The Accession (Immigration and Worker Authorisation) Regulations 2006: Implications for UK employers and Bulgarian and Romanian (“A2”) nationals in the UK

1. Introduction

The Joint Council for the Welfare of Immigrants is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI actively lobbies and campaigns for changes in law and practice and its mission is to eliminate discrimination in this sphere.

We have been monitoring the implementation and effects of the Accession regulations since their introduction on 1 January this year. We are concerned that they continue to present problems of implementation, are not proven as a policy solution to some of the problems envisaged as a result of Accession, and give rise to confusion among A2 nationals, and injustice against them.

What follows is an analysis of the regulations, some of the adverse effects we are aware of to date and some recommendation for change. We are grateful to Adrian Berry, Barrister at Garden Court Chambers, for his work in helping us to summarise these very complex rules and make practical suggestions for changes.

2. Some cases of A2 nationals adversely affected by the rules

These are some of the cases of Romanian nationals which have come to our attention.

*Miss L entered the UK last year and has worked continuously for a year as an au pair. This, together with the fact of Accession, ought to entitle her to new documentation entitling her to work freely. However, her previous employers are refusing to provide her with evidence that she worked for them so she is now refused this documentation, meaning that while she can exercise right to residence she still experiences restrictions on her ability to work.*
Mrs F is 53. She is exercising her right to residence and would like to be able to work lawfully. She has approached several agencies advertising cleaning jobs. She sees that many vacancies remain unfilled and that she could do the job. But the agencies refuse her work because she cannot provide a national insurance number, and they will not accept proof of her self-employment registration with HMRC.

Mr P wants to work lawfully in construction and applied as required to HMRC for documentation to present to contractors demonstrating that he has been vetted by the Inland Revenue and is eligible for the national insurance regime as a self-employed person. However Mr P’s application coincided with a reform to the construction industry documentation. Because he has nothing to demonstrate his self-employed status he has lost the possibility of a job with a contractor who was interested in recruiting him.

3. Background to the regulations and emerging problems:

According to the 2001 census, there were 7,500 Romanian-born people and 5,350 Bulgarians living in the UK. It was predicted in Spring 2006 that following Accession around 56,000 Romanian and Bulgarian workers were likely to migrate to Britain following Accession (IPPR). In 2006 the UK Government announced it would limit the rights of nationals of Bulgaria and Romania, to work in the UK. In November 2006 the Accession (Immigration and Worker Authorisation) Regulations 2006 were laid before Parliament and came into force on January 1 2007. From this date as European Economic Area (EEA) nationals Bulgarians and Romanians were able to move and reside freely in any Member State without requiring leave to enter or remain and to reside lawfully in the UK.

They now have an initial right to reside in any Member State for their first three months of residence and an extended right to remain in that state as long as they wish if they exercising a treaty right as students, self-employed persons, or if not economically active as self-sufficient persons.

However in general as a result of the Accession regulations, they do not have a right to reside as workers or as work seekers. The broad effect is that any Bulgarian or Romanian wanting to work in the UK needs to obtain permission to work before starting any employment. Any Bulgarian or Romanian national who does not do so or anyone found to be employing them risks a draconian financial penalty. In the case of the employees this is £1,000. Those who do not agree to pay the penalty risk criminal conviction by a Magistrates’ Court.

While the UK Government is generally acting within principles laid down by the European Commission in limiting A2 access to the labour market, it is clear that it is primarily doing so not to protect the labour market but to respond to public concern about impacts on communities housing and social services (Lord Bassam of Brighton Lords Hansard 4 Dec 2006: Column 1019).
anecdotes and media stereotyping abound, neither the UK or the A2 states have produced any scientific analysis of the people flows since Accession, nor their impact on communities or services. Therefore we do not see any evidence that the regulations are ameliorating social impacts, which have for the most part been presumed rather than demonstrated. In addition

- These rules are highly inconsistent and confusing for people who are not immigration solicitors, do not speak English as a first language and have not had experience of dealing with UK immigration and revenue authorities, before as the summary below makes clear

- Self-employed A2 nationals, particularly in the construction trade, are especially vulnerable to falling foul of the rules inadvertently because of a confusion over documentation and the definition of self-employed status. This has been made worse by HMRC’s ill-timed changes in the documentation regime for self-employed people in the construction trade which have resulted in some people being denied documentation for the first three months of Accession. Even those with good reasons to appeal against a penalty fine for illegal working may be discouraged from doing so by the threat of conviction by a Magistrate’s Court, and the cost and time involved in fighting a penalty

- The new rules could result in employers not being able to access an A2 labour force with essential skills or in discriminating against these nationals in recruitment so as to avoid the risk of penalty as the case we have quoted above demonstrates

- There is still a lack of clarity on the position for those wishing to switch categories of employment. The self-employed are economically active and it is seems wrong to discriminate against them as opposed to other economically active people, such as workers and students working part-time and their dependants, who are permitted to apply for normal EU residence documents after one year of economic activity.

