Churches Committee
for Migrants in Europe

PROTECTING MIGRANTS' RIGHTS: APPLICATION OF EC AGREEMENTS WITH THIRD COUNTRIES

by

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I INTRODUCTION

It has long been accepted that free movement rights, and particularly rights of residence, access to employment, establishment and services, which form a fundamental part of Community law, are directly exercisable only by persons with the nationality of a Member State.

This view may soon be challenged as Art. 8a of the Single European Act comes into effect on 1 January 1993 requiring the creation of a Community without internal frontiers. However that provision may be interpreted, third country nationals, even those permanently and lawfully resident in the Community, will not, as a result, benefit from access to employment, self-employment or residence rights across the Community.

Articles 48-66 of the EC Treaty which set out the free movement rights in respect of work, establishment and services cannot generally be relied upon directly by third country nationals even when they have permanent residence rights in one Member State. Further, these articles of the EC Treaty do not give independent rights of access either to the EC territory or labour market to third country nationals.

Third country national family members of EC nationals exercising or having exercised Treaty free movement rights may rely on the rights of the EC national to get or retain access to the territory and the labour market (the **Singh** case C-370/90). Similarly EC companies have some rights to move workers without free movement rights to other Member States to provide services (the **Rush Portuguesa** case C-113/89). Nonetheless there is no general Community competence over third country nationals though the Community may adopt legal acts concerning workers from non-member countries.

The Community does have power to enter into Agreements with third countries under Article 238 EC. In exercise of that power the Community has concluded, **inter alia**, Association Agreements with Turkey, Poland, Hungary and the Czech and Slovak Federal Republic (subject to the legal status of that state) and Co-operation Agreements with Algeria, Morocco and Tunisia all of which agreements include provisions in respect of labour, workers and/or establishment and services. A Co-operation Agreement with Yugoslavia also contained such provisions but was denounced in November 1991.

The Community has also concluded the Lomé IV Convention with 69 states in Africa, the Caribbean and Pacific which includes at Annex VI, provisions about workers.

Finally, the Community has entered into an agreement with the states parties to the European Free Trade Agreement (EFTA) (Austria, Finland, Ireland, Liechtenstein, Norway, Sweden and Switzerland) which agreement effectively gives full free movement rights to all EC and EFTA nationals in each others' states from 1 January 1993 subject to transitional arrange-ments for Liechtenstein and Switzerland. This area, encompassing the Community and EFTA states, is known as the European Economic Area (EEA).

The jurisprudence of the European Court of Justice (ECJ) has established that in respect of the Turkey/EC Association and Morocco/EC Co-operation Agreements, workers from those third states have directly enforceable rights in respect of employment and/or social security benefits.

This briefing paper will investigate the protection Community law may extend to third country national workers in the areas of permission to work, the right of residence, social security benefits and limitations on expulsion by virtue of agreements concluded by the Community with third countries.

It is important to note here that where a right under an agreement is found to be directly enforceable (direct effect) by the ECJ it is part of the acquis Communautaire and must be applied by the Community's national courts.

In accordance with the principles of Community law, national law which contravenes Community law may not be applied. Further if it appears to a national court that a national provision does not comply with Community law, the court must apply Community law and if necessary grant interim relief while the opinion of the ECJ is sought (the **Marleasing** C-106/89 and **Factortame** C-221/89 cases). The enforcement of Community law is very effective. If a government fails to implement Community law, anyone who suffers loss as a result may be entitled to damages from the state (the **Francovich** case C-6/90 and C-9/90).

II ASSOCIATION AGREEMENT WITH TURKEY

Turkey and the Community concluded an Association Agreement[1] and First Protocol[2] which contain provisions in respect of workers under the heading Movement of Persons and Services (First Protocol). Under the Agreement, an Association Council was established to promulgate decisions to give effect to the Agreement. The Council has produced three decisions regarding workers: 2/76, 1/80 and 3/80. The ECJ has considered the provisions relating to workers on three occasions. In the first case (the **Demirel** case C-12/86) the court found it had power to interpret the provisions of the Agreement relating to workers but that the provisions upon which reliance was placed lacked sufficient precision to found direct rights.

In the second case it found that the decisions of the Association Council could have direct effect that is to say Turkish workers can rely directly on some provisions of the Council Decisions to enforce their rights (the **Sevince** case C-192/89). On the third occasion (the **Kus** case C-237/91) the ECJ decision is awaited but the Advocate General's opinion which was delivered on 10 November 1992 reaffirmed the **Sevince** decision and clarified some issues relating to residence permits.

