



**International Organization  
for Migration (IOM)**

# **International Comparative Study of Migration Legislation and Practice**

**April 2002**

**Commissioned by**



**DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM  
AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ**

**IRELAND**

BAILE ÁTHA CLIATH  
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR  
Le ceannach díreach ón  
OIFIG DHÍOLTA FOILSEACHÁN RIALTAIS,  
TEACH SUN ALLIANCE, SRÁID THEACH LAIGHEAN, BAILE ÁTHA CLIATH 2,  
nó tríd an bpost ó  
FOILSEACHÁIN RIALTAIS, AN RANNÓG POST-TRÁCHTA,  
51 FAICHE STIABHNA, BAILE ÁTHA CLIATH 2,  
(Teil: 01 - 6476834/35/36/37; Fax: 01 - 6476843)  
nó trí aon díoltóir leabhar.

---

DUBLIN  
PUBLISHED BY THE STATIONERY OFFICE  
To be purchased directly from the  
GOVERNMENT PUBLICATIONS SALE OFFICE,  
SUN ALLIANCE HOUSE, MOLESWORTH STREET, DUBLIN 2,  
or by mail order from  
GOVERNMENT PUBLICATIONS, POSTAL TRADE SECTION,  
51 ST. STEPHEN'S GREEN, DUBLIN 2,  
(Tel: 01 - 6476834/35/36/37; Fax: 01 - 6476843)  
or through any bookseller.

**(Pn. 11601)**

**€7.00**

Wt. —. 600. 7/02. Cahill. (M70108). G.Spl.

<b>I.</b>	<b>EXECUTIVE SUMMARY</b>	<b>5</b>
<b>II.</b>	<b>STUDY OBJECTIVES</b>	<b>9</b>
<b>III.</b>	<b>THE IRISH CONTEXT</b>	<b>11</b>
	Trends/Policy Context	11
	Current legislation and external influences on change	11
<b>IV.</b>	<b>OTHER COUNTRIES AND SYSTEMS</b>	<b>13</b>
	Europe	13
	United Kingdom	14
	Australia	15
	Canada	15
	New Zealand	16
	United States of America (US)	17
<b>V.</b>	<b>VISAS AND OTHER PRE-ENTRY CLEARANCE SYSTEMS</b>	<b>19</b>
	Issues	19
	International experience	19
	<i>Form of visa</i>	20
	<i>Visa processing</i>	22
	<i>Pre clearance (also including pre-inspection)</i>	25
	Comments	29
<b>VI.</b>	<b>ENTRY CONTROLS</b>	<b>33</b>
	Issues	33
	International experience	33
	<i>Post September 11 developments</i>	38
	Comments	38
<b>VII.</b>	<b>ENFORCEMENT MEASURES</b>	<b>41</b>
	Issues	41
	International experiences	41
	<i>EU Developments</i>	42
	<i>Trafficking/Smuggling</i>	43
	<i>Powers of Immigration Officers</i>	44
	<i>Detention</i>	45
	<i>Removal/Exclusion</i>	46
	<i>Voluntary Return</i>	48
	<i>Readmission and Return</i>	49
	Comments	49

<b>VIII. RESIDENCE PERMITS</b>	<b>53</b>
Issues	53
International experience	53
<i>Europe</i>	53
General	53
Temporary residence permits	54
Permanent residence permits	55
<i>Traditional Immigration Countries</i>	56
Comments	58
<b>IX. LABOUR IMMIGRATION SYSTEMS</b>	<b>61</b>
Issues	61
International experience	62
<i>Traditional immigration countries</i>	63
Permanent immigration	63
<i>Labour migration in traditional migration countries — permanent programmes</i>	64
Points Systems	64
<i>Rising Temporary and Skilled Migration</i>	65
<i>New labour migration policies in Europe</i>	66
Skilled Labour	67
Unskilled Labour	69
<i>European Commission Proposals</i>	69
<i>Employer Sanctions</i>	70
Comments	72
<b>X. IMMIGRATION FOR STUDY AND RESEARCH</b>	<b>75</b>
Issues	75
International experience	75
<i>Systems for regulating foreign education industry</i>	76
Comments	76
<b>XI. ADMINISTRATIVE STRUCTURES</b>	<b>79</b>
Issues	79
International experience	79
Comments	82
<b>XII. INTEGRATION</b>	<b>85</b>
Issues	85
International experience	85
<i>Ability to integrate</i>	88
Comments	89
<b>XIII. REVIEW</b>	<b>91</b>
Issues to be considered	91
Comments	94
<b>XIV. NATIONALITY/MARRIAGE TO IRISH CITIZEN</b>	<b>97</b>
Issues	97
Comments	97

# I. EXECUTIVE SUMMARY

This study provides the Irish Department of Justice, Equality and Law Reform (the *Department of Justice*) with an overview and analysis of international experience in the field of immigration legislation and practice. Its purpose is to support the Department's efforts in developing comprehensive immigration legislation and procedures by drawing lessons from the experience of other countries. It focuses primarily on the immigration of *non-EEA country nationals*; and covers asylum and refugee issues only to the extent that they impact on regular migration systems.

The study is divided according to the following headings: *Visas and other Pre-entry Clearance Systems, Entry Controls, Enforcement Measures, Residence Permits, Labour Immigration Systems, Immigration for Study and Research, Administrative Structures, Integration, Review, and Nationality*. The majority of topics were identified by the Department of Justice, with Integration, Review and Nationality additionally proposed by the IOM team. Each chapter identifies some key issues for Ireland, describes the current position internationally, and analyses the range of possible policy approaches and their advantages and disadvantages for Ireland. The study does not purport to make policy recommendations to the Irish Government on these issues.

For the purpose of this exercise, Europe is defined as the Member States of the European Union. The study examines European developments at the supra-national (European Community) level to the extent that they could, and do, impact on Ireland within the EU context. But it also looks at individual European countries for comparison, when considered relevant. The United Kingdom is dealt with as a distinct category due to the special arrangement with Ireland, in particular, the Common Travel Area (CTA). Also considered are the "traditional" countries of immigration: Australia, Canada, New Zealand and the United States, which offer a range of well-tried options and experiences in migration management considered of interest to Ireland in its current endeavours.

A large amount of information supporting the main analysis is relegated to annexes, particularly where data across a number of countries can be readily presented in tabular or matrix format.

## **Visas and other pre-entry clearance systems**

Ireland has a considerable visa caseload but does not have a large diplomatic representation abroad. The recent increase in immigration to the country and the growth in the number of international visitors are placing increasing demands on the visa and pre-entry clearance system. This section considers the intent and diversity of visa categories in other jurisdictions, visa-free arrangements, contemporary pre-clearance mechanisms and alternatives to offshore processing.

## Entry controls

An effective system of entry control must seek to balance the speedy inward processing of persons with valid claims for entry with the expeditious exclusion of those without valid claims to enter. The study highlights a growing tendency in some countries to shift border management offshore; and examines the various systems of “entry” control, including document fraud detection, in other countries. It discusses the role and effectiveness of carrier sanctions, and the urgent need for effective systems and mechanisms for information sharing among authorities. Increased security measures in the wake of the events of 11 September 2001 are also considered.

## Enforcement measures

The report highlights a range of enforcement measures that may be carried out external to a country, at the point of entry or in-country. Like a number of other countries, Ireland has tended to place primary emphasis on external controls in the prevention of irregular migration. This section considers the power of immigration officers in other countries to enforce immigration laws, a range of approaches to removal and exclusion of illegal immigrants, and international responses to the smuggling/trafficking of human beings.

## Residence permits

There is no specific provision in Irish legislation for long term secure resident status for non-EEA nationals. This section considers the type and duration of residence permits in other countries; in particular the differences in approach between Europe, with less of a tradition of permanent residence, and the traditional immigration countries, with a wide and complex variety of permanent residence options. Developments at the supranational level are also highlighted, in particular because of the tendency towards facilitating more permanence of stay for legitimate residents.

## Labour immigration systems

Rapid growth in the Irish economy, and a resultant shortage of employees in many sectors, have compelled Ireland to pursue an active policy of encouraging labour immigration. The approach to date has been to mobilise the necessary labour supply in the quantity and quality needed for sustainable economic growth, but based on the principle of temporariness. This section highlights the difference in approach between Europe and the “traditional” immigration countries of North America and Australasia. It demonstrates the widely divergent ways in which governments determine the quantity of required migrant workers and select them; and the range of effective and less effective measures taken to attract both skilled and unskilled migrants. Emphasis is given to temporary labour migration, both as a means of remaining competitive in a globalised environment, and as provided for in European proposals.

## Immigration for study and research

This section examines the enormous benefits that export study/research programmes can bring to countries like Ireland. It also considers the potential of such programmes to be

abused by irregular migrants, including for possible terrorist purposes. It offers examples of how the export education industry is regulated in other countries; while also providing a ready source of labour to fill local employment gaps.

## Administrative structures

This section looks at some classic features of immigration administration structures, pointing out the advantages and disadvantages of centralised or decentralised approaches. It discusses mechanisms for co-operation between Ministries and relevant agencies in the immigration arena; and highlights the critical need for information systems and immigration research to underpin any immigration regime.

## Integration

Given Ireland's history of emigration, there has hitherto been no urgent need to develop a comprehensive integration policy for the country's immigrants. This section demonstrates a range of integration programmes utilised by various governments and highlights the difference in degree of government involvement in the integration process. Consideration is also given to the use of targeted selection (e.g. points scheme) to facilitate easier integration.

## Review

Over the last ten to twenty years, immigration decision-making has been subject to increasing judicial scrutiny. In this time, the experience of the sample countries is that recourse to judicial review of immigration decisions continues to increase. This section considers *inter alia* the levels and degree of review provided for in legislation in other systems as well as the suspensive effect of review on removal.

## Nationality/Marriage to Irish Citizen

This section considers the constitutional entitlements of a child born in Ireland to non-national parent/s and the strong claim of non-national parents to reside in the state as a result of the *Fajujonu*<sup>1</sup> case. Marriage of a non-national to a citizen of the country is also examined.

---

<sup>1</sup> *Fajujonu v. Minister for Justice* [1990] 2 IR 151 (*Fajujonu*).



## II. STUDY OBJECTIVES

This study provides the Irish Department of Justice with an overview and analysis of international experience in the field of immigration legislation and practice. Its purpose is to support the Department's efforts in developing comprehensive immigration legislation and procedures by drawing lessons from the experience of other countries. It focuses primarily on the immigration of *non-EEA country nationals*; and covers asylum and refugee issues only to the extent that they impact on regular migration systems. Whilst gender issues are not dealt with specifically in the following sections, the feminisation of migration is noted as an issue requiring particular attention in the development of a country's immigration policy.<sup>2</sup> In particular, there is an emerging need to collect gender-specific statistics and research the scope for gender considerations in developing any new policies on immigration.

The study deals with the legislation, practice and structures of a range of countries under the headings: *Visas and other Pre-entry Clearance Systems, Entry Controls, Enforcement Measures, Residence Permits, Labour Immigration Systems, Immigration for Study and Research, Administrative Structures, Integration, Review, and Nationality*. The majority of topics were identified by the Department of Justice, with Integration, Review and Nationality proposed by the IOM team. Where possible, administrative costs to the relevant Government are also given. For the purposes of this report, 1.00 USD is the equivalent of 1.1 EUR, 1.00 AUD is the equivalent of 0.6 EUR, 1.00 CAD is the equivalent of 0.7 EUR and 1.00 NZD is the equivalent of 0.5 EUR.

The structure offers:

- a description of the current position internationally on the issues of interest;
- an analysis of the range of possible policy approaches and their advantages and disadvantages for Ireland.

The study does not purport to make policy recommendations to the Irish Government on these issues.

The Irish Government has stated that the basic legislation on which its immigration system is founded is in need of revision. The Department of Justice, in co-operation with a number of other Government Departments and bodies, is currently revising and updating its overall

---

<sup>2</sup> "Women account for approximately 48 percent of international migrants. The policies of receiving countries (related to admission, residence permits, access to the labour market, integration etc) play an important role in determining the position of migrant women in the host society. The response of countries to female migrants varies. However, in Western countries there has been increased emphasis placed on the collection of gender specific data, counter-trafficking measures and gender related issues in the context of labour migration. Of particular interest is Canada's "gender based analysis" (GBA) approach to migration policy. The GBA mainstreams gender, so that it is considered at all stages of the policy, legislative and program development and implementation process. Every policy and legislative issue is subjected to the test of "potential gender impacts" and an assessment about the need for further research, data collection and monitoring.

immigration policy in the context of the proposed new immigration legislation. This study forms part of a four-pronged approach to this entire “re-modelling” exercise:

- a cross-departmental group on immigration, involving the relevant Government departments;
- a public consultation process;
- internal review of practices in the Immigration and Citizenship Division of the Justice Department;
- this comparative study of international legislation and practice in the field of immigration.

It should be noted that, given both the evolving nature of migration, and the short timeframe of this exercise (three months), it has only been possible to highlight some key elements of international migration legislation and practice which appear to be of most relevance to Ireland.

# III. THE IRISH CONTEXT

## Trends/Policy Context

Ireland has traditionally been a country of emigration. Apart from short periods of net immigration, the country has almost invariably experienced net migration outflow leading to a steadily declining population. Since the mid 1990s, however, Ireland has undergone rapid economic expansion. The recent economic growth has resulted in an influx of approximately 250,000 migrants over the past five years. While a large number of immigrants are returning Irish nationals, or EEA nationals, there has been a dramatic increase of non-EEA nationals entering the country, primarily as temporary workers.

In addition to the growth in regular migration, the number of asylum seekers in Ireland has increased substantially in recent years, rising from a figure of 39 in 1992 to 10,325 in 2001.<sup>3</sup> As with most other destination countries in Europe, the number of persons granted refugee status is very small, and Ireland faces the challenge of developing measures to respond to the growing number of rejected asylum seekers as well as other regular and irregular migrants outside the asylum system.

As a consequence of its recent economic fortunes, Ireland is experiencing first hand, and more rapidly than many others countries, the growing diversity and complexity of contemporary migration. The transition from being an emigration country to that of a highly sought-after immigration country brings with it new migration management needs. Whilst new refugee-asylum legislation and administrative procedures introduced in 1996 and 1999 are beginning to respond to the burgeoning asylum claims, there has not, as yet, been a comparable consolidation of immigration provisions to accommodate the new realities on that front.

The rapid increase of inward migration has placed strains on Irish immigration legislation, policy and practice which, like most countries, have largely developed in a piecemeal way. A number of gaps in the current system have been identified by the Department of Justice and the IOM team, which will be addressed under each of the headings in this report. The purpose of the report is to provide comparative examples and analysis of international practice in these areas to facilitate implementation of a flexible migration system able to respond to the challenges Ireland is currently facing, as well as those it may face in the future. Account will be taken of Ireland's population, its resources and limited diplomatic representation abroad, as well as the CTA with the UK.