The Government has promised to review the restrictions on A2 labour Market access after a year. However this critique shows that review and action are merited much sooner. Ideally the restrictions should be lifted entirely but some other possible steps are also suggested. Before we list these recommendations we present a legal analysis of the rights and restrictions applying to A2 nationals under the current regime.
4. Technical summary of the rules:

The Accession of Bulgaria and Romania to the EU on 1 January 2007 means that a whole range of EU free movement rights are now available to nationals of Bulgaria and Romania. Leaving aside the specific rights for workers and work seekers for a moment, it is worth remembering all the rights that Bulgarians and Romanians now have in common with other EU/EEA nationals from countries such as France and Germany.

Basic Rights

**Admission** In immigration terms, Bulgarians and Romanians have the right of admission to the UK when they present themselves at British airports or seaports.

**Residence** On admission, A2 nationals and their family members enjoy an initial right of residence for up to three months. Once admitted it is also possible for them to obtain what is known as an extended right of residence based on being either self-employed, self-sufficient or students. The family members of those Bulgarians and Romanians who have an extended right of residence may also have a right to reside as well.

**Permanent Residence** Once a Bulgarian or Romanian national, or the family member of such a person, has enjoyed an extended right of residence for a period of time, there are circumstances in which that person may acquire a permanent right of residence. All these rights are available to nationals of Bulgaria and Romania on the same basis as nationals of other EU/EEA states such as France and Germany.

**Documentation** Bulgarians and Romanians and their family members are entitled to Registration Certificates and, where the family members are non-EEA nationals, Residence Cards, on the basis of their extended and/or permanent rights of residence. These are the sorts of documents available to all EU/EEA nationals and their family members.

In addition, like nationals of other EU/EEA states, nationals of Bulgaria and Romania are not after 1 January 2007 unlawfully present in the UK. As EU/EEA nationals they do not fall to be classified as over stayers or illegal entrants so that they are liable for the commission of a criminal offence.

**Workers and Work Seekers – Who is exempt?**
For Bulgarians and Romanians who are workers and work seekers the position is very different to that of seeking to exercise only their right to residence. Nationals of Bulgaria and Romania are subject to a so-called derogated scheme that means that they cannot directly rely on European Community law. In order to be able to work a national of Bulgaria or Romania must either satisfy the Home Office and his employer that he is (i) not an accession state worker subject to worker authorisation or that (ii) he is such a person but has an accession worker authorisation document.

**Who does not need worker authorisation?**

A person who is not an accession state worker subject to worker authorisation may have that status on a number of bases including:

- (i) where that person had leave to remain without being subject to any restriction on his ability to take employment and such leave has expired and (ii) where that person has been legally working for a 12 month period in the UK.

- A Bulgarian or Romanian spouse or civil partner of a UK national or a person settled in the UK is also not subject to the worker authorisation requirements.

There are also other categories of persons not subject to the worker authorisation requirements. All such persons are free to take any work and to apply for a Registration Certificate on the same basis as an EU/EEA national such as a French or German worker. A worker in this situation has an extended right of residence in EC law.

In addition, where the Bulgarian or Romanian national fits the criteria for being a highly skilled person, that person is entitled to a Registration Certificate that enables him to be in the UK as a worker or a job-seeker. He is free to take any relevant employment without being a subject to worker authorisation requirements. Although factually any job seeker may enter the UK and look for a job, only a highly skilled person will be able to be here with the legal status of a job seeker and take any employment. This Registration Certificate is blue in colour.

Finally, a student from Bulgaria or Romania is also not subject to worker authorisation requirements where he obtains a Registration Certificate entitling him to work 20 hours a week in term time, full time in vacations, and for 4 months after his course ends. This certificate is yellow in colour.

**The position of family members of A2 nationals in the UK**

A family member of a worker not subject to worker authorisation requirements has the same rights to reside as the family member of an EU national from
France or Germany where that person is a family member of a person exercising a right to reside under European Community law.

However, a family member of an accession state national subject to worker authorisation will only be an authorised family member where the worker from Bulgaria or Romania has an accession worker authorisation document. That said, in some scenarios where the worker has that document, a family member will still not be an authorised family member able to obtain an accession worker card. This is so where that worker is working as an au pair, a seasonal agricultural worker or under the Sectors Based Scheme.

**Accession State Nationals Subject To Worker Authorisation**

An accession state national subject to worker authorisation only has the right to reside in the UK as a worker during the period he has an accession worker authorisation document and is working in accordance with its conditions.