The provisions of the Agreement and Association Council decisions of particular importance are:

First Protocol

Article 37:

> As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community.

Article 39:

1. Before the end of the first year after the entry into force of this Protocol the Council of Association shall adopt social security

1. (Council Decision 64/732 of 23.12.63)
2. (1.1.73)

measures for workers of Turkish nationality moving within the Community and for their families resident in the Community.

2. These provisions must enable workers of Turkish nationality, in accordance with arrangements to be laid down, to aggregate periods of insurance or employment completed in individual Member States in respect of old age pensions, death benefits and invalidity pensions, and also as regards the provision of health services for workers and their families residing in the Community. These measures shall create no obligation on Member States to take into account periods completed in Turkey.

3. The above mentioned measures must ensure that family allowances are paid if a worker's family resides in the Community.

Article 41(1):

The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

Association Council Decision 2/76

Article 7:

The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers legally resident and employed in their territory.

Association Council Decision 1/80

Article 6:

1. Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:

(i) shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;

(ii) shall be entitled in that Member State, after three years of legal

employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;

(iii) shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.

2. Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment.

Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment.

3. The procedures for applying paragraphs 1 and 2 shall be those established under national rules.

Article 7:

1. The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him:

(i) shall be entitled - subject to the priority to be given to wo~kers of Member States of the Community - to respond to any offer of employment after they have been legally resident for at least three years in that Member State;

(ii) shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.

2. Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.

Article 10:

1. The Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and Community workers.

2. Subject to the application of Articles 6 and 7, the Turkish workers referred to in paragraph 1 and members of their families shall be entitled, on the same footing as Community workers, to assistance from the employment services in their search for employment.

Article 11:

Nationals of the Member States duly registered as belonging to the labour force in Turkey, and members of their families living with them, shal enjoy in that country the rights and advantages referred to in Articles 6, 7, 9 and 10 if they meet the conditions laid down in those Articles.

Article 13:

The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.

Article 14:

1. The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.

2. They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals.

In the **Demirel** case the ECJ held that the Community has the power to adopt legal acts concerning workers from non-member countries. It held, in that case, that Articles 7, 12 and Article 36P of the Agreement (not reproduced here) were not of direct effect. The Court also stated «there is at present no provision of Community law defining the conditions in which Member States must permit the family reunification of Turkish workers lawfully settled in the Community.»

However, the Advocate-General was of the opinion that Article 41(1) was probably sufficiently clear to be of direct effect. This leaves open the question of whether restrictions on establishment and provision of services by Turkish nationals in the Community are «frozen» at their 1973 level. For instance, if a Turkish plumber could have come to a Member State to establish himself or herself in business in 1973, then any subsequent change in the law which would restrict that plumber's entry passed later would be contrary to the standstill provision of the First Protocol.

In the **Demirel** case, the ECJ did not consider whether Articles 37P and 39P were of direct effect. The wording of Article 37P is almost identical to the wording of the non-discrimination articles in the Maghreb Co-operation Agreements (see below). Article 10 of Association Council Decision 1/80 also prohibits discrimination in working conditions and remuneration. Accordingly it is difficult to see how the ECJ could come to a different conclusion on the direct effect of Article 37P from that found in **Kziber** regarding Article 40 of the Morocco Agreement. Therefore the arguments in favour of protection of Co-operation Agreement workers set out below also apply to Turkish workers. However, Turkish workers have more clearly defined rights under the Association Council Decisions.

In a second case on the Association Agreement, **Sevince**, the Court held that the decisions of the Association Council established under the Agreement could be and in certain circumstances were of direct effect. This is of particular importance in terms of rights to extensions of work and residence permits but is also relevant to expulsion and access to social security benefits.

FORMS OF PROTECTION

1. EXTENSION OF WORK AND RESIDENCE PERMITS

Decision 1/80 gives Turkish workers duly registered as belonging to the labour force the following rights:

a. After one year's legal employment, renewal of permit to work for the same employer;

b. After three years' legal employment to respond to another offer of employment for the same occupation;

c. After four years' legal employment to take any employment of choice;

d. Family members authorised to join the worker have the right to work after three years legal residence in the State and free access to employment after five years residence;

e. The children of Turkish workers at least one of whom has been legally employed for three years which children have completed a course of vocational training in the host country may take employment.

