall not be treated in a more restrictive way than those from third countries resident and working in that Member State or Bulgaria respectively. Furthermore, in application of the principle of Community preference, migrant workers from third countries resident and working in Bulgaria shall not be treated more favourably than nationals of Bulgaria'.

<sup>3</sup> Ibid. '14. The effect of the application of paragraphs 2 to 5 and 7 to 12 shall not result in conditions for access of Bulgarian nationals to the labour markets of the present Member States which are more restrictive than those prevailing on the date of signature of the Treaty of Accession.'

<sup>4</sup> E.g. *Reina v Landeskreditbank Baden-Wurtemberg* C-65/81, *Mutsch* C-137/84, *Commission v Italy* C-63/86 and *Even v ONPTS* C-207/78.

<sup>5</sup> [UK Action Plan on Tackling Human Trafficking, Home Office & Scottish Executive, 27 March 2007.](#)

there is a same-day service for applications for leave to remain submitted by third-country nationals at the Public Enquiry Office in Croydon. There is no same-day service for an Accession Worker Card.

If an A2 national is currently in the UK wishes to change employer, the new employer will apply for permission to them to work. If that is approved, the worker must apply for an Accession Worker Card. ILPA members report that Accession Worker cards issued in the UK are taking between 20 days and 8 weeks to be produced. Only once the A2 national has received the card can they take up employment for the new employer. By contrast, if a new employer applies for a work permit for a third-country national currently in the UK with leave to enter or remain as a work permit holder then once the work permit application is approved the third country national may immediately commence work for the new employer pending the outcome of the leave to remain application. The work permit approval letter issued by the Border and Immigration Agency specifically states that this is the case. The leave to remain application currently takes approximately four weeks by post or may be processed on the same day if submitted in person to the Public Enquiry Office at the Border and Immigration Agency in London. If the leave to remain application is refused, the third country national must immediately cease work for the new employer.

A2 nationals not yet working in the UK cannot work while they wait for their Accession Worker Card to be processed. The would-be employee may however have to be in the UK because an original passport or ID card is required as part of the application and even if special arrangements are made to bring the passport to the UK this is highly undesirable.

Thus, in violation of the principles described above, the A2 national is in a less favourable position than they would have been prior to Accession and is treated less favourably a third-country national.

If the BIA is not willing to change the rules so that an A2 work permit holder can take up new employment on approval of the new work permit application, it would assist if the A2 national could at least be able to process the Accession Worker Card application on a same day basis at the PEO.

### **Treatment of family members**

Spouses of A2 nationals who are self-employed or self-sufficient are required to obtain registration certificates that are only issued when a job offer is made. This places them in a worse position than the third country national spouses of third country nationals with work permits, who obtain access to the UK labour market without restrictions. A2 spouses of third-country national work permit holders do not enjoy the same access to the labour market as third country national spouses of work permit holders. They cannot obtain a work permit abroad but instead must apply for a registration certificate when they arrive in the UK. This will be issued only if they have a job offer. Given that the derogations in the Annexes to the Accession treaties<sup>6</sup> do not apply to the spouses of self employed or self sufficient A2 nationals, and given the requirements set out above, the imposition of the requirement to obtain prior permission to work from the Home Office is contrary to the Treaties. Such a requirement puts spouses of self-employed A2 nationals in a worse position post accession than that in which they were prior to accession since, if granted leave as dependants of self-employed people, they would have been granted permission to work without conditions. This is contrary to the principles set out above. ILPA considers that the experiences of third country national family member spouses of A2 nationals are worthy of special consideration.

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<sup>6</sup> *Op cit.*

## Social Assistance

The Treaties governing the accession of members of the A2 permits member States to apply measures regulating ‘access’ to their labour markets for nationals of the A2<sup>7</sup>. There is nothing in the Treaties or in the annexes to them to suggest that member States may impose measures going beyond the limitation of ‘access’ to the labour market and treat workers who do access the labour market in a different manner to other workers. Yet this is what the UK has done.