## Current legislation and external influences on change

The legislative foundation for the Irish immigration system is the *Aliens Act 1935* (the Aliens Act) which has increasingly come under strain by emerging immigration demands. Further, Irish courts have found certain of the Act's procedures unconstitutional. Other relevant

---

<sup>3</sup> Department of Justice.

instruments include the *Aliens Order 1946* (the Aliens Order) and other Orders made pursuant to the Aliens Act, the *Immigration Act 1999*, the *European Communities Rights of Residence Regulations 1977 and 1997*, the *Illegal Immigrants (Trafficking) Act 2000* and the *Refugee Act 1996*. The Irish Government has introduced the *Immigration Bill 2002*, which provides for penalties to be imposed on carriers bringing passengers to Ireland without adequate immigration documentation.<sup>4</sup>

There are a number of external factors to be borne in mind in the formulation of Irish immigration legislation and policy. First, Ireland is to a certain degree constrained by the CTA between the UK and Ireland.<sup>5</sup> While this does not oblige the two countries to adopt exactly the same immigration rules, the maintenance of the CTA depends on there being a certain degree of policy alignment on the admission of third country nationals. Second, the European Economic Area entitles nationals of EEA countries to move freely and take up employment anywhere within the EEA. Also, since the conclusion of the Amsterdam Treaty 1997 (Amsterdam Treaty) there has been progress in Europe towards the creation of a common migration policy.<sup>6</sup> Rather than be bound by all EU initiatives in this context, Ireland has negotiated a protocol whereby it may “opt in” to particular measures. To the extent that it wishes to do so, its migration policy must comply with Community initiatives. Finally, Ireland must also comply with its human rights obligations under international law.

---

<sup>4</sup> Introduced in Parliament in February 2002.

<sup>5</sup> The CTA also includes the Channel Islands and the Isle of Man.

<sup>6</sup> Under which asylum and migration were moved from the Third Pillar to the First Pillar, from the Union to the Community, and hence, from the Treaty of the European Union (TEU) to the Treaty Establishing the European Community (TEC).

## IV. OTHER COUNTRIES AND SYSTEMS

The report provides comparative information and analysis of migration programmes in a number of countries assessed to be of interest to Ireland in its current endeavours. Aside from economic, administrative and political differences, each system is influenced by its history — its social and religious traditions and the way in which it has dealt with migration in the past — as well as its public sense of fair treatment of an individual. The countries and the rationale for selecting them are as follows.

### Europe

For the purpose of this study, Europe is defined as the Member States of the European Union. Developments in individual European countries are outlined as relevant. The United Kingdom is dealt with as a distinct category due to its special arrangement with Ireland, in particular, the CTA. In addition, the study highlights European developments at the supranational (European Community) level to the extent that they impact on the topics under discussion.

Since the Treaty of Amsterdam, the development of a common migration policy has become the responsibility of European Community institutions. Objectives to be achieved under the Treaty include:

- the removal of controls on third country nationals when crossing internal borders;
- standards and procedures of control on persons crossing external borders;
- rules for visas for less than three months and the right of free travel within the EU;
- conditions of entry and residence, and standards on procedures for the issue of long term visas and residence permission including family reunion,
- measures to be taken against illegal residence including repatriation; and
- the definition of rights and conditions of residence of third country nationals legally residing in a Member State.<sup>7</sup>

At the meeting of the European Council in Tampere, Finland, 1999, Heads of State and Government developed political guidelines to achieve the objectives of the Amsterdam Treaty.<sup>8</sup> Since then, a number of initiatives have been submitted by the Commission to establish common policies as well as the delivery of a number of Communications. These, *inter alia*, encourage regular migration, promote the rights of migrants and facilitate their integration. As Ireland has stated that it intends to opt in to the maximum extent compatible

---

<sup>7</sup> These objectives are to be achieved by 1 May 2004.

<sup>8</sup> Arts. 61-63 TEC.

with the maintenance of the CTA,<sup>9</sup> these initiatives are highlighted under each of the headings to be addressed.

A number of European countries are trying innovative approaches to migration management, notably: Germany's draft Bill to set up a regular social/economic/humanitarian immigration programme following the conclusions of the (Süssmuth) Commission on Immigration Reform,<sup>10</sup> Denmark's first-ever efforts in Europe to establish a special central Ministry of Immigration; southern European countries' initiatives at integration of migrants; the UK's introduction of a points assessment-based skilled immigration programme, and a general relaxing of criteria for highly skilled, qualified immigrants by a number of European states. Opportunities are opening up globally for the highly skilled, as well as programmes for seasonal workers. At the same time, more restrictions are being placed on the entry and stay of such unskilled workers, e.g. reduced family accompaniment and social welfare support. Developments in individual European countries are cited where relevant.

## United Kingdom

As a contiguous country, sharing the Common Travel Arrangements (CTA) with Ireland, the UK has common issues, also in regard to the burgeoning growth of immigration and the need to partially resolve labour problems through immigration. The "migration" fates of the UK and Ireland are as intertwined as their histories; and as such invite ready comparison and interchange.

The UK Immigration Service is responsible for the regulation of entry to the UK. Its tasks include maintaining controls at ports of entry, preventing illegal entry and other abuses of immigration entry controls, and securing compliance within the entry conditions imposed on a person, including their departure. The Immigration Service falls under the umbrella of the Immigration and Nationality Directorate (IND), which in turn is part of the UK Home Office. The Service is committed to a non-discriminatory immigration regime in accordance with the law and published service standards, and in compliance with the international obligations.

Recent years have seen increasing political priority given to immigration and asylum matters within the UK, reflecting a rise in the public importance of the issue. A significant overhaul of immigration and asylum legislation has taken place as recently as 1999 with the introduction of the Immigration and Asylum Act 1999. The focus of this Act is the provision of more flexible control arrangements, the introduction of a civil penalty in respect of carriage of clandestine entrants, a streamlined appeal system referred to as a "one-stop" procedure and a new structure for supporting asylum procedures. Even with such recent changes still in the implementation phase, the Government has announced further legislative amendment intended, in particular, to tackle illegal working while providing for managed opportunity for employment. New measures are also expected to tackle the involvement of organised crime in human trafficking.

---

<sup>9</sup> Report of the Inter-Departmental/Agency Group on Immigration Policy, p.10 (Ireland, 2000).

<sup>10</sup> The Bill was subject to a vote in the German parliament's upper house on 22 March 2002. At the time of writing, the legality of the vote remains in question. The general direction follows models already tried in Australia, Canada and the USA.

## Australia

An island nation, Australia has gathered extensive experience in managing a predominately offshore selection process, with a view in recent years to rationalising the costs of this process. With a relatively small population and limited capacity to sustain a larger population, it has experimented with, and extensively evaluated, a range of options to facilitate desirable social, economic and humanitarian migration while controlling undesired migration. It also shares a migration history with Ireland, the language, and a Common Law-based legal system.

The possible adoption of any aspect of Australia's immigration regime brings with it the advantage of thorough testing against a system of law and justice comparable to most countries in the western world. It also benefits from a testing of the natural tension that exists in most western democracies between an Executive government exercising its authority to legislate and put into practice its policies and the interpretations given by the Judiciary of those legislated policies.

The policy, legislative and operational responsibility for immigration is fully centralised with the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) which co-ordinates the legislative framework for immigration. Immigration/visa decisions in Australia moved from one of broad discretion in the early 1980s (and before) to a heavily regulated system by 1989. This was influenced by landmark Court deliberations on decisions based on broad discretions. As such cases could influence migration outcomes, government control of the migration programme became problematic and the legislation sought to reduce the need for discretion by spelling out the criteria that had to be met before a visa could be granted. The system put in place was designed to be transparent, consistent and certain in its outcomes both to those administering the system and to the applicants.

Having developed such a highly regulated immigration/visa system, it became necessary for the efficient operation of the system to re-introduce into the legislation a number of discretionary powers. They reserved to the Minister, acting personally, the power to make affirmative decisions in appropriate cases, usually after applicants had had their cases unsuccessfully reviewed. The legislation provides that the Minister cannot be compelled to use these powers. After initial testing of these powers before the Courts, such challenges and consequential delays involving the use of these powers have become rare. Applicants are not able to apply to the Minister to exercise his discretion, and the Minister is not obliged to use them. Administratively, a practice has grown up where the Minister is asked to consider deserving cases on a regular basis. This approach ensures that immigration management/control remains with the Immigration Minister and his Department.<sup>11</sup>

## Canada

Canada's immigration regime is very similar to that of Australia, in some senses even anticipating and complementing the evolution of Australian immigration programmes. The

---

<sup>11</sup> The Minister has created guidelines for the consideration of cases by him where there has been an unsuccessful review process. Those cases which fall within the guidelines are put to the Minister by the Department under cover of a submission in which he is advised that although he is under no obligation, he might like to consider the particular matter as it falls within the guidelines. If the Minister decides to re-consider the persons circumstances, his decision process then becomes subject to the normal administrative legal rules governing decision-makers. If he decides against re-consideration, as he is not under a duty to reconsider, the matter ends there.

immigration programmes are strongly Government-regulated along the full continuum from overseas visa issuance to onshore post arrival settlement/integration. Canada can offer similar useful lessons, particularly in operating the on/offshore location of immigration processing. Like Australia, responsibility for the entire immigration programme resides in the central Ministry, Citizenship and Immigration Canada (CIC).

The Government is in the process of reforming its migration legislation. Bill C-11, the proposed *Immigration and Refugee Protection Act*, and its regulations carry a dual mandate: closing the back door to criminals and others who would abuse Canada's openness while opening the front door to genuine refugees and to the immigrants the country needs. With this dual mandate in mind, the new legislation focuses on the following main areas of reform, to:

- create a simpler, more coherent legislative framework that, *inter alia*, is responsive to current realities, including strengthening human rights commitments;
- strengthen family reunification;
- modernise the selection system for skilled workers and business immigrants and facilitate the entry of skilled temporary foreign workers;
- introduce transparent criteria for permanent resident status and enhance the rights of permanent residents;
- strengthen refugee protection through a faster, fair process;
- streamline the immigration appeal system; and
- maintain the safety of Canadian society and respect for Canadian norms of social responsibility.

## New Zealand

New Zealand offers ready comparison with Ireland on the basis of its small population size, shared history, including migration, legal system, and relatively limited immigration authority presence abroad. Like Ireland, immigration to New Zealand has grown; and like other sample countries, New Zealand has sought economies of scale in the way it delivers its immigration programme abroad and in-country. Another important similarity lies in its *Trans Tasman Agreement* with Australia, which like the CTA between Ireland and the UK facilitates visa free travel between the two countries. In general, New Zealand works closely with other like-minded countries on immigration matters: Australia, Canada, US and UK.

Similar to Ireland, authority for the various elements of immigration is divided between entities within different Government Departments. There is no single, central Department responsible for immigration matters. The New Zealand Immigration Service (NZIS) within the Department of Labour is the sole entity responsible for immigration and entry to the country; and Citizenship resides with the Department of Internal Affairs. The primary legislative basis for all immigration processes is the Immigration Act 1987 and Immigration Regulations 1991. The delivery of policy abroad and in-country is transparent and readily accessible, both by means of an Operational Manual, available electronically, as prescribed in the Act, and through a national Contact Centre, a customer service available per telephone, mail and e-mail.

The programmes are similar to those of Australia and Canada, and while numerically smaller, are similarly regulated and delivered. The lessons are similar to those of the other countries and in regard to the onshore/offshore location of immigration processing can offer some interesting directions.

## **United States of America (US)**

As a large country with large-scale migration challenges, the US can provide a vast array of tried models and lessons learned, which in some form apply to most immigrant-receiving countries.

A traditional country of immigration, it has a complex set of laws and regulations governing admission of persons for permanent and temporary stays. The Immigration and Nationality Act (INA) is the principal statutory basis for managing immigration. It is implemented in more of a decentralised way by numerous federal agencies, including the Immigration and Naturalisation Service and the Executive Office of Immigration Review in the Justice Department, the Bureau of Consular Affairs and Bureau for Population, Refugees and Migration in the State Department, the Department of Labour, and the Department of Health and Human Services.

The aim of U.S. immigration policy is to facilitate legal admissions, deter unauthorised migration, and effect the removal of persons who violate immigration law. The agencies responsible for implementing immigration policy are only partially successful in meeting these aims. This may be attributed to ambivalence within the country and its political leadership about these goals. The U.S. public is proud of its own immigrant antecedents but, as depicted in opinion polls, would prefer that current admission levels be reduced.

Each of the sample countries/locations contributes something to the overall picture of what is possible, useful and exemplary in the field of immigration management. Remarkable is the growing similarity of policy and approach — a witness perhaps to the commonality of issues.



# V. VISAS AND OTHER PRE-ENTRY CLEARANCE SYSTEMS

Non-EEA nationals seeking to enter Ireland are divided into visa-required and non-visa required categories according, principally, to their country of origin. Visa-required nationals must obtain a visa prior to arrival in Ireland.<sup>12</sup> Non-visa required nationals are not subject to pre-entry clearance. All non-EEA nationals are subject to immigration controls on arrival at a port of entry. Ireland has a considerable visa caseload (64,000 visas issued in 2000), but does not have a large diplomatic representation. Visas are for short stays (C Visas — up to 90 days) or longer term temporary stays (D visas — longer than 90 days) for visits, study or employment. A visa merely allows the holder to present at the border where s/he will be subject to further checks.

## Issues

- The meaning and intent of a “visa”. Option of one document combining travel to, entry and stay.
- The diversity and intent of visa categories in other jurisdictions.
- Visa-free arrangements in other jurisdictions.
- Pre-clearance mechanisms in other jurisdictions.
- Alternatives to offshore processing.

## International experience

There is an increased blurring of distinctions between pre-clearance/visa processing, pre-inspection, entry control and enforcement. These sections therefore should be viewed as a whole. Where pre-inspection should be placed in the report was the subject of considerable debate. Pre-clearance is referred to in the report as a method of ascertaining the entitlement of an individual to travel to, or travel to and enter, a country. Pre-inspection on the other hand is seen as a checking system which takes place immediately before embarkation for travel, in other words, a first step to entry control. For the sake of convenience, pre-inspection is included in this chapter as a precursor to Entry Control.

---

<sup>12</sup> Refusal of a visa may be appealed in writing to a Visa Appeals Officer in the Department of Justice.

<b>Europe</b>	<p>A Schengen visa merely allows the holder to present at the border where s/he will be subject to further checks.<sup>13</sup> A Schengen visa is valid for the territory of all Contracting Parties for up to 90 days and it is a sticker placed in the passport of the applicant. Prior to the grant of a visa, the applicant must satisfy criteria such as: a passport or official travel document accepted by the Schengen countries; proof of purpose of visit; evidence of sufficient funds to cover the cost of stay. A Schengen visa does not include work rights.</p> <p>National visas are still, in principle, possible in the Schengen area. Called “Visas with limited territorial validity” they entitle the holder to visit the national territory of one (or more) Contracting Party/ies, provided that both entry and exit are through the territory of this/these Contracting Party/ies.</p>
<b>UK</b>	<p>Under the Immigration Act 1971, except where there are specific visa free arrangements in place, all persons who are not UK or EEA nationals or do not have a Right of Abode must obtain entry clearance prior to arrival in the UK by applying for a visa. The Immigration (Leave to Enter and Remain) Order 2000 provides for entry clearance to serve as leave to enter subject to certain requirements and conditions. The grant of a visa does not exempt a passenger from subsequent examination by an Immigration Officer at the port of arrival, but entry will not be refused unless there has been a material change of circumstances, or the Immigration Officer decides that false information was given at the time of the application or there was a failure to disclose important facts.</p>
<b>Australia</b>	<p>Under s. 42 and s. 65 of the Migration Act, Australia has a universal, non-discriminatory visa regime. An Australia visa gives its holder the right to travel to, enter and remain in (for either a specified period or indefinitely) Australia.<sup>14</sup> The visa is therefore the sole document used as authority to travel, enter and stay in Australia. It also contains all the conditions to which the visa holder will be subject during his or her stay in Australia, including work rights.</p> <p>All visa grants are recorded in electronic form and are usually evidenced in the form of a label (with security features) affixed to the holder’s travel document. If granted under the Electronic Travel Authority (ETA),<sup>15</sup> the visa will not be evidenced unless specifically requested. The ETA is used for visitors, including business visitors, from low risk countries. Visas may be for either temporary or permanent stay in Australia providing the relevant criteria have been met.</p>

<sup>13</sup> The EU has developed a list of third countries whose nationals require a visa in order to enter the EU territory as a whole. Visas may be for transit, travel, short-term travel, for single or multiple entry.