Turkish workers are entitled to a renewal of their work permits in the above circumstances by virtue of Community law. The renewal of a work permit may not be subject to the application of national law. The Turkish worker cannot be required to fulfil any requirements extraneous to Decision 1/80, such as that he or she has adequate housing or has not had recourse to benefits. The renewal of the work permit must be granted by the national authority as long as the requirements of the Decision alone are fulfilled.

Art 13 of Decision 1/80 is an unequivocal «standstill» clause which may be relied upon directly by Turkish workers (the **Sevince** case). Therefore new restrictions on access to employment for legally resident Turkish workers is not permissible. This standstill provision also exists in the earlier Decision 2/76 Art 7 therefore applies to changes in legislation after its adoption on 20.12.76.

A further decision of the ECJ on the Turkey/EC Agreement is awaited (the **Kus** case) in respect of which the Advocate General's opinion was pronounced on

10 November 1992. A German court asked the ECJ whether the requirement to renew a work permit presupposes the renewal of a residence permit and whether protection under the Agreement is limited to Turks who came to the Community as workers. The Advocate General has indicated in his Opinion that Art 6 of Decision 1/80 does require Member States to extend residence permits as well as work permits to Turkish workers meeting the requirements. Further, he stated that the fact that the worker had come to Germany for the purpose of family reunion did not exclude him from the benefits of the Agreement.

If the ECJ follows the Advocate General then the value of the Agreement in protecting the rights of Turkish workers will be clarified and enhanced.

It is not clear whether or to what extent Art 6 of Decision 1/80 protects workers who change employers during their first three years of employment but such protection may be afforded by Art 14 of the Decision which limits the grounds of expulsion (see below).

Further, where Turkish workers seek to engage in self-employed activities after a period of employment the Decision is silent. Here regard must be had to Art 41(1)P referred to above and the Advocate General's Opinion in **Demirel**. It would appear that although there is no right to engage in self-employment **per se** restrictions placed on self-employment (establishment) after 1973 must not apply to Turkish workers.

In respect of Member States which joined the Community after 1973 the effective date of the standstill clause must be that on which they acceded to the Community.

2. EXPULSION

Article 14 of Decision 1/80 limits the expulsion of Turkish workers to grounds of «public policy, public security and public health». The wording is the same as applies in respect of the expulsion of EC workers exercising free movement rights in another Member State (Art 48(3) EC). For EC workers the ECJ has interpreted the power to expel on these grounds extremely narrowly. To expel on grounds of public policy, there must be «a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society» (the **Bouchereau** case C-30/77).

As the same wording appears in Art 14 of 1/80 and Art 48(3) EC, the same

interpretation may apply to the expulsion of Turkish workers. However, according to the jurisprudence of the ECJ, the existence of identical wording in Community provisions and an agreement does not mean they must necessarily be interpreted in the same way (**Re the Draft Treaty on a European Economic Area** Opinion 1/91). Regard must also be had to the purpose and intention of the agreement.

The purpose of the Agreement is to achieve through preparatory, transitional and final stages, the accession of Turkey to the Community. This ultimate purpose has, of course, not been attained. Nor has freedom of movement for Turkish workers in the Community been achieved as required by Art 36(P) of the Agreement. Nonetheless the purpose of the Agreement is to lead to accession. Accordingly, the interpretation of identical provisions in Community law and the Agreement cannot reasonably be differentiated on the basis of purpose. The fact that political will has been lacking to achieve the goal of the Agreement cannot be a reason for a court to resile from the interpretation of that Agreement in accordance with its stated purpose.

Therefore while the national laws of Member States apply to the admission of Turkish workers to the territory once they are admitted to a Member State and have gained lawful employment the provisions of the Agreement and its subsidiary legislation apply and must be interpreted by the courts in accordance with the Agreement's objects. On this basis, the interpretation of the Agreements provisions should mirror the identical EC provisions.

The ECJ has found that the failure of EC workers to complete national legal formalities concerning, **inter alia**, residence cannot constitute a breach of public order or public security and does not of itself justify expulsion (the **Royer** case C-48/75). If this reasoning can be applied to the Turkey/EC Agreement, then where a Turkish worker has been lawfully resident and had lawful access to the labour market of a Member State but fails to take steps to renew or extend that permission, expulsion could not be justified for that reason alone. This does not apply where a Turkish worker has never had lawful access to the territory and labour market as freedom of movement has not been achieved for Turkish workers.