An accession worker authorisation document may be (i) a passport or other travel document endorsed with leave to enter or remain subject to a condition restricting that person to a particular employer or category of employment, (ii) a seasonal agricultural worker card, or (iii) an accession worker card. One of these documents must be obtained prior to the work being started.

A person may apply for an accession worker card where he falls within an authorised category of employment or where he is an authorised family member. This requirement severely restricts the categories of work for which a person who requires an accession worker card may apply. For an accession worker card to be issued to an accession state national subject to worker authorisation on the basis that that person’s work falls within an authorised category of employment, he will be required to produce either (a) a letter of approval where one is required under work permit arrangements or (b) otherwise a letter from his employer confirming that there is a job offer.

A letter of approval under the work permit arrangements is required for (i) employment under the Sectors-Based Scheme, (ii) employment under the Training and Work Experience Scheme, or (iii) employment under the Work Permit employment Scheme.

Confirmation of an offer of employment is required from the employer is required for those applying and seeking to work in the following capacities: (i) Airport based operational ground staff of an overseas airline, (ii) Au pair placement, (iii) Domestic worker in a private household, (iv) Minister or religion, missionary or member of a religious order, (v) Overseas government employment, (vi) Postgraduate doctors, dentists and trainee general practitioners, (vii) Private servant in a diplomatic household, (viii) Representative of an overseas
newspaper, news agency or broadcasting organisation, (ix) Sole representative, (x) Teacher of language assistant, and (xi) Overseas qualified nurse.

Any application must be made to the Secretary of State and granted prior to the work being started. An accession worker card issued to a family member will include a condition restricting employment to the employment specified in the application. An accession worker subject to worker authorisation who has provided a letter of approval will have any accession worker card issued to him endorsed with a condition restricting him to work for the specified employer and any secondary employer and a condition restricting him to the type of work specified in the letter of approval. An accession worker subject to worker authorisation who only requires confirmation of a job offer from his employer will have any accession worker card issued to him endorsed with a condition restricting him to work for the specified employer and a condition restricting him to the authorised category of employment specified in the application.

**Appeal Rights, Criminal Offences, Removal Directions and Asylum Seekers**

There is no right of appeal against the refusal to issue an accession worker card. It can only be challenged by way of judicial review in the Administrative Court of the High Court.

It is a criminal offence punishable with a fine for an employer to employ a person who requires an accession worker authorisation document and does not have one or who is not working in accordance with its conditions.

It is a criminal offence punishable by a fine and/or imprisonment to work as a person who requires an accession worker authorisation document and does not have one or as a person who is not working in accordance with its conditions. An immigration officer or constable may offer the A2 national who he has reason to believe is so working the opportunity to avoid liability to conviction by payment of a civil penalty of £1,000.

Under the new regulations for Bulgarian and Romanian nationals, where immigration removal directions have been given before 1 January 2007 for the removal of a Bulgarian or Romanian national or the family member of such a national, those directions cease to have effect on and after that date.

In respect of Bulgarian and Romanian nationals who had applied for asylum prior to 1 January 2007 and who were being supported and accommodated by the Home Office under asylum support provisions, the Home Office have produced an Asylum Support Policy Bulletin 76 version 2.0 on 1 January 2007. This sets out the procedure for dealing with Asylum Support issues for nationals of EEA states including Bulgaria and Romania.
The Self-employed

Perhaps the easiest way to avoid becoming caught in the coils of the new regulations that apply to workers and work seekers is for Bulgarian and Romanian nationals to be economically active on a genuinely self-employed basis. Where a person sets himself up as a self-employed person, that person does not require prior permission to be economically active. A person is self-employed in EC law where his economic activities are carried out outside any relationship of subordination with regard to the conditions of work or remuneration and under his own personal responsibility.

A person who sets himself up as self-employed should notify HM Revenue and Customs that he is self-employed for tax and national insurance purposes. There should also be proper record keeping of the economic activity and evidence that such activity is genuine and effective rather than marginal and ancillary.

A person who works as a freelance or a consultant providing services may be self-employed. Equally a cleaner may provide services on a self-employed basis. There is no exhaustive list of the types of work in which a person may be self-employed rather than employed. Any person claiming to be self-employed may apply for a Registration Certificate from the Home Office as proof of his status.

Posted Workers

When companies based in other EU/EEA states, and employing workers in that state, ‘post’ a worker to the UK, such a person is known as a ‘posted worker’. Posted workers are not accession state nationals subject to worker authorisation during any periods in which they are posted workers.