<sup>14</sup> Generally, a visa will also provide the holder with the right to enter and re-enter Australia during a specified period.

<sup>15</sup> The ETA is not based in legislation, but is an administrative practice giving effect to the requirement under the Migration Act that every non-national travelling to Australia requires a visa. An Australian citizen choosing to travel on a foreign passport should obtain an Australian Declaratory Visa (ADV) if they do not want to encounter processing delays at the barrier when returning to Australia. An ADV provides simple recognition that the holder is indeed an Australian national and does not require a visa in the ordinary sense.

<b>Canada</b>	A visa in the Canadian system provides official evidence that the person has met all requirements for admission to the country at the time of application. Section 12 of the Act requires all people seeking to enter Canada—whether visitors, immigrants, or returning residents or citizens — to be examined by an immigration officer at the port of entry. In the case of immigrants seeking permanent status or visitors intending to study or work temporarily in Canada, a more detailed interview may be required before admission will be granted. Possession of a visa or an authorisation does not guarantee a person’s admission to Canada. <sup>16</sup>
<b>NZ</b>	A New Zealand visa is an endorsement in the holder’s passport for travel to New Zealand only. An entry permit is then issued at the border in the form of an endorsement in the passport to remain in New Zealand for the purpose indicated in the visa. It will state the expiry date of the stay. <sup>17</sup> As with Australia, Canada and the US, visas can be for temporary or permanent stay.
<b>US</b>	In the US, visas entitle individuals to travel to, but not enter, the United States. Unlike the visas issued by many European countries, but similar to Australia and Canada, U.S. visas also denote certain rights after entry — e.g. to study or to work.

With the exception of Australia, all the “sample” countries have some kind of reciprocal visa-free arrangements for short term/visitor stays. In Australia’s case, under its universal visa system, it meets the reciprocity criteria via the electronic travel authority (ETA) by issuing an electronic visa, which is simply not evidenced in the passport. There is no formal visa application process involved. New Zealand has visa waiver arrangements with some 53 countries.

The largest visa waiver programme is in the US. In 1986, the Immigration Reform and Control Act (IRCA) authorised a visa waiver programme (VWP) that allows certain categories of foreign entrants to gain admission for a period of up to 90 days without having to obtain a visa.<sup>18</sup> The result has been an increase in the number of non-immigrant visas issued, and relative ease of travel of certain nationals. To be included on the visa waiver list, a country must satisfy three statutory criteria: its citizens must demonstrate a non-immigrant visa rejection rate of less than two percent during a prior two-year period and less than 2.5 percent during each of the two previous years, the country must issue a machine-readable passport, and it must be willing to reciprocate by extending the right of visa-free travel to U.S. nationals. The Attorney General, acting on the State Department’s recommendations, decides on a country’s inclusion in the visa waiver programme.

<sup>16</sup> The examining officer at the port of entry must be satisfied that the visa or authorisation is valid, that the person’s circumstances have not changed since the visa or authorisation was issued, and that the person’s presence in Canada will not contravene any of the provisions of the Immigration Act and Regulations.

<sup>17</sup> A Visitor’s Permit may be granted to persons seeking entry to NZ to visit family and friends, for tourism, study (one course of no more than three months duration); sport (in a tournament of no more than three months duration); a business trip (of no more than three months duration); or to undertake medical treatment.

<sup>18</sup> Entrants admitted on this basis are ineligible to work or study while in the United States. See Tips for U.S. Visas: Visitors-Business and Pleasure at <http://www.travel.state.gov/visa/visitors.html>, 14 September 1999.

<p><b>Europe</b></p>	<p>The government department responsible for visa processing varies between European countries. For example, in Denmark, the Ministry of Refugees, Immigration and Integration has delegated part of its discretion to decide visa applications to the Ministry for Foreign Affairs.<sup>19</sup> In the Netherlands, the Ministry of Foreign Affairs is responsible for visa policy and its implementation, both through offices in foreign countries and the Immigration Directorate and the Consular Affairs and Visa Service.<sup>20</sup> In Sweden, an application can be submitted to a Swedish embassy or Swedish consulate general. If the Embassy/Consulate-General is not sure what position to take on an application, it passes the case on to the Swedish Migration Board (SMB) for a decision. Similarly, the procedures for visa processing vary among European states.<sup>21</sup></p> <p>Where a Schengen country does not have a mission in a given country, it may enter into an agreement with another Schengen country to handle visa applications on its behalf.<sup>22</sup> Under such agreements, the visa is issued on behalf of the Contracting Party that is being represented, however it is issued according to the procedures and practices of the Schengen country processing the application.<sup>23</sup> Processing costs are covered by the visa fee. Where a country does not have a presence abroad and has not entered into a representation agreement, the applicant must apply to nearest Embassy of the country s/he wishes to visit.</p>
<p><b>UK</b></p>	<p>The Joint Entry Clearance Unit (JECU), a joint Department set up in June 2000 to include the Foreign and Commonwealth Office and Home Office, is responsible for all entry clearance procedures. Home Office and Foreign and Commonwealth Office Ministers signed a Memorandum of Understanding which sets out the commitments of both departments and the financial, resource and management framework within which this single integrated unit functions. JECU runs its visa service through a network of visa sections at Embassies and High Commissions overseas. The overseas sections are managed by an Entry Clearance Manager (ECM), who may be either a Foreign Office or Home Office official, and supported by Entry Clearance Officers (ECO) who are usually immigration officers. The costs of visa processing are covered by the visa and entry clearance fees.<sup>24</sup></p>

<sup>19</sup> Certain defined cases have to be referred to the Danish Immigration Service.

<sup>20</sup> The Visa Service is, however, a department within the Immigration and Naturalisation Service.

<sup>21</sup> For example, in Germany, visa applications (tourist, business, family reunion, education, work and marriage) have to be lodged at a German Embassy or Consulate abroad. Full documentation is then forwarded to the local immigration office of the city/district the foreigner wishes to visit. The local immigration office decides and informs the Embassy/Consulate, which then issues the respective visa. For those who are refused a visa abroad there is no formal process or appeal procedure to a superior authority, however, the person refused a visa can appeal to the same local immigration office that made the first decision.

<sup>22</sup> For example, Denmark has "Representation Agreements" with countries such as France, Germany, Netherlands, Sweden, Norway and Finland.

<sup>23</sup> Although the visa policy is uniform throughout the Schengen area, practice in issuing varies between the Schengen countries.

<sup>24</sup> UK Home Office, "Fairer, Faster and Firmer — A Modern Approach to Immigration and Asylum" (1998) (*Fairer, Faster, Firmer*).

<p><b>Australia</b></p>	<p>While most visas for persons travelling to Australia for the first time are processed by delegates of the Minister for Immigration and Multicultural and Indigenous Affairs overseas, the sheer weight of numbers of visa applicants at some posts overseas has required that certain classes of visas be processed in Australia. In this respect, the integrity of Australia’s visa processing system has tended to limit onshore processing of offshore applications.<sup>25</sup> All applicants for an Australia visa are required to meet regulatory criteria for the grant of a visa, including health and character. The onus of proof through appropriate documentation remains with the visa applicant.</p> <p>Under the Migration (Visa Application) Charge Act 1997, a charge is levied in almost all applications for a visa, and follows the “user pays” principle. All visa application charges collected go into Consolidated Revenue, although in financial arrangements between DIMIA and the Department of Finance, visa processing is funded on an “x” dollars per visa formula.<sup>26</sup></p> <p>Where a visa is processed within Australia, the database used is the Integrated Client Services Environment (ICSE). While the ICSE system is intended to become Australia’s global database for visa processing and retention of visa data, Australian visas are currently issued overseas via the Immigration Records Information System (IRIS); the data in that system being transmitted to Australia daily. Data in respect of visa applicants is therefore readily accessible. These systems enforce the consistent application of relevant visa criteria to every visa client of DIMIA.</p>
<p><b>Canada</b></p>	<p>The Minister of Citizenship and Immigration has the primary authority to issue visas. This authority is delegated to Immigration Officers serving at Missions overseas.<sup>27</sup> The new Act will also grant authority for visa issuance in Canada under certain circumstances. In certain missions without an immigration presence, Department of Foreign Affairs and International Trade (DFAIT) officers may assist in visa issuance, but the decision to issue the visa will be rendered remotely by an immigration officer at the responsible post.<sup>28</sup> The visa fee is part of a cost recovery programme to recoup the cost of providing immigration services.<sup>29</sup></p>

<sup>25</sup> The ability to process within Australia the visa applications of overseas applicants (onshore processing) allows much of the mechanical processes involved in processing a visa application to be undertaken onshore. In other words, the visa application charge can be receipted and the visa application information can be checked against passport biodata and keyed into the system prior to consideration by the offshore visa decision maker. It is unofficially accepted within Australian immigration circles that the efficient processing of certain categories of visas requires a degree of expertise in local conditions in high-risk countries of application. In such places, it is recognised that knowledge of local documentary evidence and practices, fraudulent scams etc. are invaluable for visa processing officers to make informed decisions about applicants and visa applications. However, the funding of Australia’s visa processing arrangements, including the maintenance of overseas staff, have been the subject of cutbacks. The cutbacks have been manifested in the diminution of the number of DIMIA (Australia based) staff operating in overseas offices and strategic regionalisation (or grouping) to deal with immigration issues in particular areas of the world. In addition, co-operative arrangements in which the services of travel agents, commercial airlines and other organisations are utilised to the mutual benefit of the Australian Government and the organisation rendering the service. Moreover, some of the more administrative tasks involved in the processing of visa applications have been moved from an offshore process to an on-shore process with the final decision being taken overseas.

<sup>26</sup> DIMIA is funded on the basis of its productivity in the number of visas it grants. The sum payable to DIMIA varies according to the complexity of the category of visas processed. In the 1999/2000-programme year actual expenditure on the non-humanitarian visa programme budget was AUD\$161.09 million. The projected budget for 2000/01 was AUD\$184.07 million.

<sup>27</sup> A Visa Officer is an Immigration Officer stationed outside Canada and authorized by order of the Minister to issue visas. The Minister may designate any person or class of persons as immigration officers and that person or class of persons shall have such of the powers, duties and functions of an immigration officer as are specified by the Minister.

<p><b>Canada</b>—<i>contd.</i></p>	<p>Canada Assisted Immigrant Processing System (CAIPS) is the database used for visa processing. It is essentially an electronic file system, which generates the visa once a number of criteria have been satisfied. Every immigration officer abroad has access to CAIPS through a local server at that office (CAIPS is only used abroad, not in Canada). The local servers download data nightly, and modifications to the programme are uploaded nightly. Officers have read-only access to CAIPS servers at other offices. All servers are linked to the main data warehouse in Canada. This system is to be replaced by Global Case Management System (GCMS) which will link offshore and onshore databases.</p> <p>A visa application can be submitted to any Canadian embassy abroad. The vast majority of applications for visitor and immigrant visas are processed offshore. An Overseas Centralisation Imaging Pilot Project will test a new sample for the centralised administrative processing of immigrant applications using digital images. This means that the administrative aspects of processing immigrant applications will be handled centrally in Canada, and a digital image of the file created and forwarded to the mission abroad for assessment.<sup>30</sup></p>
<p><b>NZ</b></p>	<p>New Zealand's visa processing is undertaken abroad by either a limited number of Immigration officers or more commonly Foreign Affairs officers under an Agency Agreement between NZIS and the Department of Foreign Affairs. The process is underpinned by a linked on-/offshore information system, the Application Management System (AMS), which enables real time, on-line data gathering and checking between overseas and onshore operations regarding visa issuance and clearance. Where this system has not been installed overseas, Foreign Affairs officials send visa-related data to New Zealand by e-mail. This means that, like in Australia, the case data should be available at the port of entry by the time the person arrives there.</p> <p>While NZIS has approximately 12 branches overseas, the offshore operations have been divided up into two large hemispheric regions, co-ordinated from London and Bangkok. To help cover parts of the world where NZ may not have a presence, the NZIS has commissioned the International Organization for Migration (IOM) to assist with up-front visa processing, on a fee for (case by case) service basis.</p>

<sup>28</sup> The visitor visa indicates the maximum length of stay, but this can be modified at the Port of Entry, the real point of admission to Canada. Students and Temporary workers apply for authorisations at missions abroad. The electronic file, along with the decision and details of the authorisation, are downloaded nightly (much more frequently from the US) and details are available for use at the Ports of Entry once the students/temporary workers seek entry. The overseas mission will provide the student/temporary worker with a letter to present at the port of entry. The final document is prepared and issued at the Port of Entry. If the student/temporary worker is from a visa-exempt country, no visitor visa counterfoil is required in the passport. If the applicant is not from a visa-exempt country, the overseas mission making a positive decision on the application will fix a counterfoil visa into the passport. The Port of Entry will still prepare the employment or student authorisation.

<sup>29</sup> Fees collected revert directly to the Consolidated Revenue Fund. CIC's overseas programmes are funded based upon FTE's (Full Time Equivalents) required to meet the immigration levels.

<sup>30</sup> The new pilot project will last from October 1, 2001 to March 31st, 2002 and will be limited to family class applications from India, Nepal and Bhutan. CIC is looking to implement front-end administrative centralisation, in conjunction with the development of a new Global Case Management System, by 2005.

US	<p>State Department Foreign Service personnel are charged with issuing visas abroad. The Visa Office has made efforts in recent years to simplify the process, e.g. by concentrating certain types of processing in specific locations (e.g. all immigrant processing for Mexico in Juarez); or centralising immigrant processing on shore (the National Visa Centre established in New Hampshire in 1994). In some cases, visas will be issued on the basis of written applications but interviews are required in other situations. Documentary evidence may be requested to show that the applicant intends to return to a residence abroad, does not come within one of the excludable classes, and has adequate financial resources for the intended trip. An applicant must shoulder a substantial burden of proof in demonstrating his or her eligibility for a visa. Officials maintain a statutory presumption that all non-immigrant visa applicants are intending immigrants, i.e. potential violators.</p>
----	--

*Pre clearance (also including pre-inspection)*

Europe	<p>The Schengen Information System (SIS), located in Strasbourg, and managed by the French, is a form of pre-clearance tool for issuance of Schengen visas. It provides vital support for the functioning of Schengen. It provides an “alert list” of those who have committed offences in the Schengen countries. If a visa applicant’s name appears in SIS, the visa is denied. Member states feed the system with information through national networks (N-SIS), which are connected to a central system and supplemented by the SIRENE network made up of representatives from the national and local police, customs and the judiciary.<sup>31</sup> Pursuant to Article 96 Schengen Convention, data on aliens for whom an alert has been issued for purposes of refusing entry is entered on the basis of the national criteria chosen from the scope of Article 96 Schengen Convention. As a consequence, criteria for being included in SIS may vary between the Schengen countries.<sup>32</sup> Members States are under an obligation to check SIS prior to the grant of a Schengen visa.</p> <p>In its recent Communication to the European Council and European Parliament on a Common Policy on Illegal Immigration,<sup>33</sup> the Commission outlined a number of proposals for strengthening co-operation in the area of visa policy. These included the establishment of a European Visa Identification System which would allow exchange of information on issued visas among Member States,<sup>34</sup> the development of an early warning system and the creation of a network of Airline Liaison Officers to work globally with carriers.</p>
--------	--

<sup>31</sup> Migration Policy Institute, Background Paper, *Immigration and National Security*, September 28, 2001.