3. SOCIAL SECURITY

In respect of social security benefits for Turkish workers, Council Decision 3/80 applies. That Decision makes specific reference to its EC counterpart - Regulation 1408/71. The Decision applies to Turkish nationals who are or

have been subject to the legislation of one or more Member States, members of their families resident in the Community and the survivors of such workers (Art 2). It gives these persons the same rights and obligations as regards social security benefits as nationals of the state in respect of:

a. Sickness and maternity benefits;

b. Invalidity benefits including those intended for maintenance and improvement of earning capacity;

c. Old age benefits;

d. Survivors' benefits;

e. Benefits in respect of accidents at work and occupational diseases;

f. Death grants;

g. Unemployment benefits;

h. Family benefits.

This list of benefits is identical to that of 1408/71. Further, each benefit set out in the Decision is defined by reference to 1408/71. In accordance with the argument set out above the Decision must be interpreted in the same way as the Community Regulation. Further it must give rise to rights directly enforceable in each Member State by Turkish workers. Therefore a Turkish worker must have equal access to these benefits as Community nationals.

WHICH TURKISH WORKERS ARE PROTECTED?

Protection under the Agreement may be claimed by workers who have:

1. Turkish nationality.

2. Lawful access to the territory.

3. Lawful access to the labour force.

III CO-OPERATION AGREEMENTS WITH ALGERIA, MOROCCO AND TUNISIA

The European Community has entered into Co-operation Agreements with Algeria[3], Morocco[4], and Tunisia[5] all of which include provisions on Co-operation in Field of Labour.

Identical articles appear in each of the Agreements:

> «The treatment accorded by each Member State to workers of [Algerian/Moroccan/Tunisian] nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions or remuneration, in relation to its own nationals.»[6]

and:

> «Subject to the provisions of the following paragraphs, workers of [Algerian/Moroccan/Tunisian] nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed.»[7]

The ECJ in considering the Morocco/EC Agreement found in the **Kziber** case (C-18/90) that the provision in respect of social security was of direct effect. This means that the Agreement can be relied on directly by a Moroccan worker in the Community against a Member State government if he or she is discriminated against in the provision of social security benefits on the ground of nationality. The ECJ then stated that the provision of the Agreement prohibiting discrimination as regards working conditions and remuneration was also of direct effect.

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3. (Council Regulation (EEC) No 2210/78 of 27.9.78)
4. (Council Regulation (EEC) No 2211/78 of 27.9.78)
5. (Council Regulation (EEC) No 2212/78 of 27.9.78)
6. Article 38 (Algeria)
   Article 40 (Morocco)
   Article 39 (Tunisia)
7. Article 39 (Algeria)
   Article 41 (Morocco)
   Article 40 (Tunisia)

As identical provisions exist in all three Agreements, (Algeria, Morocco and Tunisia) the ECJ's interpretation of the Morocco/EC Agreement should apply **mutatis mutandis** to the identical provisions in the other two Agreements.

Accordingly, Algerian/Moroccan/Tunisian workers in the Community may be able to rely on the Agreements as part of the acquis Communautaire where they are subject to discrimination based on nationality in respect of social security benefits, working conditions or remuneration.

The ECJ decision applies both to active workers and to those who have left active employment after reaching retirement age or becoming victims of industrial accidents or diseases. The Agreements also protect workers who are involuntarily and temporarily unemployed as regards benefits. Family members of the worker (whether still active or retired) who are resident in the Community are also entitled to protection.

FORMS OF PROTECTION

1. EXTENSION OF WORK AND RESIDENCE PERMITS

Co-operation Agreement workers must not be discriminated against on the basis of nationality «as regards working conditions and remuneration». This phrase is identical to that used in Art 48(2) EC relating to EC workers with one exception - Art. 48(2) includes «employment» as a prohibited area of discrimination.

The ECJ has interpreted Art 48 widely (the **Heylens** C-222/86 and **Royer** C-48/76 cases). However the fact that the provisions of an agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically (**Re the Draft Treaty on a European Economic Area Opinion** 1/91). An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives.

Therefore the difference in purpose between Article 48 generally, to secure free movement of workers, and that of the Co-operation Agreements to protect workers from discrimination, must be regarded.

The object of the Co-operation Agreements is, primarily, to secure enhanced economic and commercial relations between the parties. In the Community

legal order similar provisions are only a part of the means to achieving European unity. However, notwithstanding the difference of objectives, in defining the provisions relating to social security the ECJ relied directly on the interpretation of the corresponding Community provisions (the **Kziber** case). Therefore the same reasoning should apply to the interpretation of «working conditions».