Rights to social benefits are restricted. These include income-support, income-based jobseekers’ allowance, state pension credit, housing benefit and council tax benefit. Rights to in-work income-related benefits are available to A2 workers but pre-employment and, most significantly in this context, post employment, benefits are not. See the Social Security (Bulgaria and Romania) Amendment Regulations 2006 (SI 2006/3341) and the Accession (Immigration and Worker Registration) Regulations 2006 (SI 2006/3317) as amended by the Accession (Immigration and Worker Registration) (Amendment) Regulations 2007 (SI 2007/928). Under SI 2006/3317 (as amended) neither jobseekers nor A2 nationals who cease to work (reg 6) can claim these benefits, save in the case of those certified as highly skilled under reg 7. The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/194, as amended) restrict eligibility for assistance to those from A2 states treated as workers for the purposes of regulation 6 of SI 2006/1003 and their family members. Similarly for the Housing Benefit Regulations 2006 (SI 2006/213, see regulation 10(3B)(f)). Similar provisions are found in a multiplicity of other instruments<sup>8</sup>.

These provisions, all of which affect a worker’s experience of periods of sickness or unemployment, including following dismissal from employment, are contrary to Community law. Where the consequences of the loss of employment are more severe than for other workers, a person’s vulnerability to exploitation in the workplace is increased.

## Eligibility for permanent residence

The UK’s transposition of Article 16 of Directive 2004/38/EC requires (reg 15(1)) that the Union citizen have been residing in accordance with the European Economic Area Regulations 2000 (SI 2000/2326) or 2006 (SI 2006/1003) for the residence to count toward obtaining rights of permanent residence. Broadly stated, these regulations apply to Union citizens exercising treaty rights. This has the important consequence that accession State nationals are not able to count periods of residence prior to accession, since they were not at that time Union citizens.

Secondly and for the same reason, even if they are exercising rights under Association Agreements between the European Union and their member State, accession state nationals will not be treated as having been exercising treaty rights ‘in accordance with’ the relevant regulations, although they may have been residing lawfully in the UK for years prior to that date. There are limited provisions in the Immigration Rules (rules 222 to 223A) whereby those who were present in the UK under Association Agreements and continue in self-employment following accession can become eligible for indefinite leave to remain in the UK.

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<sup>7</sup> See for example Annex VI to the ~~to the~~ Treaty of Accession for Bulgaria, *op cit*: at paragraph 2.

<sup>8</sup> E.g. the Council Tax Benefit Regulations (2006 (2006/215), the Council Tax Benefit (Persons who have attained the qualifying age for State Pension Credit) Regulations 2006 (SI 2006/216), the Housing Benefit (Persons who have attained the qualifying age for State Pension Credit) Regulations 2006 (SI 2006/214), the income Support (General) Regulations 1987 (SI 1987/1967) and the State Pension Credit Regulations 2002 (SI 2002/1792). All references are to these regulations as amended and these are examples and not an exhaustive list.

The UK's transposition of Article 16 means that, for many A2 nationals, the possibility of obtaining permanent residence will simply not arise until 1 January 2012. Third country family members, who may also have been lawfully resident in the UK prior to becoming the family members of EEA nationals, are similarly affected.

Thus, a Bulgarian national in the UK for three years on a work permit prior to accession and thereafter exercising treaty rights as a worker will need to wait a total of 8 years before becoming eligible for permanent residence, whereas a third country national would need to wait for only 5 years before becoming eligible for indefinite leave to remain. This violates both the principles set out above: these nationals are in a less favourable position than they would have been prior to accession and are treated less favourably than third country nationals.

As set out in the 18 January 2007 letter from E. Crabit, (Acting Head of Unit C3: Citizenship and Fundamental rights in Directorate C: Civil Justice, Rights and Citizenship) to Kingsley Napley solicitors, the European Commission does not accept the UK's approach. The letter states:

‘Since the Directive does not provide for the condition that the five year residence has to be ‘on the basis of the Directive’ this notion should cover also those persons who have recently become Union citizens and have legally resided in the UK for five years. Otherwise such persons would have to wait for five years from the acquisition of citizenship of the Union which would be an additional condition not foreseen in the text.’

This view suggests that the Hungarian case *GN (EEA Regulations: Five years' residence) Hungary* [2007] UKAIT 00073 is wrongly decided and unlikely to survive challenges in the higher courts.

The UK's approach has put A2 nationals in a worse position as regards integration than non-EEA nationals.

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