<sup>32</sup> For example, an individual included in SIS by Germany may not have been included in the list by Denmark.

<sup>33</sup> COM (2001) 672, 15 November 2001.

<sup>34</sup> In the context of the prevention of terrorist threats, the conclusions of the JHA Council held on 20 September invite the Commission to make proposals on the creation of a system to be used to exchange information on issued visas. The EU is interested in exploring whether a common electronic online system could complement existing security documents in order to create a dual identification process based on secure documents and a corresponding database. The Commission proposes to assess the feasibility of a European Visa Identification System in order to establish a timely instrument to ensure proper admission for short-term stays and return after the expiration of the visa.

UK	<p>In considering whether a visa should be issued or not, entry clearance officers are able to make inquiries at Immigration Service headquarters. The Suspect Warnings Index can be checked to see if a person has an adverse immigration record, but pre-clearance still generally relies on the interview procedure. The Immigration and Asylum Act 1999 allows for the provision of passenger information from carriers to the Immigration Service, and work is underway to give this practical effect in the same way as the APP and APIS systems already in place in Australia and the US respectively.<sup>35</sup> Airline Liaison Officers are posted overseas to prevent improperly documented passengers from travelling to the UK.<sup>36</sup> Preclearance is carried out at Prague airport in the Czech Republic prior to passengers boarding flights to the UK by agreement between the UK and Czech Governments. The UK hopes to develop such schemes elsewhere. The UK is currently developing the concept “Authority to Carry” which would allow carriers to check the details of passengers against Home Office databases and receive instant confirmation that they pose no known security or immigration threat.<sup>37</sup></p>
Australia	<p>Australia’s universal visa system is a “pre-clearance” process in accordance with the introductory paragraph to this section. Any person wishing to travel to and enter Australia must first obtain a visa by satisfying basic entry criteria, principally relating to character and health. Character checks are routine and automatic via Australia’s Migration Alert List (MAL) an electronic lookout or early warning system, which enables immigration authorities to check if there is any known character or other immigration problem which might affect the grant of a valid visa. MAL also contains information about debts due to the Commonwealth so that a visa cannot be granted until appropriate arrangements are made for payment of the debt.</p> <p>Australian pre-clearance <b>and</b> pre-inspection arrangements are connected to the ETA platform. The Australian Advanced Passenger Processing (APP) scheme, which performs a type of pre-inspection on behalf of DIMIA, is an enhancement of the ETA system. Like the APIS system in the US, it uses passenger manifests to double-check all passengers before they arrive in Australia. The data, recorded by a participating airline, is transmitted to Australia at the time of passenger boarding, so that the person’s data can be re-matched with the information stored at the time of visa grant. If there is a clear match, the passenger is processed speedily through the primary line on arrival in Australia. As the coded zone of a passenger’s passport is machine-read at the port, essential bio-data is checked against Australia’s alert lists and visa database within 4 seconds to establish that the passenger is entitled to enter Australia.<sup>38</sup> Australian and New Zealand nationals are also checked against both countries’ passport databases.</p>

<sup>35</sup> See below for a description of the APP and APIS systems.

<sup>36</sup> During 2001, 22,515 inadequately documented passengers enroute to the UK and elsewhere were denied boarding by carriers at ALO locations: Secure Borders, Safe Haven, Integration with Diversity in Modern Britain at p.93.

<sup>37</sup> *ibid* at p.95.

<sup>38</sup> The arrangement also provides DIMIA an opportunity to advance check whether there are any passengers on the particular flight that need to be further checked before entry. Participating airlines also experience savings because of reductions in the number of penalty fines incurred for the carriage of non-visaed passengers. Passengers cleared in advance are subject to streamlined clearance procedures at airports. The advance passenger processing system is out-sourced to an international computer company.

<p><b>Australia—contd.</b></p>	<p>Like Canada, the US and New Zealand, Australia also posts Immigration Liaison officers abroad to work on a rotating basis with carrier companies at focal transit and departure ports, mostly in Asia, mostly to detect fraudulent documents.</p> <p>If, after arrival at an Australian port, a person's circumstances have changed in some relevant way after initial visa grant, s/he will be referred to an immigration inspector on arrival. This inspection operates in the same way and carries out the same checks against alert lists, visa and passport databases.<sup>39</sup></p>
<p><b>Canada</b></p>	<p>Canadian Immigration Control Officers are located at various posts around the world, and can be responsible for a particular country or a region. They, <i>inter alia</i>, provide training to airlines to facilitate recognition of fraudulent Canadian documents, verify document authenticity at the request of carriers and may be called upon to offer expert advice to the air/airline officials conducting such checks.</p> <p>Background checks are carried out on anyone over 18 years of age who applies for an immigrant visa. In particular, the applicant must satisfy criminality and security concerns. Criminality is determined through the applicant's signed statement on the application form, sometimes supported by a police certificate. Background/security checks are conducted by the Department of the Solicitor General using the information provided by the applicant on the application form. Record checks are also conducted to verify whether the applicant is previously known to the Department.</p> <p>Through a network of 70 offices world-wide, CIC uses various tools to monitor and control the movement of people to Canada. They include: electronic screening and verification of travel documents, and co-operating with international organisations as well as other countries to monitor the illegal movements of people and intercept them when necessary.</p>
<p><b>NZ</b></p>	<p>Under the <i>Trans Tasman Agreement</i> with Australia, there are pre-departure inspection arrangements between New Zealand and Australia, which allow for full clearance (customs, agriculture, immigration) at the port of departure in Australia and passenger manifests to be shared between immigration authorities in both countries ahead of the arrival of the carrier in New Zealand.</p> <p>New Zealand is currently in the process of developing a fuller pre-inspection approach in response to the events of September 11. This includes the possibility of adopting the Australian APP programme. This could lead to a next step towards an electronic visa system as in Australia, which the current legislation would sustain. Like Australia, Canada, the US and some European states, New Zealand posts Airline Liaison Officers abroad on a peripatetic basis to advise airlines at high risk/main transit ports.</p>

<sup>39</sup> At present, 5 international airlines have modified their computer systems to undertake APP (QANTAS, Air New Zealand, Cathay Pacific, Singapore Airlines and JAL) with negotiations being concluded with a further four airlines.

<p>US</p>	<p>The United States has long used an automated “look-out” system in its consular operations to identify individuals who are excludable. When an applicant requests a visa, the consular officer is required to check the applicant’s name against the Department’s automated computer consular lookout and support system (CLASS). In particular, consular officers are on the lookout for known criminals and terrorists. Consular personnel who fail to check the CLASS system can face serious penalties. In addition, the CLASS database has been expanded to include data from other agencies, including the Drug Enforcement Administration (DEA) and the INS.<sup>40</sup></p> <p>The Advanced Passenger Information System (APIS) system allows electronic transmission of passenger names and passport details to INS and the Customs Service for information checking prior to the flight’s arrival in the United States. When INS receives the flight manifest, inspectors check the names against the Interagency Border Inspection System (IBIS) that contains data from various immigration and law enforcement databases. Airline participation has been voluntary, but legislation passed in the aftermath of the September 11 terrorist attacks now makes it mandatory.</p> <p>International Liaison officers are also posted abroad to work with local authorities and carrier companies in detecting fraudulent documents and other irregularities prior to embarkation.</p> <p><u>Pre-inspection</u> is the forward deployment of the country’s immigration control system. It is particularly useful in screening passengers who do not require visas to enter the country. INS established pre-inspection sites at Ireland’s Dublin and Shannon airports as well as passengers coming from Canada and a few other selected sites. Congress has called on the INS to expand pre-inspection, while at the same time requiring that officers conducting these procedures remain secure. This often precludes the system’s operation in high-risk areas.</p> <p><u>Pre-enrolled Inspection Programmes.</u> The INS operates several programmes that pre-enrol frequent travellers to and from the United States. The Passenger Accelerated Service System (INSPASS) enrolls passengers who, after clearance, receive a card encoded with identifying biometric information. It is open to citizens of the United States, Canada and the Visa Waiver Programme countries. The system uses hand geometry. When the traveller arrives at an INSPASS kiosk at the airport, the previously captured biometric data establishes identity and the passenger can enter.</p>
-----------	--

Above samples demonstrate that the underlying purpose of visa regimes and pre-clearance is to identify/register/endorse those persons entitled to enter a country under its immigration laws; and sift out those who potentially pose a threat to the integrity of its immigration laws. Visa regimes have generally performed that function, but do so less and less as more and more visa free arrangements are applied on a country by country basis.

<sup>40</sup> Because the lookout system is based on a name check, it has many weaknesses. Applicants in the lookout system can give a new or differently spelled name. Nonetheless, CLASS is continually being upgraded. A custom algorithm has been installed to match an applicant’s date of birth with the date of birth of a record on the CLASS file. In recent years, the State Department has also put considerable effort into developing and improving linguistically-based name-check algorithms to ensure that changes in spelling do not result in missed “hits.” The DOS has implemented special algorithms to handle Arabic and other non-Latin alphabet names.

Where there is no overarching visa regime for a particular country, there may still be categories, e.g. employment or education, where the need to obtain a visa will arise. This generally applies where persons in these categories seek to remain in a country for longer than a short-term visit. Conversely, in countries where entry by visa is the rule, exceptions can be made for certain categories of person, e.g., government officials, certain members of the armed forces, Royal Family et al.

The visa may be either electronic or documentary, but in any event a record is created to enable recognition of the individual by immigration officials at the point of entry to the country.

In all the sample countries, some degree of pre-clearance of longer-term immigrants is undertaken and, indeed, continues to be pivotal to their immigration systems. Except where visa free arrangements are in place, clearance usually takes the form of a visa. Where there is no visa, more emphasis is being placed on other forms of pre-clearance, or pre-inspection, and entry controls, increasingly also of temporary travellers.

All sample countries have a warning process to alert immigration officials to potential difficulties with the possible acceptance of individuals for entry to their countries. In some of the countries examined (e.g. Australia and Canada), thorough and comprehensive checks are carried out before visa issue so that checks at the point of arrival may be kept to a minimum. In others (e.g. US), the final checks may only be carried out prior to an individual's arrival at the immigration barrier.

## Comments

The above survey demonstrates that effective information is an essential element of migration management. The countries examined show a high degree of sophistication in this area and considerable data sharing between the various players involved in the visa/pre-clearance process.<sup>41</sup> All the control mechanisms highlighted rely on appropriate systems backup. This is even more critical in the case of visa waiver arrangements. Information in this context is power, but only if it is stored, managed and capable of being retrieved efficiently and effectively. The development of such systems in Ireland may be vital to the effective implementation of any new legislation. But so is the question of their ownership and compatibility, and links to other relevant databases (see "Entry Controls" below).

Some of the sample countries have **visa free**, or reciprocal visa free, arrangements with other countries (reciprocity is not essential). To a greater or lesser extent, all implicitly divide the countries of origin into either high or low risk, depending on the incidence of the nationals thereof breaching the destination country's immigration laws and conditions. Visitor or short term travel is then generally made available to the "low risk" nationals. Even Australia, which has an obligatory universal visa arrangement, has been able to achieve an arrangement (through the ETA) with countries that offer Australians visa free travel. Under this, visa processing is absorbed in the travel/ticketing process conducted by travel agencies and airlines around the world. This will soon be enhanced by an online travel application process.

---

<sup>41</sup> See also Annex I for a record of the main points of the recent IATA conference relating to matters of interest to the Irish in the pre-clearance context.

The US sees the following benefits to visa waiver: it saves on Consular processing resources in countries with low refusal rates, thus allowing re-deployment of Consular officials to “high risk” countries; and through its reciprocity, allows US residents to benefit from visa-free travel to other countries. Some of the problems of visa waiver are: once in place, it is politically (and diplomatically) hard to revoke, even if problems emerge; some partner countries have less than adequate control over their passports so some abuse creeps into the programme, extra costs of returning those denied admission at points of entry; and some terrorist suspects, in the wake of September 11, are naturalised citizens of the waiver countries, having entered with less screening than otherwise required.

These kinds of problems, however, can also be addressed through improved inspections and other kinds of identity registering and checking than necessarily through visa regimes.

**Pre-inspection** systems such as APIS and APP also have many advantages. They enable pre-screening of passengers during the flight and thereby facilitate the admission of bona fide travellers. Inspectors at point of entry do not need to do a full computer check on each passenger if they are previously cleared. It is an early warning system for apprehending criminals and terrorists before they are allowed off the aeroplane.

Pre-inspection can both facilitate travel and perform a valuable law-enforcement function. The process combats the endemic corruption among immigration officials in origin and transit countries, that often renders those countries where pre-inspection would work best unwilling to co-operate. Pre-inspection offers benefits to carriers charged with selecting out undocumented/ illegal migrants. But it can also be a sensitive issue to accommodate foreign law enforcement officers on the territory of a sovereign state.

In the US, pre-inspection has had mixed results. On the one hand, the system is costly and its expansion has been rejected by INS’ budget office. On the other hand, it expedites passengers’ arrival in the United States, thereby facilitating overall travel. Moreover, the process takes place during downtime before departures, when passengers have little else to do but wait for their flight. In addition, when pre-inspection is completed for migrants covered by the visa-waiver programme, they no longer have to worry about rejection at points of entry after having made a longhaul flight.

Systems like APP and APIS are ultimately a cost-effective way to pre-screen as they are based on passenger manifests which do not require the posting of officials outside the country. They are dependent on voluntary participation of airlines that agree to incorporate the appropriate software into their systems at their own cost. This is cost effective for both government and airlines as the latter usually are able to make savings through diminished penalties for carrying non-visaed passengers. Since 11 September, **airline participation** has become mandatory in the US. A further pre-clearance strategy illustrated by the US is forward deployment of a country’s immigration control. While this may be too costly for Ireland to undertake alone, it may be possible to negotiate some form of co-operative agreement with another government to pool resources in this area.

There is a balance to be struck between the elements of border control at the point of entry and pre-clearance systems which effectively operate as an external arm of border control. There is always a risk that the lack of a comprehensive examination of an individual’s circumstances before travel may result in greater numbers of potential refusals of entry at

the border. The division of nationalities into high and low risk goes some way toward obviating this.