To approach the same phrase in the Co-operation Agreements in a different spirit would have the effect of giving Mahgreb workers lawfully in the Community diminished employment protection rights in comparison with EC nationals. The avoidance of this discrimination must be the underlying purpose of the provision. As the Agreements are the responsibility of the Member States and the Community to implement, the protection afforded should be to a Community wide standard of non-discrimination.

The Agreements give no right of **access** to the Community territory for Maghreb workers. They only protect workers who are already lawfully resident in a Member State and have lawful access to the labour force. Where a Co-operation Agreement worker fulfils these requirements is it open to national authorities to refuse to renew work and residence permits on a ground which could only apply because of the worker's nationality? The view expressed here is that it is not. Such a refusal would amount to discrimination prohibited by the Agreements.

Where Maghreb workers are subject to short time limits under their work and residence permits and have no guarantee of an extension of those permits this of itself amounts to discrimination in comparison with «own nationals». «Own nationals» as described in the Agreements are, of course, not under any such limitation. EC nationals have a right to have their residence permits extended so the requirement to do so while superficially discriminatory cannot cause detriment, particularly as it cannot, of itself, justify expulsion. No such protection exists in respect of Maghreb workers. Therefore Maghreb workers in these circumstances are the subject of discrimination which is based on nationality. But is this discrimination in respect of working conditions or remuneration?

Maghreb workers, having no free movement right, must have obtained lawful access to the territory and labour market before any protection is afforded. But once this happens if they have less security in the labour market than "own nationals" or EC nationals then discrimination in working conditions must result. For instance, uncertainty of residence will be a disincentive

to employers considering the promotion of workers. It is also a disincentive for workers to upgrade their skills and qualifications which may be of use to them only in their country of residence.

Discrimination in promotion and training resulting from the uncertain position of workers in the labour force must inevitably be reflected in their wages. Workers whose position is insecure are likely to remain in the lowest paid and least skilled posts as these are the easiest to fill in the event that the worker is expelled. Similarly, uncertainty in respect of work and residence rights can give rise to discrimination in social security benefits, for instance workers may be unable to complete the period of time necessary to accrue the benefit.

Further, the Agreements as between the Community and a third state must be interpreted consistently in all Member States. The ECJ has held that by such agreements Member States undertake obligations not only to the non-Member State but above all to the Community. Therefore the effects of such agreements must not be allowed to vary from state to state (the **Kupferberg** case C-104/81). If national laws apply in respect of the renewal of work and residence permits, there cannot be consistency of application.

For instance, if Moroccan workers resident in the UK are entitled to secure work and residence rights for 4 years which carry a right of permanent residence at the end of the period, their position in the labour market is secure. If Moroccan workers in Ireland are required to renew their permission to work and reside every six months and on each occasion a renewal may be refused in the absolute discretion of the state, then the workers' position is uncertain.

In such circumstances there is no uniformity of application of the non-discrimination principle across the Community. As a result the Community may be in breach of its obligations under the Agreements to the third state to protect their workers to a comparable level throughout the Community.

2. EXPULSION

Expulsion is certainly an interference with the ability to work and therefore may be contrary to the non-discrimination provision on working conditions and remuneration. "Own nationals" with whom protected workers must be compared may not be expelled. EC workers may only be expelled on the grounds of public policy, public health or public security. These three grounds

have been interpreted very restrictively by the ECJ (the **Bouchereau** case). Notwithstanding the wording of the Agreement's provisions it is unlikely that Maghreb workers have superior rights to EC workers in respect of expulsion. However, it is arguable that Maghreb workers can only be expelled on the same grounds that EC nationals exercising free movement rights may be, that is to say public policy, public health and public security as defined by the ECJ (see above under Turkey/EC Agreement).

The compatibility of expulsion of a Moroccan worker with the provision of the Morocco/EC Agreement was considered in **Amimi Mohamed**, Supreme Court of Gibraltar (August 1992). The decision of that court supports the interpretation of the Morocco/EC Agreement as protecting Moroccan workers from expulsion. The judge in that case stated «I have come to the conclusion that a Moroccan worker in Gibraltar has the same rights as say a Spanish or Danish worker...».

3. SOCIAL SECURITY

Discrimination in the provision of social security benefits between «own nationals» and Co-operation Agreement workers is prohibited (the **Kziber** case). The ECJ looked to EC law on social security rights for EC workers (Regulation 1408/71) to interpret the Agreement right. Under that Regulation, discrimination in the provision of benefits in the following categories is unlawful:

a. Illness and maternity benefits;

b. Invalidity benefits including those intended for the maintenance or improvement of earning capacity;

c. Old age benefit;

d. Survivor's benefits;

e. Benefits in respect of accidents at work and occupational diseases;

f. Death grants;

g. Unemployment benefits;

h. Family benefits.