A company or firm in Bulgaria or Romania could transfer its employees for fixed or finite periods of time using the freedom to provide services provisions under Articles 49 and 50 EC Treaty. Such a transfer could be attractive to a person who simply wishes to work and earn money in the UK and who is not interested in acquiring, at least in the short term, a permanent right to reside or British citizenship. If the object is to live and work in the UK, and earn wages, this option should not be rejected at the outset.

To take advantage of the freedom to provide services, a company providing services of economic value would need to be established in Bulgaria or Romania. The company would need to be incorporated in Bulgaria or Romania. Thereafter, the relevant employees would need to come to the UK to provide services. The service provision would have to be of a temporary nature. Services do not include activities carried out on a permanent basis or without a foreseeable limit to duration.

If a Bulgarian or Romanian company obtains a sub-contract from an English
company for works or specific projects to be carried out, for example, on the Olympic site in Stratford, east London, it could transfer Bulgarian or Romanian employees here to undertake such work. It is a condition precedent of such an arrangement for the provision of services by the Bulgarian or Romanian company that the employee must have been lawfully and habitually employed by the company prior to being posted.

There are three scenarios in which nationals of Bulgaria or Romania may be posted workers. The first has been covered by the example of the Olympic project set out above. The second scenario is where a Bulgarian or Romanian company established in Bulgaria or Romania, posts one of its workers to an establishment or subsidiary it owns in England for a limited period, provided that the Bulgarian or Romanian company remains the employer for the period of the posting. The third is by far the most interesting. It is a scenario where a Bulgarian or Romanian company established in Bulgaria or Romania as a temporary employment, undertaking or placement agency, hires out workers to any English company pursuant to a contract, provided that the Bulgarian or Romanian company remains the employer for the period of the posting.

Put simply, a Bulgarian or Romanian employment or placement agency, that retains workers as its own employees, can hire them out for profit to any English company and move them to the UK for the purpose of carrying out fixed term or project work. There is nothing to prevent a Bulgarian or Romanian company paying its own workers wages at UK levels for fixed term or project based work done in the UK. So long as the English company pays the Bulgarian or Romanian company a commercial fee for the work and the latter pays its employees wages for undertaking the work, the work is lawful and there is a right of residence for the employees for the duration of the project.

The drawbacks are that the period of residence will not lead to the permanent right of residence or eventually naturalisation as a British citizen. However, such persons could still earn money at UK rates, protected by UK employment law and live in the UK on that basis. Moreover, working for fixed or finite periods and working on projects is quite a common and flexible way of working, attractive to many people. There is no obvious reason why a person could not work on a succession of projects in the UK with breaks in Bulgaria or Romania in between.

5. What should be done instead

JCWI has a number of suggestions that could temper the harshness and complexity of the provisions that require Bulgarian and Romanian nationals to comply with the requirement for prior authorisation to work and limit the authorised categories of permissible employment:
(a) abolish the derogated scheme that applies to Bulgarian and Romanian workers and work seekers and apply the same rules that apply to workers and work seekers from EU/EEA states such as France and Germany,

(b) use the Workers Registration Scheme instead. This is the scheme that applies to counties such as Poland that acceded to the EU on 1 May 2004. It is far from ideal as a registration cost is imposed on the worker and compliance with registration cannot be guaranteed. However if the Government is seriously interested in measuring the social impact of A2 nationals it does at least provide a device for enabling statistics to be collected on how many people are accessing the labour marker. Additionally it does not impose any restrictive requirement for prior authorisation in order to work, nor does it limit the categories of authorised employment,

(c) allow and require all Bulgarians and Romanians job seekers to be eligible for Registration Certificates as job seekers rather than simply those who qualify as highly skilled persons. This would enable more effective monitoring of those who seek to enter the labour market and could be coupled with a requirement that an accession worker authorisation document is obtained prior to commencing actual work, or

(d) abolish the requirement for work to be within an authorised category of employment in order for an accession worker card to be issued. Prior authorisation would still be required to work, and monitoring of those entering the work force would remain in place, but a more flexible and demand driven labour market might result.

(e) or exempt those who have been self-employed for more than a year in the UK from the requirement to obtain prior authorisation in order to work if they switch into employment.

6. Conclusion:

We believe the status quo is unsustainable. It has adverse effects for nationals of the new Accession states, most of whom would prefer to co-operate with the HMRC and the Home Office and work lawfully. The regulations make A2 workers liable to discrimination and criminalisation. They also militate against collecting accurate information about the presence of A2 nationals so as to achieve a reliable analysis on the impact on the labour market or on service delivery. This would seem to run counter to the Home Office’s goals of managed migration as expressed through the creation of the new Migration Advisory Committee and Migration Impacts Forum. This cannot be good for increasing public faith in the immigration system as a whole or increasing community cohesion. These
matters are too urgent to wait another year for consideration. We believe the Government must urgently consider the options we have set out above.