It can also be argued that a system which permits comprehensive checking of a traveller's circumstances overseas before visa issuance and embarkation provides a more transparent and easily understood process. Some of the factors which need to be taken into account in striking the right balance are the availability of overseas resources and the degree of control available at the point of entry. These need to be adjusted to the level and scale of immigration movements, for example, it is clearly more advantageous for the US to invest in extensive offshore pre-inspection given the massive numbers of persons requiring inspection upon arrival (approximately half a million inspections annually in the US). Where overseas resources are not available to carry out pre-clearance (visa processing), co-operative arrangements as have recently been brokered among the Schengen/EU states may provide an answer.

As will be seen in the chapter Entry Control, in all of the sample countries a residual right to question the permission of visaed passengers to enter the country at the inward movement barrier remains. That is, all countries reserve the right to reject an individual on the basis of possible changes in circumstances since visa issuance. All countries have a screening process offshore which requires the maintenance of overseas staff, many have sophisticated electronic/computer support which includes various forms of early warning checks, and many engage in some form of co-operative arrangement with the travel industry for the mutual benefit of both to allow for strategic and efficient processing of inbound passenger movements.



# VI. ENTRY CONTROLS

Entry controls in Ireland are the responsibility of the GNIB. As in many countries, the number of illegal entries have increased in recent years; the Cherbourg-Rosslare ferry route between France and Ireland being a significant source. Ireland has had consultations with the French authorities to resolve this; and the co-operation between the Garda and the ferry company has been a precursor for carrier sanctions. There is also co-operation with the United Kingdom on an ongoing basis to combat illegal immigration within the CTA.

In general, non-EEA nationals coming from a place outside Ireland, other than Great Britain or Northern Ireland, must present to an immigration officer for leave to land. Leave to land may be refused on a number of grounds.<sup>42</sup> Under section 5(4) Aliens Order, a person to whom leave to land has been refused may be arrested and detained until such time as the person is removed from Ireland.

## Issues

- The concept of “entry” in legislation.
- Admissions, refusals and return of refused persons in other jurisdictions.
- The right of appeal of those refused entry.
- Responses to issues arising from 11 September<sup>43</sup>
- Carrier sanctions.

## International experience

<b>Europe</b>	In Europe, there are differences between the member states in responsibility for border management. Some have a fully civilianised immigration service, while others place this function within police jurisdiction, with various degrees of integration with general policing functions. In Belgium, the Ministry of Interior is responsible for border control, a power that is delegated to the federal police. In Denmark, the Danish National Police are responsible for border management; however, local police carry out actual border control. In Germany, the Federal Border Protection Police (“Bundesgrenzschutz”(BGS)), a special branch of the Ministry of Interior, is responsible for border management. In Italy, the Department for Border Control and Immigration (Police Forces) within the Ministry of Interior is responsible for border management. In the Netherlands, the Ministry of Justice, State Secretary and the Royal Marechaussee (royal constabulary) are responsible for border management.
---------------	--

<sup>42</sup> The most common of which include not having a visa, inability to support oneself or ones dependants whilst in the country, intention to travel to the UK where a person would not qualify for admission at a UK port of entry, and intending to work without a work permit.

<sup>43</sup> See Annex II for a summary of changes to migration controls proposed by various Governments post September 11.

<p><b>Europe—contd.</b></p>	<p>All persons crossing an external Schengen border are subject to entry control. A valid visa does not guarantee permission to enter. Where a person is visiting the Schengen area for a period not exceeding three months, s/he may be refused entry, <i>inter alia</i>, for lack of a valid passport or other recognised identification document authorizing him/her to cross the border; lack of a valid visa if required; insufficiency of funds, or because s/he is perceived as a threat to public policy, national security or the international relations of any of the Contracting Parties.</p> <p>In Belgium, a person refused entry has a right of appeal to the administrative court. In Denmark, a person who is refused entry has a right of appeal to the Ministry for Refugees, Migration, and Integration. In Germany, there is no right of appeal for those who are refused entry. In Italy, the appeal must be lodged before the competent Italian Administrative Regional Tribunal within 60 days from the notification via the Italian diplomatic and consular representations in the origin country. In the Netherlands, there is a right of appeal to an administrative court.<sup>44</sup> In none of these countries does the instigation of an appeal suspend removal.</p> <p>The long-term objective of the European Commission is to integrate all the elements of border management to be managed by a Europe-wide integrated service. As part of this strategy it is intended to develop joint training and reciprocal personnel exchanges within the Schengen area. Europol will have an increasingly important role in addressing criminal activities in the Schengen area; and moves to secure common standards in the use of technology and document security can be expected.</p>
<p><b>UK</b></p>	<p>Pursuant to the Immigration Act 1971, a person who is neither a British citizen nor a Commonwealth citizen with the right of abode nor an EEA national, or the family member of such a national who is entitled to enter or remain in the UK, is subject to immigration control and requires leave to enter. An immigration officer may grant leave to enter for a limited period and may impose conditions on the leave to enter.<sup>45</sup> Although leave to enter may be granted by an immigration officer, the power to refuse leave to enter requires the authority of a senior officer.</p> <p>A person with inadequate or improper documentation on arrival or who is refused leave to enter for any other reason may be removed immediately without entering the UK under the provisions of the 1971 Act. A person may exercise a right of appeal to the court or the Home Office only after removal from the UK unless they claim asylum, have an entry clearance or work permit, or if they make a claim under the European Convention on Human Rights.</p>

<sup>44</sup> The Haarlem court, under which Schiphol airport falls, has set up a court room in the airport enabling judges to hear cases at the airport. However, taking individuals to the Haarlem court does not imply that they have entered the country.

<sup>45</sup> Such conditions may restrict employment, require self-sufficiency without recourse to public funds, require a person to report regularly, or any combination of conditions. In the case of a person who is granted limited leave to enter or remain in the UK, variations of the conditions or time limit may be sought from IND.

<p><b>Australia</b></p>	<p>Under s. 166 Migration Act, immigration clearance requires all persons arriving in Australia's "immigration zone" to present themselves to an immigration clearance officer in order to provide evidence of identity and authority to be in Australia. The process is simply a final opportunity to check the credentials of passengers entering Australia. These checks generally take no more than a few seconds per passenger. The Customs Service covers the primary immigration line in Australia and immigration only becomes involved if an immigration query has arisen about a passenger.<sup>46</sup> Australia cannot arbitrarily refuse a visa holder the right to remain in Australia after entry (arrival). There must be a valid ground for the cancellation of a visa. Once cancelled, there is an obligation to detain and remove the person whose visa has been cancelled.</p> <p>Persons refused entry are "turned around" on arrival with the carrier being penalised for the carriage of the person. Because visaed passengers are processed comprehensively before they get their visas to travel to Australia, a very small minority of passengers may be refused immigration clearance. They have the right to contest the decision in court but from experience very few cases succeed.</p>
<p><b>Canada</b></p>	<p>The border is managed by Citizenship and Immigration, which collaborates closely with other departments such as Revenue Canada, Solicitor General (RCMP). Customs officers, who are formally designated as Immigration Officers, staff the primary inspection line. If the Customs Officer has doubts as to the bona fides of the person, if their documents are not in order, if there is an additional immigration process which must be completed at the point of entry,<sup>47</sup> the person is referred to a secondary immigration examination which is conducted by an Immigration Officer.<sup>48</sup> A person refused entry has a right of appeal. Instigation of an appeal suspends removal.<sup>49</sup></p>
<p><b>New Zealand</b></p>	<p>New Zealand has similar requirements and processes to those of Australia. All arrivals must present a passport, visa (if necessary) and arrival card. If entry is refused, the person is turned around, and the carrier expected to return the person to the port of embarkation. Under new provisions, undocumented asylum seekers will be routinely detained for identification purposes.</p>

<sup>46</sup> The total budget for the non-humanitarian entry regime in 1999/2000 was AUD\$163 million and in 2000/01 AUD\$211 million.

<sup>47</sup> Such as for temporary workers or persons seeking landing as permanent residents.

<sup>48</sup> Three actions are possible:

- the person is allowed to enter Canada — this permission to enter can be accorded either at the Primary Inspection Line or at Secondary examination;
- the person is refused permission to enter Canada;
- the person is allowed to withdraw (with no stamp in the passport indicating refused entry, and no removal order).

A person is not considered to have "entered" Canada until permission to enter has been granted by an immigration officer at the point of entry. Canadian citizens and permanent residents of Canada, as well as a person registered as an Indian pursuant to the Indian Act have the "right" to enter Canada. To all others, entry to Canada is a privilege. The onus is on the applicant to demonstrate that he or she meets the requirements for entry to Canada.

<sup>49</sup> Under the new legislation, the right of appeal for refusal of entry for those seeking permanent entry ("immigrants") remains, however, it will be removed for those seeking temporary entry ("visitors").

US	<p>Those seeking entry must demonstrate that they are admissible.<sup>50</sup> The demand for speed determines the procedures used during inspection at ports of entry. Immigration inspectors often make decisions on the basis of profiles. According to at least one study, inspectors tend to pre-judge flights from specific geographic regions as either “clean” or “dirty” and treat their passengers accordingly.<sup>51</sup> Front-line immigration inspectors have the option either to admit migrants or to refer them for secondary inspection. During the process of secondary inspection, officials try to avoid placing migrants in costly detention. Inspectors co-ordinate with airline officials in the hope that migrants denied entry can be placed on the next return flight.</p> <p>In 1996, Congress introduced a new expedited exclusion procedure that permits inspectors to issue an order for removal of all aliens who enter with no documents, counterfeits or legitimate documents fraudulently obtained. If removed under these provisions, the foreign national may not reenter the United States for five years.<sup>52</sup> The only exception to the expedited process is for those who request asylum.<sup>53</sup></p>
----	---

In addition to regulating entry and deterring illegal admissions, countries are increasingly setting up exit controls in their systems of migration management. In the US, greater interest in exit controls has arisen in response to the events of September 11. Section 110 Illegal Immigration Reform and Immigrant Responsibility Act 1996 (IIRAIRA) required the US Attorney General, within two years of the law’s passage, to establish an automated entry and exit control system.<sup>54</sup> The provision’s aim was twofold: when implemented, to provide for a matching of individual arrival and departure records, and to enable the identification of visa overstayers, i.e. lawfully admitted non-immigrants whose stay in the U.S. exceeds the period authorised. Congress intended section 110 to facilitate apprehension of criminal aliens and terrorists.<sup>55</sup>

While most European states possess the technological capacity to perform exit controls, these appear to be resorted to only in specific cases such as criminal apprehensions. For example, exit controls in the UK, suspended in 1998, accounted for only three apprehensions during ten years of operation.<sup>56</sup> European countries primarily rely on internal monitoring of resident foreigners.

<sup>50</sup> The grounds of inadmissibility are similar to those described above as reasons for denying visas.

<sup>51</sup> See generally Janet A. Gilboy, *Deciding Who Gets In: Decisionmaking by Immigration Inspectors*, 25 (1991) *Law & Society Review* 571.

<sup>52</sup> The 1996 law permits INS to use the expedited procedures if foreign nationals bypass inspection, entering the country between ports of entry, and are apprehended within two years of entry. If implemented, this provision would significantly alter the distinctions now made between those who are inadmissible/not admitted and those who are illegally in the country.

<sup>53</sup> Asylum seekers have the opportunity to present their case to an asylum officer who must judge whether the claim reflects a “credible fear”. If the claim meets the credible fear standard, the asylum seeker has the opportunity to present a full case before an immigration judge and, if appealed, the Board of Immigration Appeals and the federal judiciary. Those denied by the asylum officer can request an expedited review by an immigration judge of the credible fear determination.

<sup>54</sup> The Section 110 requirement was subsequently amended, on October 21, 1998, to extend the time available for implementation. At the time of writing, the entry and exit control system is still not operational.

<sup>55</sup> While generally feasible at airports, exit controls are more problematic at the land borders with Canada and Mexico where more than 500 million crossings take place each year. Exit controls could have extremely detrimental effects, especially on industries dependent on cross-border movement. For instance, trucks move roughly 80 percent of all goods traded between the United States and Mexico, and convoys are responsible for most surface trade between the U.S. and Canada. Fearful that Congress’s proscribed exit control system would result in delays at the borders, several industry representatives banded together with Congressional representatives and domestic business concerns to form a coalition against IIRAIRA’s Section 110 in 1998. Since September 11, however, there is renewed interest in developing entry-exit control systems in order to identify persons and institutions sponsoring individuals who fail to leave when their legal stay has ended.

<sup>56</sup> Christian, B.P., *Workshop Report: Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management*, (1999) *Geo. Immig. L.J.* 215 at 230.

**Carrier Sanctions**<sup>57</sup> are an effective means of deterring unauthorised arrivals. For example, statistics relating to the number of clandestine entrants detected show that at Dover, where the majority of clandestine entrants arrive in the UK, 1423 persons were detected in the month prior to implementation of the “civil penalty” provisions of the Immigration and Asylum Act 1999.<sup>58</sup> This has fallen steadily with 601 persons being detected in July 2001. However, transportation industries have, not surprisingly, come to resent stiff penalties imposed by governments for transporting aliens without proper authorisation to enter. In response, a number of initiatives have been implemented by various governments to mitigate tensions between government and carriers, to facilitate the carriers in the execution of their statutory obligations, and reduce their exposure to risk. These include:

- The provision of training and technology to help identify improperly documented passengers before they embark;
- The use of Airline Liaison Officers to assist airlines to carry out their boarding checks;
- The use of incentive schemes. For example, in the UK, “approved gate-checked status” works on the basis that when a carrier has established a satisfactory performance level in terms of non-arrival of undocumented passengers over a period of time, it will be permitted one or two errors within a certain period without penalty. Should the inadmissible passenger rate creep up, the status will be removed and the carrier will be liable for each and every inadmissible passenger arrival.<sup>59</sup> Similar schemes have been implemented in countries such as the US and Canada resulting in the mitigation of fines based on an airline’s overall verification performance.<sup>60</sup>

**Document Fraud** can arise at any stage of the process of seeking entry and establishing residence. It is included in this section because it is most commonly found at border control points. One effective means of combating counterfeiting is through the issuance of machine-readable visas and the incorporation of biometric data in travel documents. As highlighted in the US context, costs can be recovered through fees, and many countries have advanced on designing such documents to reduce counterfeiting. However, in order to have any effect, the documents must be linked to a database. Increases in document security should be supplemented by staff training on identifying fraudulent documents. Initiatives such as the Edison Project would be helpful in providing or identifying training resources. CD Roms produced by Edison are available for purchase by governments.<sup>61</sup>

Most sample countries are adopting new anti-fraud measures, given new impetus by the events of September 11, and incorporating security features into passports, visas and residence documents, which are more expensive and more difficult to forge. Some of these will also incorporate biometric features such as fingerprint profiles, which will be nearly

---

<sup>57</sup> See Annex III for a comparative table of national carrier sanctions legislation.

<sup>58</sup> Immigration and Nationality Directorate.

<sup>59</sup> The Civil Penalty is an extension of carrier liability into the area of clandestine arrivals.

<sup>60</sup> For example, the U.S. provides for a 20-50 percent reduction of fines if airlines meet certain performance thresholds.

<sup>61</sup> EDISON is an electronic handbook developed by the Netherlands, USA and Canada on passports and travel documents for border management officials. There are over 1300 examples of documents from most of the world on the system and examples of detected forgeries are also available. Images of the documents are displayed enabling visual comparison to be made when persons present at the control point.

impossible to replicate.<sup>62</sup> Again, it is important that these features are supported by IT recognition systems in order to accurately identify within a short period the bona fides of a document holder.