In respect of family benefits, discrimination is only prohibited where the family members are in the Community. There is no requirement that these benefits be payable for family members in the country of origin. It is unclear in the **Kziber** case exactly which heading of benefit the ECJ had in mind when reaching its decision.

Therefore, wherever a Co-operation Agreement worker (whether active, retired or involuntarily unemployed) is denied one of these benefits on the ground that it is only available to the state's nationals the worker can rely on his or her Community law rights to force the state to pay the benefit. The worker can pursue his or her right in the national courts which must apply Community law even if national law requires otherwise.

WHICH WORKERS ARE PROTECTED?

Protection under the Co-operation Agreements may be claimed by workers who have:

1. The nationality of a relevant state.

2. Lawful access to the territory of a Member State.

3. Lawful access to the labour market of a Member State.

IV ASSOCIATION AGREEMENTS WITH THE CZECH AND SLOVAK FEDERAL REPUBLIC, HUNGARY AND POLAND

Three Association Agreements have recently been concluded by the Community with the above states all of which Agreements include provisions on workers, establishment and services. In respect of the Czech and Slovak Federal Republic the agreement is in abeyance until the position of the two states is formalised.

FORMS OF PROTECTION

1. MOVEMENT OF WORKERS

Art. 37 to 43 of each of the Agreements contain, with a minor exception in respect of the Poland/EC Agreement, identical provisions relating to workers. No right of access for workers from the Association Agreement countries is provided under the Agreement. However discrimination based on nationality between Agreement workers and «own nationals» as regards working conditions, remuneration or dismissal, is prohibited but only where the workers are lawfully employed on the territory of the Member State.

Therefore unlike the earlier agreements, irregular Eastern European workers under these Agreements may be exploited in respect of working conditions, remuneration and dismissal. At the stroke of an administrative pen a hitherto lawful Eastern European worker may become irregular. At that moment the worker can no longer rely on the Agreements to protect him or her from discrimination by an employer or the state.

The Articles are also conditional in that they are «subject to the conditions and modalities applicable in each Member State». This would appear to permit variation in the application of the non-discrimination provision depending on the national laws of each Member State. For this reason it is unclear whether the arguments set out above in respect of the Maghreb Co-operation Agreements are applicable.

Art. 37 provides that the legally resident spouse and children of a worker legally employed in a Member State shall have access to the labour market for the duration of the worker's authorised employment. However, specifically excluded from this provision are the spouses and children of seasonal workers

and workers under bilateral agreements. Whether such an exclusion is compatible with the obligation to respect private and family life contained in Article 8 of the European Convention on Human Rights is questionable.

Art. 38 of the Agreements relates to social security benefits but does not prohibit discrimination on the basis of nationality. Rather it provides that the conditions and modalities of each Member State shall apply. The purpose is only to co-ordinate social security systems for workers from the Association Agreement countries in respect of aggregation of periods of insurance, employment or residence in different Member States for the purpose of old age pensions, annuities, invalidity and death benefits and medical care. Also, workers are to receive family allowances for members of their families legally resident in the territory of the Member States.

Powers are given to Association Councils to adopt detailed rules and provisions in respect of social security matters.

Art. 41 provides that existing facilities for access to employment for these workers under bilateral agreements **ought** to be preserved and if possible improved. This provision probably lacks the precision, clarity and unambiguity necessary for it to be of direct effect as a standstill clause as it expresses nothing more than an intention.

In respect of the Poland/EC Agreement provision is made that Member States will examine the possibility of granting work permits to Polish nationals already having residence permits in Member States. Excluded are Polish nationals who have been admitted as tourists or visitors. It would appear that the possible beneficiaries of the provision are Polish students.

2. ESTABLISHMENT

Arts. 44 to 54 of the Agreement relate to the establishment of Community and Association Agreement companies and nationals on one anothers' territories.

Association Agreement companies and nationals who seek to establish themselves in a Member State are to be granted treatment «no less favourable than that accorded to its own companies and nationals». However in respect of branches, agencies and nationals establishing themselves as self employed persons this equality treatment only comes into effect at the start of the second stage (five years after entry into force of the Agreements).

Establishment is strictly defined as «the right to take up and pursue economic activities as self-employed persons and to set-up and manage undertakings, in particular companies, which they effectively control». Access to the labour market is strictly prohibited. Various areas of activity are excluded in the annexes and throughout the text reference is specifically made to the fact that national regulations shall apply so long as they do not offend against the non-discrimination principle.

Further, it is made very clear in Art. 52 that employees of Association Agreement companies may only be moved to the Community if they are nationals of the Association Agreement country and if they fulfil the definition of key personnel contained in Art. 52(2).

Key personnel are defined as:

Senior employees of an organisation who primarily direct the management of the organisation, receiving general supervision or direction principally from the board of directors or shareholders of the business, including:

- Directing the organisation or a department or sub-division of the organisation;
- Supervising and controlling the work of other supervisory, professional or managerial employees;
- Having the authority personally to engage and dismiss or recommend engaging, dismissing or other personne actions.

Persons employed by an organisation who possess high or uncommon:

- Qualifications referring to a type of work or trade requiring specific technical knowledge;
- Knowledge essential to the organisation's service, research equipment, techniques or management.

These may include, but are not limited to, members of accredited professions.

Each such employee must have been employed by the organisation concerned for at least one year preceding the detachment by the organisation.

It is interesting to note that the previous employment requirement is not limited to the preceding year immediately prior to detachment. Therefore if a company re-engaged a former employee who had at some time in the past worked for the company for a year it appears the requirement would be satisfied.

3. SERVICES

Arts. 55 to 57 regulate the supply of services in Member States. They provide for the temporary movement of natural persons to provide such services or natural persons employed by a company or business providing services but any employee must be «key personnel» as defined above. There is a limitation on provision of services which is very unclear. Representatives of service providers may only have access to the territory «for the purpose of negotiating for the sale of services or entering into agreements to sell services for a service provider, where those representatives will not be engaged in making direct sales to the general public or in supplying services themselves». Undoubtedly judicial interpretation will be required.

The provisions in respect of services are not subject to the completion of an initial transitional stage therefore may be relied upon from entry into force. The main services provision, Art. 55 may be sufficiently clear and precise to be directly effective even though Art. 55(3) states that Association Councils shall take measures to implement the provisions.

Finally, Art. 58 specifically states that the parties may apply their national laws and regulations regarding entry, stay, work, labour conditions, establishment of natural persons, and supply of services. However in so doing they may not impair or nullify the benefits «accruing to any party under the terms of a specific provision». It is difficult to see how the application of national regulations and laws on entry, stay, work and labour could not, if they were more restrictive than the provisions set out in the Agreement, fail to have the effect of impairing the benefits accruing under the Agreements. This would be the case even if the benefits were impaired only by reason of the delay which is normally attendant on the application of national laws on access and stay.

V LOME IV CONVENTION

On 15 December 1989 the fourth ACP-EEC Convention was signed at Lomé (the Lomé IV Convention). Two annexes to this Agreement relate to the

treatment of ACP migrant workers (Annex V and VI).

Annex V (Joint declaration on ACP migrant workers and ACP students in the Community) limits itself to intentions as regards migrant workers such as the need for respect of the fundamental freedoms as they derive from the general principles of international law for ACP migrant workers, improvement of social and cultural facilities for workers who are ACP nationals, training projects for ACP nationals and an obligation on ACP states to discourage irregular migration of their nationals into the Community.

ANNEX VI

JOINT DECLARATION ON WORKERS WHO ARE NATIONALS OF ONE OF THE CONTRACTING PARTIES AND ARE LEGALLY RESIDENT IN THE TERRITORY OF A MEMBER STATE OR AN ACP STATE

1. Each Member State shall accord to workers who are nationals of an ACP state legally employed in its territory treatment free from any discrimination based on nationality, as regards working conditions and pay, in relation to its own nationals.

   Each ACP state shall accord the same treatment to workers who are nationals of the Member States legally employed on its territory.

2. Workers who are nationals of an ACP state legally employed in the territory of a Member State and members of their families living with them shall, as regards social security benefits linked to employment in that Member State, enjoy treatment free from any discrimination based on nationality in relation to nationals of that Member State.

   Each ACP state shall accord to workers who are nationals of Member States and legally employed in its territory, and to members of their families, treatment similar to that laid down in paragraph 1.

3. These provisions shall not affect any rights or obligations arising from bilateral agreements binding the ACP states and the

Member States where those agreements provide for more favourable treatment for nationals of the ACP states or of the Member States.