### *Post September 11 developments*

The events of September 11 have shown that terrorists frequently operate outside the regular enforcement purviews, often with regular status, even citizenship. This calls for tighter control within existing immigration policies. But whilst the cross border dimensions make this a migration issue, it remains primarily a law enforcement matter. While immigration policy may not be central to counter terrorism, it can be an important vehicle for better application of law enforcement and intelligence. Appropriate systems and mechanisms for information sharing among authorities and States need to be in place. Annex I provides a list of actions taken by various countries as a result of the events of September 11, and offers examples of what can and needs to be undertaken at both national and multilateral levels.

## **Comments**

An effective system of entry control must seek to balance the speedy inwards processing of persons with valid claims for entry with the expeditious exclusion of those without valid claims to enter. Efficient border management is about the identification of all or most individuals who are either not entitled to be cleared through immigration or who, while in possession of relevant permission to be at the border or entry control point should not be permitted to proceed. Best practice requires that any person within a country demonstrate appropriate clearance to be there. The concept of “entry” should therefore effectively coincide with permission to proceed beyond a country’s entry control points. At its best, a visa in the possession of an individual ought to be subject to a simple validation process through prudent checks at the point of immigration clearance at an entry control point. If not, an individual should be able to be identified as not having been cleared through such a clearance process.

The experience of the sample countries shows that the greater investment in technology at the entry control points, the more rapid processing of bona fide travellers and the greater the detection of non-genuine individuals. Entry control points are generally more efficient, where there is onsite specialist support for forgery detection, which can be called upon where an officer at the control points may have suspicions. Machine-readable passport readers plus IT-supported suspect lists have proven beneficial where updating is conscientiously carried out. International travel involves wide variations in the peaks and troughs of activity following the arrival of a plane, and work force flexibility is key to flow management in these circumstances. An immigration officer who has the authority to impose a wide range of conditions on a person’s entry, notwithstanding that a visa with certain conditions may already have been granted, is more likely to ensure an appropriate fit at the time of entry between the individual, his purpose in seeking entry and his compliance with the immigration rules, than a visa system which does not permit an immigration officer to make amendments at the point of entry.

---

<sup>62</sup> A number of organisations are considering the standardisation of security features within travel documents and visas. Both IATA and ICAO act as a forum for discussion between governments and carriers, but as these matters increasingly fall for discussion within the EU there will need to be an understanding reached as to the role of the different organisations.

After entering a country, individuals commence a pattern of behaviour, which can give valuable information about the person's immigration intentions. When this pattern exceeds the legal conditions of their stay, there should be the means to tap into sources of information able to help governments establish the whereabouts of such persons; and take appropriate action to regularise their stay. Often, the most relevant public data is held by tax, social welfare, medical or education authorities. Clearly, there is value in the authorities being able to share such data with one another; there are also cogent arguments that this could unnecessarily impinge upon the privacy of an individual. Responsible governments have to balance the pros and cons of such arguments and establish information-sharing laws accordingly. As a minimum, and as a convenient starting point, inter-governmental information on character and criminality could be made available on a negotiated basis in order to filter out criminals or terrorists seeking to enter a country.



## VII. ENFORCEMENT MEASURES

Under Irish legislation, there are a number of ways in which the integrity of the migration system can be assured through enforcement. These include the power of the Minister to order deportation or exclusion orders, anti-smuggling legislation,<sup>63</sup> the forthcoming entry into Readmission Agreements with third countries, voluntary return programmes, and the imposition of carrier sanctions.

### Issues

- The sanctions which exist for breach of visa/permit conditions in other jurisdictions. The meaning and method of removal and/or deportation in other jurisdictions.
- Powers of immigration officers in other jurisdictions.
- Voluntary return and Readmission Agreements.
- Anti-smuggling and trafficking measures in other jurisdictions.
- The cost of enforcement measures where known.

Enforcement covers a broad range of issues. For the sake of continuity, certain enforcement related issues are dealt with in greater detail in other chapters of this report. For example, carrier sanctions are dealt with under “Entry Controls” and employer sanctions are dealt with under “Labour Migration Systems”. These are, however, mentioned in this chapter where relevant.

### International experiences

Enforcement may be carried out at points external to a country, at the point of entry, or in-country. Traditionally, the historic countries of immigration, Australia, Canada, New Zealand and the US, as well as island nations such as Ireland and the UK, have placed primary emphasis on external and entry point controls, aiming to prevent unwanted foreigners from entering the country, with minimal internal enforcement of immigration laws. In contrast, most continental European countries, have long had population registers and some form of national ID card, and most had developed sanctions on employers who hired unauthorised foreign workers by the early 1970s.<sup>64</sup>

During the 1980s and 1990s, there was a convergence between island and continental strategies of immigration control. The US and UK adopted employer sanctions while many European countries placed renewed emphasis on external controls, often in co-operation with

---

<sup>63</sup> The Illegal Immigrants (Trafficking) Act 2000 makes it an offence for a person to organise or knowingly facilitate for gain the entry into Ireland of a person who s/he has reasonable cause to believe to be an illegal immigrant or a person who intends to seek asylum.

<sup>64</sup> P. Martin, “The Costs of Immigration Control: An International Comparison”, draft report for IOM, unpublished, 2002.

other countries, such as under the Schengen Agreement, to make it unnecessary to strengthen internal controls. Thus, there was convergence across the Atlantic in the 1990s.<sup>65</sup>

### *EU Developments*

A legal framework for the fight against illegal immigration exists in all EU Member States as do measures on the issuance of visas, border controls, illegal entry and stay, smuggling, trafficking, illegal employment and carrier liability. Certain common principles on these issues have been laid down in several recommendations under the Maastricht Treaty. In addition, and much more importantly, a large number of binding rules have been established within the Schengen framework.

A number of measures have been introduced by Community institutions establishing a Community response to illegal migration. These include a Directive on the Mutual Recognition of Expulsion Orders of Third Country Nationals,<sup>66</sup> and a Council Decision on strengthening the penal framework to prevent the facilitation of unauthorised entry and residence of third country nationals.<sup>67</sup>

Although it is hoped that increasing opportunities for legal migration may help reduce irregular migration, the European Commission wishes to strengthen efforts to combat illegal migration. In its recent Communication on a Community Immigration Policy (2000)<sup>68</sup> the Commission argues that: "A more open and transparent immigration policy would be accompanied by a strengthening of efforts to combat illegal immigration and especially smuggling and trafficking".<sup>69</sup>

The Commission argues for a comprehensive approach to combating irregular migration, and that whatever measures are designed to fight irregular migration, the specific needs of potentially vulnerable groups like minors and women need to be respected. It has already been recognised at European level, in the field of trafficking in human beings, that only a multidisciplinary approach covering both eradication and prevention would be able to tackle the phenomenon in an efficient and coherent way.

In the recent Communication on A Common Policy Against Illegal Immigration, the Commission highlighted a number of future enforcement initiatives. These include an increased role for Europol, further work in the area of trafficking and smuggling, the promotion of trilateral talks between Member States, the transport industry and the Commission to achieve greater harmonisation of carrier sanctions. In addition, the Commission has also presented a legislative proposal on short-term residence permits for

---

<sup>65</sup> *ibid*

<sup>66</sup> Directive 2001/40, OJL 149 of 2.6.2001.

<sup>67</sup> OJC 253 of 4.9.2000 at p.6.

<sup>68</sup> Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy COM (2000) 757 final at p.3 (*Communication on a Community Immigration Policy*).

<sup>69</sup> *ibid* at p.22. In September 2001, the JHA Council reached political agreement on a Framework Decision on combating trafficking in human beings. The Framework Decision provides in particular a common definition of trafficking and a common level of penalties set at not less than **eight years' imprisonment** if the offence has been committed in specifically defined circumstances.

victims of trafficking who are prepared to co-operate in investigations and criminal procedures against their exploiters.<sup>70</sup>

### *Trafficking/Smuggling*<sup>71</sup>

The phenomena of migrant smuggling and trafficking in persons are distinctly defined in the Protocols to the United Nations Convention Against Transnational Organised Crime:<sup>72</sup> smuggling is the facilitation of illegal border crossing or residence in another country, with the complicity of the migrant; and trafficking, which does not necessarily involve cross-border movement, is a highly abusive phenomenon, involving coercion and exploitation of the migrant, usually for profit.

National policies are evolving in different ways, but most are intensifying their efforts at policy and legislative reform, following the signing of the UN Protocols. Most countries already have legal provisions against aiding and abetting illegal border crossing.<sup>73</sup>

Many governments now provide for carrier sanctions, immediate expulsion of migrants in irregular situations, imprisonment for smugglers (and in some cases the smuggled migrants), the detection of fraudulent documents and information systems which can identify registered migrants against those persons who come to the notice of law enforcement agencies.

To assist intra-governmental co-ordination on combating smuggling and trafficking, some governments, like Australia, the Philippines and the USA have created inter-Ministerial mechanisms to deal with the multifaceted policy issues of the phenomena. Other countries like France, Italy and Switzerland have established *ad hoc* parliamentary committees to better understand the phenomena and advise their governments on possible new legislation.

Particular attention is also being given to combating the pull factors — the attractiveness to migrants and employers alike of irregular employment options in countries of destination. To curb this, many countries are trying a mix of punitive and non-punitive measures as deterrents, with varying degrees of success.

Against the individual: a number of countries impose fines and/or imprisonment on migrants in irregular situations, including Switzerland, Portugal, Norway and Japan. But increasingly most governments understand that the effect of such measures is bound to be greater if imposed on the industries and employers rather than the migrants.

---

<sup>70</sup> In the context of the prevention of terrorist threats the conclusions of the JHA Council on 20 September 2001 invite the Commission to make proposals on the creation of a European-wide system to be used for exchanging information on visas. Details are outlined under the heading "Preclearance" above.

<sup>71</sup> See Annex IV for a comparative table of selected national trafficking/smuggling legislation.

<sup>72</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (A/RES/55/25, Annex II) (*Trafficking Protocol*); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (A/RES/55/25, Annex III). To date, the Convention has been signed by 140 states, the Trafficking Protocol by 101 states and the Smuggling Protocol by 97 states.

<sup>73</sup> Most states declare as an offence the abetting of a person in breaching immigration rules. Sometimes these are termed as facilitation offences, but are able to be used to prosecute both those engaged in the actual illegal movement of persons and those who provide false documents. In some jurisdictions, but not all, the smuggled person may be prosecuted if complicit in the offence. Within Europe, agreement has recently been reached on a facilitation Directive, which seeks to define facilitation and set appropriate penalties across the EU. There will be further discussion about a common approach to trafficking, including criminal prosecution and the protection of victims.

Against the employers: in Europe, it is often the employers and industries who are seen as creating the pull factor for smuggling and trafficking, and laws sanction the employers of any persons involved in these two crimes. In developing a common policy on illegal immigration, the EU aims at eliminating competitive advantages through harmonisation of sanctions which a) criminalise the act of illegal employment and b) diminish the gains for employers.

Against sub-contractors: it is often the sub-contractors who hire, and even smuggle, undocumented migrant workers; and in some countries, such as France, Austria, the Netherlands, Finland and the U.S.A., these subcontractors also face fines and/or time in prison. The same applies to persons who aid and abet illegal employment. In Japan, middlemen who commit offences related to illegal employment, including prostitution, face up to three years in prison and fines of up to JPY 2 million.

Against the smugglers and traffickers: in addition to increasing fines and jail sentences for convicted smugglers and traffickers, a number of governments have adopted measures on money laundering, and the identification, tracing, freezing, seizing and confiscation of means and assets from crime, as important means also to prevent and reduce smuggling and trafficking. Immigration and police authorities in a number of countries are managing increasingly to access the takings of convicted smugglers and traffickers.

### *Powers of Immigration Officers*

Powers of Irish immigration officers include the power to refuse leave to land to an alien coming from outside the CTA on certain grounds,<sup>74</sup> arrest and detain a person to whom leave to land has been refused,<sup>75</sup> require the production of documents,<sup>76</sup> detain and examine any person arriving at or leaving any port in Ireland who is reasonably supposed to be an alien,<sup>77</sup> arrest and detain without a warrant<sup>78</sup> a person against whom s/he suspects a deportation order is in force.<sup>79</sup> An immigration officer may also take into custody without a warrant a person who has, or who is “reasonably suspected” of having, acted in contravention of the Aliens Order.

The powers exercised by immigration officers vary between countries. For example, in New Zealand, immigration officers do not have the power of arrest. Therefore, when apprehending someone against whom a removal order has been issued, they must be accompanied by the police. In contrast, UK immigration officers may arrest without warrant a person who has committed or attempted to commit various immigration offences, or where there are reasonable grounds for suspecting that to be the case. The power to arrest may extend to offences of harbouring and obstruction. Furthermore, immigration officers may search property and take possession of evidence relating to their inquiries; and search a person for evidence in relation to their inquiries and where they have reason to believe the safety of the individual or another person may be at risk. The 1999 legislation also confers on immigration officers the power to use reasonable force, if necessary, in the exercise of their powers including the use of reasonable force to take fingerprints.

---

<sup>74</sup> s. 5(2) Aliens Order 1946 (*Aliens Order*).

<sup>75</sup> s. 5(4) Aliens Order.

<sup>76</sup> s.15 Aliens Order.

<sup>77</sup> s. 17 Aliens Order.

<sup>78</sup> In certain circumstances.

<sup>79</sup> s.5(1) Immigration Act 1999.

In many European countries, specific legislation has not been necessary because, as in Ireland, immigration enforcement is vested in a specific police entity, e.g. the Aliens Division of the National Commissioner of Police in Denmark.

In the US, only those designated as law enforcement officers can carry firearms or have powers of arrest. These powers vary from individual to individual, as per the delegation from the Attorney General. One of the most controversial powers is that of expedited removal, where an immigration officer can order an “alien” (non-asylum seeker) removed without further hearing or review after “determining” that the person had arrived without documents, with fraudulent documents or by fraudulent means.

As has been noted under Entry Controls, a number of countries have introduced Airline Liaison Officers (ALOs) and/or Immigration Liaison Officers (the UK distinguishes between the two; Canada combines the two in one). Monitoring whether the passenger has complied with the immigration requirements of the country of destination and advising carriers who may decide to deny boarding to those who have not, has markedly decreased unwanted migration from destinations where this has been a problem. It is possible to locate such officers at key hub points where their deployment is most effective. One immediate effect is the re-routing of irregular flows to avoid such control measures. But by making it more difficult and more expensive to achieve the irregular migration objective, pressure is exerted on the criminal industries. The work of ALOs needs to be complemented by carrier sanctions.

### *Detention*

Detention plays a different role at different stages of immigration control. It is often useful to be able to detain people on arrival to establish *bona fides* when there are some doubts, particularly in the case of undocumented arrivals. This is the major reason why most European states have the power to detain persons without proper documentation. As Denmark reports, it also gives the authorities an opportunity to establish whether the person can be returned to another European country under the Dublin Convention.

Detention is also used at different stages in the enforcement process. For example, a person who is detected as being unlawfully present in a country may have little to gain by complying with an instruction to report to an airport for a flight. Absconding is a significant risk and detention provides the solution. It is the more necessary where an individual is returned to a country to which there are not regular daily flights. In the UK, the vast majority of enforced removals are underpinned by detention. While detention in the UK is theoretically possible for an indefinite period, the supervisory role of the court ensures that it will only be permitted where there is progress towards the person’s removal. The court will also take into account the degree to which the person is co-operating with the removal process. While detention per se is not a deterrent, there is no doubt that this can be one side effect, and persons who are detained pending removal and enquiry into their nationality and identity will often offer up the required information to be returned in preference to being detained.

Detention policy varies across the world. In contrast to the non-automatic, case-by-case approach to detention of most European countries, Australia has a policy of detaining 100% of its unauthorised arrivals. Other countries do not have a detention policy at all. Detention centres in Australia and the UK are run through private contractors under competitive tendering arrangements. The Contractors remain responsible to the appropriate ministry and the Minister is ultimately responsible to Parliament for the way in which detention is used.

<p><b>Belgium</b></p>	<p>Generally, a person who is illegally in the country will receive an order to leave from the Ministry of the Interior. If the person does not leave voluntarily within the required time, s/he will be detained in a closed center prior to removal. There is no exclusion period imposed, however, the cost of removal must be repaid prior to re-entry. Where removal involves a criminal sanction, the person is usually excluded for a period of 10 years.</p>
<p><b>Denmark</b></p>	<p>If an alien who is not entitled to stay in Denmark does not leave voluntarily, the police will make arrangements for his/her departure. Where a person has overstayed a visa/work permit, s/he may be subject to a fine or imprisonment and will usually be excluded from Denmark for a one-year period. Where a court orders an alien be expelled from the country as a result of a criminal sanction, s/he will not be allowed to re-enter Denmark without special permission. Such an entry prohibition may be limited as to time depending on the circumstances.</p>
<p><b>Germany</b></p>	<p>Forced removal is always combined with a stamp in the person's passport (deported), in order to prevent return. There is no exclusion period in Germany: a person can apply to re-enter, but will be subject to intensive scrutiny on a case by case basis and the chances of being granted permission to return are very slim.<sup>80</sup></p> <p>A person refused admission at a point of entry or leaving the country voluntarily does not get a stamp in their passport. Their biodata is registered and in case of an application for a visa in the future, their background will be taken into consideration by the local immigration office when deciding on the visa.<sup>81</sup></p> <p>Persons obliged to leave and those leaving voluntarily get an official departure note from their local immigration office, which is stamped by the BGS upon leaving the country and then returned to the local immigration office as proof of departure.</p>
<p><b>Italy</b></p>	<p>A person can be subject to a removal order for administrative reasons, as a security measure, and as an alternative sanction to imprisonment. When expelled, the third country national cannot re-enter Italy for a period of five years unless he/she obtains a specific authorisation from the Minister of Interior.<sup>82</sup></p>

<sup>80</sup> In case of deportation the local immigration authorities issue a deportation search warrant which is then entered into the databases of the police and the BGS. If people go into hiding, both police and BGS will independently arrest the individual. Both prepare and execute jointly the arrest of people and their physical deportation, including transport arrangements. Only BGS personnel accompany deportees on flights.

<sup>81</sup> Local immigration offices, which are part of the city or district authorities, are responsible for immigration enforcement in Germany.

<sup>82</sup> A person may appeal against a removal order made for administrative reasons or as a security measure, however, an appeal does not suspend removal. Where a removal order is made as an alternative to imprisonment, there is no right of appeal.

<p><b>UK</b></p>	<p>A person who is not exempt from immigration control and does not have leave to enter or remain in the UK has no lawful basis for remaining in the UK and becomes subject to enforcement action under immigration legislation.</p> <p>The two possibilities for the removal of persons from the UK are administrative removal and deportation. A deportation order needs ministerial authority and may preclude a person from re-entering the UK for a specified period.<sup>83</sup> Administrative removal carries no such banning order. Under s.10 Immigration and Asylum Act 1999 anyone who has been lawfully in the UK but who no longer has an entitlement to remain will normally be subject to administrative removal rather than deportation.<sup>84</sup> Deportation applies to cases where the Secretary of State deems the person's removal to be conducive to the public good and to court recommended cases. Both administrative removals and deportation orders are subject to appeal.</p>
<p><b>Australia<sup>85</sup></b></p>	<p>Under s. 14 of the Migration Act, a non-citizen who enters Australia's migration zone without an appropriate visa or who is not immigration cleared or who has been subject to visa cancellation is deemed to be an unlawful non-citizen. Unlawful non-citizens are subject to immediate detention and removal from Australia unless they are granted permission to remain in Australia. The process is legislatively designed to obviate the need for the Minister for Immigration or his delegates to formally consider deportation. This came about as a consequence of a flood of cases in the 1980s being taken before the Australian Federal Courts challenging the Minister's right to deport them. The legislative change requiring automatic detention and removal simply shifted the onus and relieved the pressure on the removal processes that was gathering momentum through the courts.<sup>86</sup></p> <p>If an applicant has been subject to removal action by DIMIA, they are not able to be granted a visa to come to Australia for a period of 12 months after removal unless there are compelling circumstances. In certain circumstances, a person may be excluded for life.</p>
<p><b>Canada</b></p>	<p>If either a senior immigration officer or an immigration adjudicator determines that a person has violated the Immigration Act, they may issue one of the following removal orders:</p> <ul style="list-style-type: none"> <li>• Departure order: The person must leave Canada within 30 days and confirm such departure with CIC.</li> <li>• Exclusion order: The person is forbidden from returning to Canada for 12 months unless s/he receives written permission from the Minister of Citizenship and Immigration.</li> </ul>

<sup>83</sup> In practice often 2-3 years.

<sup>84</sup> Thus, those who fail to observe the conditions attached to their leave, overstayers and those who obtain leave to remain by deception, as well as family members of such people, will be subject to administrative removal.

<sup>85</sup> In Australia, the 1999/2000 programme year actual expenditure on the enforcement budget was AUD\$247.369 million. In 2001/01, it was projected to be AUD\$419.98 million. Australia devotes a great deal of effort to protecting the integrity of its borders and the resultant costs should be viewed in this light.

<sup>86</sup> It should be noted that any cost of detention and removal becomes a debt due to the Government of Australia. In considering any future visa grant by a person who has been previously detained or removed from Australia, such a debt which remains outstanding at the time of any consideration of a new grant of visa must be settled (or appropriate arrangements made to settle) before a new visa may be granted.

<p><b>Canada—contd.</b></p>	<p>In addition, an adjudicator may issue a Deportation Order under which the person is permanently barred from returning to Canada unless s/he receives written permission from the Minister of Citizenship and Immigration. Removal orders are subject to appeal.</p> <p>Departure and exclusion orders are usually issued for less serious violations. If the person is issued a departure order but does not leave Canada within 30 days and does not confirm the departure with CIC, the departure order automatically becomes a “deemed deportation” order.</p>
<p><b>US</b></p>	<p>Within the INS is a branch with responsibility for investigating and apprehending persons committing breaches of immigration law in the interior of the country. Due to a lack of funding, unless visa abusers or those who enter without inspection (EWIs) come to the attention of INS for other reasons (e.g., a worksite raid or a failed asylum application), it is highly unlikely that any efforts will be made to place “run of the mill” unauthorised migrants in removal proceedings. Instead, investigators have given special priority to the apprehension of criminal aliens.<sup>87</sup></p> <p>Under the 1996 changes unauthorised presence in the United States-rather than removal-became a basis for denial of a visa for re-entry.<sup>88</sup> Those present without authorisation for more than six months and less than a year cannot re-enter for three years, while those present without authorisation for more than one year cannot re-enter for 10 years.<sup>89</sup></p>

### *Voluntary Return*

Voluntary return has proven over the past two decades to be a cost-effective alternative to enforced return. Almost entirely a European phenomenon, assisted voluntary return helps overcome many of the logistical, financial and social difficulties encountered in trying to enforce returns.<sup>90</sup> Most western governments now include voluntary return programmes in their returns strategy. The largest voluntary return programme, the German REAG/GARP programme, has been running for some 23 years, and a number of countries have established variations on that model.<sup>91</sup> Programmes may be tailored or aimed at particular groups, may

<sup>87</sup> This process is facilitated by co-operative agreements with federal and state prison authorities that notify INS if they are holding non-citizens (Legal Permanent Residents, non-immigrants (those with temporary permission to stay) and unauthorised migrants). After determining that the person is indeed an alien subject to removal, the prison authorities are notified that they are to turn the prisoners over to INS upon the completion of their sentences. Oftentimes, INS begins the actual removal proceedings against these individuals while they are still incarcerated for their crimes so they can be removed as soon as they are released from prison. If the INS has not received a final order of removal from an immigration judge, or the country of origin will not permit the return, the migrant is placed in detention. INS also detains migrants for removal as criminal aliens if their criminal record shows up in routine database searches. In part, this has occurred because of the priority given to apprehending criminal aliens but also because of a growing recognition that INS has little capacity to remove those who are not in detention when they receive their removal orders.

<sup>88</sup> In many cases, the foreign national in proceedings offers to depart the country voluntarily rather than be formally removed. This option was more attractive to defendants before 1996. Until then, there were few penalties imposed on persons who were illegally in the United States if they volunteered to depart. They could re-enter at any point that they became eligible for a visa.

<sup>89</sup> Because this provision affects even those with a pending application for permanent residence, Congress has allowed unauthorised migrants to adjust to LPR status within the United States rather than require them to leave and re-enter with their permanent visa.

<sup>90</sup> Return policy will shortly be the subject of a more detailed reflection in a separate Green Paper on a Community Return Policy. The Commission is soon to release a Communication on a Community Return Policy as the basis of a draft Council directive or minimum standards for return procedures.

<sup>91</sup> Netherlands, Belgium, Switzerland and CEECs.

or may not include incentives such as re-integration allowances and may run for various periods of time. Whether the motives for promoting voluntary return programmes within a country are more or less altruistic, the recognition that voluntary return programmes have a part to play in migration management has spread. In making these comments, this paper recognises that there are a large number of people who return voluntarily at the expiry of their permission to remain in a country and that in some countries voluntary return programmes permit those with residence permits to be returned within such a programme. However, this is not always the case. In the UK, for example, voluntary return programmes are a recent addition to the range of return mechanisms available, and the focus is on those who have not been granted indefinite leave to remain in the country. The number of people who return as a result of a voluntary return programme in the UK has steadily increased over the past three years.

### *Readmission and Return*

The period since the 1970s has seen a rapid growth in the number of readmission agreements in Europe. The vast majority of the early agreements were between neighbouring European countries. To that extent, their use in terms of enforcement may be questioned. Readmission Agreements define who may be returned from one country to another, how it should be done and within what timeframes. If a country does not encounter difficulties in returning nationals or third country nationals to a country of origin, then there is no apparent practical need for a Readmission Agreement. However, there has been an increasing recognition that Readmission Agreements can also be a political statement. They demonstrate the co-operation between two countries in managing irregular migration and, with astute publicity, may act as a deterrent, albeit short lived, to those seeking to enter irregularly a country which has a Readmission Agreement with their country of origin.

In recent times, there has been a growth in Readmission Agreements with countries outside Western Europe, which again have both a political and practical value. The EC has also acquired the mandate to negotiate on behalf of Member States Readmission Agreements with selected destination countries. Such multilateral agreements can bring collective political leverage where there may be difficulties negotiating on a bilateral basis. However, the difference between systems will invariably require individual implementing Protocols to be negotiated subsequent to the principal agreement. It is also interesting to note that, as a standard provision, the EC now seeks to insert into all co-operation agreements with other countries/regions a clause relating to the preparedness to discuss with Member States the return of own and third country nationals.

As every Readmission Agreement is primarily negotiated for visibility reasons, it may be useful to include, as has the UK in some agreements, a clause to the effect that nothing in the agreement should preclude return under other existing formal and informal arrangements. In other words, such a provision prevents the Readmission Agreement becoming a cumbersome and bureaucratic process which gets in the way of good return practice.

### **Comments**

Enforcement is perhaps the most difficult aspect of migration management. Despite rising expenditures on enforcement in many OECD countries irregular migration has continued to increase. The US provides a case in point. The budget of the INS, half of which is devoted to preventing illegal immigration, rose from 250 million dollars in 1980 to 5 billion dollars

in 2000, while the estimated number of unauthorised foreigners rose from 3 million to 8.5 million.<sup>92</sup>

There is an emerging tendency by governments to adopt more “comprehensive” measures in combating smuggling and trafficking. Measures requiring focus in all countries, including Ireland, in response to this phenomenon are the:

- increase in inter-agency co-operation and co-ordination at the national level;
- increase in intergovernmental co-operation, specifically on returns and reintegration;
- analysis of current relevant legislation;<sup>93</sup>
- improvement of administrative mechanisms to effectively prosecute traffickers and smugglers;
- strengthening of entry control arrangements, by improving identification, registration and tracking systems, security, etc.;
- development of information systems at national, regional and cross-regional levels to track irregular migration;
- organisation of data collection within a common format across countries and regions to assess priorities for action.

Key to enforcement is the ability to return to countries of origin or transit those who have entered or remained illegally.<sup>94</sup> This is a difficult objective to achieve. Readmission agreements can help, but tend to be useful only in those areas where other governments are willing, to a certain degree at least, to co-operate. Factors such as removing the illegal’s access to an income and visibly enforced returns facilitate voluntary returns. This has been shown to be successful in the UK where voluntary returns now account for approximately 15-20 percent of all returns.

Returns are also dependent on the co-operation of carriers. Some countries have experienced difficulties with carriers deciding unilaterally to refuse to carry enforced returns or severely

---

<sup>92</sup> P. Martin, “The Costs of Immigration Control: An International Comparison”, draft report for IOM, unpublished, 2002.

<sup>93</sup> As in many other countries, legislation in Ireland does not include the distinct offence of trafficking in human beings within the meaning of the Trafficking Protocol. The Ludwig Boltzmann Institute of Human Rights, Vienna, has recently produced a Reference Guide for Anti-Trafficking Legislative Review, which incorporates a number of recommendations of potential interest to Ireland in the development of such legislation. These include, *inter alia*:

- Sanctions should have a deterrent effect and reflect the serious nature of the crime and human rights violations involved, e.g.: imprisonment, fines, confiscation of assets resulting from trafficking and closure of establishments associated with trafficking;
- Confiscated assets should be used to compensate victims and pay for assistance required;
- All activities related to trafficking should be identified as criminal offences, e.g. instigating, aiding, abetting, attempting, omission to act against and conspiracy to traffic;
- Activities of organised criminal groups engaged in trafficking should be a criminal offence;
- States should, additional to prosecuting traffickers under the offence of trafficking in human beings, invoke other provisions of criminal law, to cover e.g.: slavery, slavery-like practices, involuntary servitude, forced or compulsory labour, forced marriage, rape, sexual assault, kidnapping etc.

Kartusch, A., Reference Guide for Anti-Trafficking Legislative Review with Particular Emphasis on South Eastern Europe (Ludwig Boltzmann Institute of Human Rights, Vienna 2001).