4. The Parties hereto agree that the matters referred to in this declaration shall be resolved satisfactorily and, if necessary, through bilateral negotiations with a view to concluding appropriate agreements.

As in respect of the Association and Co-operation Agreements discussed above, the Lomé Conventions are «mixed», that is, they contain obligations which rest on the Community as an entity and on each of the Member States. It is clear from the ECJ jurisprudence that the Lomé Conventions are self-executing and capable of giving direct effect (the **Razanatsimba** case C-65/77). In that case the ECJ considered Art. 62 of Lomé I which contains a non-discrimination provision on the treatment of the ACP nationals. However the Court held that the wording of the Article, requiring treatment «on a non-discriminatory basis» did not mean either that an ACP national must be treated like an EC national or that one ACP national must be treated as favourably as any other ACP national in a Member State.

The wording of Annex VI of Lomé IV is substantially clearer in this regard, prohibiting discrimination «in relation to its own nationals» which means nationals of a Member State. On such a wording it is likely that the ECJ would come to a different conclusion than it did in respect of Art. 62.

In considering what protection, if any, the Annex extends to ACP workers the first question is whether it can give rise to obligations of direct effect in the Community. The status of a declaration to a convention is itself unclear.

Some assistance may, however, be provided by the ECJ's caselaw on different types of legislation. The ECJ has considered the effect of a Commission recommendation a measure specifically excluded from having binding force (Art 189 EC) (the **Grimaldi** case C-233/88). There are to aspects of this decision which are of assistance in the interpretation of the declaration. First the ECJ found that even though a recommendation does not have binding force it still has some legal effect. National courts are bound to take such measures into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures. Secondly, the ECJ confirmed its jurisprudence that the choice of form cannot alter the nature of the measure. The Court must ascertain

whether the content of a measure is wholly consistent with the form attributed to it. Only a provision which is sufficiently precise, clear and unambiguous to give rise to rights and obligations may be directly applicable.

The provisions included at Annex VI are properly the subject matter of articles in the Association and Co-operation Agreements (see above). Further, the corresponding provision of the Morocco/EC Agreement on social security benefits has already been found to have direct effect by the ECJ (the **Kziber** case). Therefore it is difficult to see why the contents of Annex VI are such that it is excluded from having binding effect.

Additionally on its wording, Annex VI is clear, precise and unambiguous. It is directed to each Member State, framed so as to create an obligation and that obligation is clearly defined ie, non-discrimination on the basis of nationality in working conditions, pay and defined benefits. On this basis it is clearly possible that the Annex gives rise to rights.

Alternatively, even if the Annex is not binding, following the ECJ reasoning in the **Grimaldi** case, it must nonetheless be considered by national courts. The national court should seek to interpret national provisions in accordance with the intention and purpose of the Annex.

As in respect of the Eastern European Agreements the provisions of the Annex prohibiting discrimination based on nationality are limited to ACP workers who are legally employed. It extends only to working conditions, pay and social security benefits linked to employment. Unlike the Association and Co-operation Agreements social security benefits are only payable for members of the family who are living with the ACP worker. In the other Agreements such benefits must be paid in respect of family members residing in the Community.

The provisions of the Annex may not have the effect of diminishing the rights of ACP nationals arising from bilateral agreements.

VI AGREEMENT ON THE EUROPEAN ECONOMIC AREA

On 1st January 1993 this Agreement is expected to come into force. It will extend to nationals of EFTA states all those free movement rights which are currently available only to EC nationals. Transitional provisions in respect of Liechtenstein and Switzerland delay free movement rights for EC nationals to those states.

These third country nationals will, therefore, be the first to have full free movement rights in the Community which they may exercise independently. It is a matter of some concern that free movement rights should be granted to these third country nationals who have no Community connection while they are denied to third country nationals with permanent residence rights in the Community.

CONCLUSIONS

The above arguments outline the possible extent of protection of third country nationals in the Community on the basis of international agreements. In some cases the protection only applies to workers who have obtained lawful access to the labour market and territory of a Member State. This leaves exclusive competence on the **admission** of these workers with the Member States. However, once a Member State has granted lawful access to the labour market and territory to such workers protection of their rights must be in accordance with the Agreements and subsidiary legislation. This framework applies also in respect of the Lomé IV Convention.

In respect of the recent Association Agreements with Eastern Europe, protection of workers in the Community is augmented by provisions giving a right of **access** in certain circumstances. The EEA Agreement goes further giving full free movement rights equivalent to those of EC nationals within the Community to third country nationals, citizens of EFTA states.

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