<sup>94</sup> In the Netherlands, return of the illegal immigrant has been made the responsibility of the individual concerned rather than of the returning society. In Germany, return is the responsibility of the Länder, an arrangement which suffers from a lack of co-ordination. In Sweden, responsibility for returns has been moved from the police to the “Immigrationsverk” with the success rate decreasing as a result. Further, a number of European countries have entered into bilateral return programmes.

limiting the number of enforced returns on their routes. In response to this problem, the UK has introduced legislation to empower it to instruct a carrier, irrespective of whether that carrier originally brought the individual to the country, to return that person and also to determine whether and, if so, how many escorts will be provided.

The absence of documentation is perhaps the greatest hurdle to effective enforcement. Countries have, however, managed to develop innovative solutions. For example, an agreement between the UK and Sri Lanka exists for Sri Lankan consular officials to interview people to determine their nationality where they appear to be of Sri Lankan origin but are without documentation. A number of returns have resulted. Similar approaches are also under discussion between a number of European countries and China. The USA and Canada have also introduced visa denial regimes against governments who do not provide travel documents to permit enforcement action to take place. In both countries, these have helped unblock the documentation process. Such initiatives are highly political, require the will of the Government and involve the risk of retaliatory action.

Some countries have found that linking aid<sup>95</sup> with returns facilitates returns to countries where these have been historically difficult. In its 1999 legislation, the UK created a category of administrative removal, which eased the bureaucratic burden of processing most cases through the deportation channel. This also had the benefit of removing one stage of the appeals process. However, the legal process still acts as an impediment to effective removal in the UK, despite large increases in appeals processing, personnel and adjudicators. A key contributing factor to this appears to be the fact that appeals are suspensive in nature, not because of legal requirements but because of parliamentary undertakings. Should this be reversed, enforcement action is likely to proceed more swiftly and certainly as a downward pressure on another “pull” factor.

As has been noted under Entry Controls, carrier sanctions are an effective way of securing immigration rule compliance, particularly when they are balanced by incentive schemes for the carriers. For example, the “approved gate-checked” status in the UK works on the basis that when a carrier has performed satisfactorily in terms of non-arrival of undocumented passengers over a period of time, it will be permitted one or two errors within a certain period without penalty. Should the inadmissible passenger rate creep up, the status will be removed and the carrier made liable for each and every inadmissible passenger arrival. The UK Civil Penalty extends carrier liability into the area of clandestine arrivals. In each case, support is given to the industry, e.g. through training, to facilitate compliance with the requirements.

Some of these initiatives can be resource intensive, and where there are severe constraints on the deployment of resources, bilateral or multilateral partnerships may be an option for countries whose volume of traffic does not require a sole dedicated resource. This need not be restricted to the areas of ALOs but could be extended to voluntary return programmes, discussions with other governments on innovative applications such as consular interviews to determine nationality, and joint border controls.<sup>96</sup> It can also be resource intensive to have numerous special units or task forces focusing on discrete areas such as marriage abuse,

---

<sup>95</sup> Whether it be in terms of reintegration assistance or other technical co-operation, or capacity building programmes.

<sup>96</sup> For example, developments in North America between USA and Canada involving joint border initiatives following September 11.

trafficking, readmission agreements etc. But there may be a case for having a specialist unit to focus on certain key elements, which may pose a problem in enforcement terms, with a mandate to develop and deliver new solutions to old problems.

In-country enforcement clearly requires both the administrative resources to follow-up on illegal immigrants and, in the case of workplace enforcement, the support of employers and the community in aiding compliance. In many communities in Europe and North America, there is little will to understand that illegal migrant employment is in breach of law, and detrimental to all concerned. Many governments need to change public perceptions in this regard, to give them the necessary ground support in compliance work. Employer sanctions will be discussed under the chapter “Labour Migration Systems”.

## VIII. RESIDENCE PERMITS

There is no specific provision in Irish legislation for long term secure resident status for non-EEA nationals. Non-EEA nationals who have resided legally in Ireland for at least ten years, and who have not been naturalised, may obtain permission to remain without condition as to time.<sup>97</sup>

### Issues

- Types and duration of permits in other countries.<sup>98</sup>
- The obligations and entitlements of permit holders in other countries.<sup>99</sup>

### International experience

#### *Europe*

##### *General*

A residence permit may cover many purposes of stay, including the take up of paid employment. It thus has a wider scope than the work permit. In Ireland, Denmark, Luxembourg and the UK, only one title exists for residence permits. All other EU countries have two or more titles, following a hierarchy from temporary to permanent residence.

Most EU Member States have two to four different forms of residence titles.<sup>100</sup> France has the combined form of residence and work permit which may become the EU norm in the future (see below). In France, the permit may be granted for one or for ten years. The other Member States have the following main types of residence permits.

Most permits are issued for a limited period of time, but may be extended if the type of residence permit allows.<sup>101</sup> In the legislation, it is not foreseen that third country nationals can automatically extend their stay. On the contrary, almost all Member States provide titles for specific purposes, which are by their nature time-limited, e.g. seasonal work. Such non-renewable titles for specific purposes reflect a general trend in the migration policy of the EU Member States.

The residence permit requirement does not apply to all third country nationals. Member States are committed to bilateral agreements and may exempt third country nationals by law

---

<sup>97</sup> Leave to Remain is not defined in legislation, nor are the rules governing the exercise of ministerial discretion. As a general practice, leave to remain is initially granted for one year and is subject to renewal. Under the Irish Nationality and Citizenship Act 1956 persons may apply for naturalisation after five years residence in Ireland. A separate regime applies to the acquisition of citizenship by marriage.

<sup>98</sup> See Annex V for a table of the types of residence permits in Europe.

<sup>99</sup> See Annex VI for a comparative table of the rights accorded to those entering under family reunification procedure.

<sup>100</sup> ECOTEC, Admission of Third Country Nationals for Paid Employment or Self-Employed Activity (2001) (*Ecotech*).

<sup>101</sup> Some countries, like Austria, have quotas for the number of residence permits awarded annually.

from visa requirements. However, in most cases visa exemptions are valid for stays not exceeding three months. Beyond this period some form of resident permit is always required.

The residence permit is often granted as a visa through diplomatic representatives of the respective Member State. All necessary documentation is transferred to the respective national authorities. In-country applications are in general only possible for some extensions, not for initial applications.

Eligibility criteria of the Member States do not vary significantly. All require, for example, proof of accommodation and a health certificate. Some Member States, such as Belgium, Germany, Italy, the Netherlands, and Sweden require a clean criminal record, a “certificate of good life and behaviour”, or evidence that there are no grounds for expulsion. In Greece and Germany, basic knowledge of the national language is necessary to obtain a permanent residence and work permit.

When it comes to deciding on the length of each permit, Member States have a margin of discretion, especially in cases of first admission. Some provide a legal right to a certain permit. The close link between work and residence permit can be seen in the fact that many authorities will adjust the length of the residence permit to the length of the work permit.

On 5 February 2002 the European Parliament adopted the Resolution on the European Commission’s proposal for a Council Directive concerning the status of third country nationals who are long term residents in the EU.<sup>102</sup> The Directive has two purposes:

- to approximate national legislation and practice regarding the grant of long-term resident status to third-country nationals residing legally. As has been noted, while the great majority of Member States provide for forms of long-term or permanent resident status, the conditions for acquiring it vary. Approximating national legislation would enable all third-country nationals to enjoy long-term status on equivalent terms in all the Member States, irrespective of the Member State of residence;
- to give effect to Article 63(4) of the EC Treaty and determine the conditions in which third-country nationals who are long-term residents within the meaning of the Directive may reside in a Union State other than the one which first granted them the status.

#### *Temporary residence permits*

This type of temporary residence permit exists in all Member States and is granted to those who enter the country for the first time. The permit can be strictly tied to a specific purpose, which is by its nature time-limited. Border commuters, rotating personnel, seasonal and contract workers usually fall under these provisions. The length of temporary residence permits is at the discretion of respective authorities and ranges between three months and two years.

In France, Germany and the Netherlands, change of status from temporary to permanent residence requires that the permit holder depart the Member State and apply from abroad. The Netherlands further has a rule that the temporary residence permit expires if

---

<sup>102</sup> COM (2001) 127 of 13 March 2001.

unemployment of the third country national was his or her own fault. Other countries allow some change from temporary to permanent status, however, this is always dependent on the type of permit and the merits of each case.

### *Permanent residence permits*

A permanent residence permit is rarely granted to third country nationals who apply for it the first time, because it usually requires several years of legal residence in the respective Member State (ECOTEC, 2000). In Finland a permanent residence permit may be granted after two years of legal residence; in the UK after at least four years of “limited leave to enter”; and in Germany after eight years of residence. For a permanent residence permit, the applicant must be able to sustain him/herself and be covered by social security. The permanent or consolidated residence permit may or may not be tied to a definite purpose. Initially, the authorities tend to tie it to a purpose, and later allow any purpose of residence. In several countries, the most consolidated form of residence permit exempts the holder from the work permit requirement. In Denmark, Finland, Germany, the Netherlands, Portugal and Spain, the holder of a permanent residence permit has the right to work without further permission. The range of temporary and longer-term residence permits available in Europe is given in Annex II.<sup>103</sup>

The Commission’s proposal for a draft directive for the admission of third country nationals for the purpose of **paid employment and self-employed** economic activities<sup>104</sup> proposes the establishment of a single residence and work permit for third country nationals. For Member States this creation of a single procedure may be an incentive to streamline their internal administration and to avoid duplication of work. It is believed that third-country nationals wishing to undertake economic activities in the EU, and future employers of third country nationals, will directly benefit from a “one-stop shop procedure”.

A “residence permit-worker” will be valid for up to three years initially. A renewed permit will again be valid for up to three years and allow for a change of activity as well as a change of employer.

For some years now, **family reunification** has been the chief form of legal immigration of third-country nationals to EU countries. This category accounts for almost three-fifths of immigration in most European states, with admission criteria differing from one state to another.<sup>105</sup> A Commission proposal for a Directive on the right of family reunification is under discussion. Under the terms of the proposal, the family members of third country nationals would have the same rights as the family members of EU nationals who have moved within the Union. Access to public funds would be prohibited. The Member State may require a legal resident to wait for up to one year before being joined by his or her family. A renewable residence permit of the same duration as that held by the applicant would be granted. After 4 years, if family links still exist, spouses and children over the age of 18 would have the right to autonomous status.

---

<sup>103</sup> Ecotec at p.10.

<sup>104</sup> COM (2001) 386 final, 11 July 2001.

<sup>105</sup> Niessen, J., The Shaping of EU Policies on Free Movement, Internal Mobility and Immigration in Policy Recommendations for EU Migration Policy at p.7.

## Traditional Immigration Countries

Residence permits in the traditional immigration countries connote permanent residence. Temporary stay in these countries is governed by temporary visas — for purposes such as tourism, study, work, etc. As will be seen below, permanent residency programmes are generally divided into Family, Employment/Business and Humanitarian categories. The focus of this section is on the Family category as Employment/Business is dealt with under the heading “Labour Migration”.

The following table summarises some key elements of the permanent residence provisions in the traditional migrant countries.

<b>Australia</b>	<p>Categories of permanent residence include: Family, Business Skills, Skilled Migration, Employer Sponsored Migration, Special Category (former residents, distinguished talent and those with close ties to Australia) and Humanitarian.<sup>106</sup> Family support is required to assure self-sufficiency.</p> <p>Family stream migrants are selected on the basis of family relationship to a sponsor in Australia — essentially spouses, fiancés, dependent children and parents who are able to meet a ‘balance of family’ test (designed to establish how strong the family links are between parent and the sponsoring relative in Australia).</p> <p>Priority is given to re-uniting immediate family with children (particularly those under 18 years of age but consideration is also given to children up to the age of 25 years of age) and any partner case involving a child. Spouses, prospective spouses or fiancé(e)s and same sex partners are also given priority. Close family members (parents or remaining relatives and carers) are also given a place in the programme subject to limitation of numbers. Others in the close relatives programme, apart from parents represent very small numbers in the programme.</p> <p>In order to avoid possible abuse of the programme, a person cannot sponsor more than two spouses in their lifetime. Each sponsorship must be at least five years apart. Common law spouses and same sex partners have to demonstrate a relationship of more than twelve months duration at the time of application. Initial visa grant is only provisional and can be confirmed if the relationship continues after a two-year period in Australia. The rules in this area of migration in Australia have evolved because of persistent abuse in the area of spouse sponsorship whether by contrived marriages or by serial sponsorship of a number of spouses after the failure of prior marriages to previously sponsored spouses. For these reasons, the area of spousal sponsorship has been regarded as relatively easy to exploit and therefore an area involving high immigration risk.</p>
------------------	--

<sup>106</sup> Humanitarian migrants must satisfy the criteria relating to refugee or humanitarian cases. This report does not discuss this category of migration.

<p><b>Canada</b></p>	<p>There are three categories of permanent migration to Canada: Family class, Independent class and Business class immigrants.</p> <p>Canadian citizens and permanent residents living in Canada, 19 years of age or older, may sponsor close family members who wish to immigrate to Canada. Sponsors must agree to support the family member and accompanying dependants for 10 years, to help them settle in Canada.<sup>107</sup></p> <p>The new Act, Bill C-11, proposes to acknowledge formally for the first time the existence of the family class, giving the class a greater measure of permanency. Membership in the family class is defined to include a foreign national who is the spouse, common-law partner, child or parent of a Canadian citizen or permanent resident and any other prescribed family member. Consistent with modernising benefits legislation, regulations will then define common-law partners as including same-sex relationships.<sup>108</sup></p> <p>The family class would be expanded through regulatory measures which include increasing the age of dependent children from under 19 to under 22 and eliminating the admission bar for excessive medical demands for sponsored spouses, common-law partners and dependent children.<sup>109</sup> The expansion of the family class would be balanced by measures to strengthen the integrity of the immigration sponsorship programme. The latter measures will be mostly regulatory.</p>
<p><b>NZ</b></p>	<p>There are three streams of permanent residence operating independently of each other with separate sub-approvals for each.</p> <ul style="list-style-type: none"> <li>• Skilled/Business Stream 60% of approvals;</li> <li>• Family Sponsored Stream 32% of approvals;</li> <li>• International/Humanitarian Stream 8% of approvals.</li> </ul> <p>Family Sponsored Stream has recently undergone a number of changes. It now also includes:</p> <ul style="list-style-type: none"> <li>• Dependent children aged up to and including 24 years (increased from 19);</li> <li>• Grandparents/legal guardians where parents are deceased;</li> <li>• Married siblings/adult children and their dependants (if principal applicant has a job offer).</li> </ul> <p>Sponsors must be responsible for providing accommodation and financial support for the first two years of the sponsored relative's residence in New Zealand. However, the sponsorship undertaking will be enforced so that, when appropriate, legal action will be taken to recover costs from sponsors who fail to honour their obligations.</p> <p>The number of spouses/partners that can be sponsored will be limited to two applications with at least five years between them in cases involving separation/divorce.</p>

<sup>107</sup> Family members eligible for sponsorship are spouses, parents, grandparents, fiancé(e)s, dependent children, including adopted children, children under 19 whom the sponsor intends to adopt, brothers, sisters, nephews, nieces, or grandchildren who are orphans, unmarried and under age 19, or any other relative if the sponsor has none of the above family members either in Canada or abroad.

<sup>108</sup> Implementation of the new Act and Regulations pertaining to common-law and same-sex relationships has not yet been defined in procedures.

<sup>109</sup> This means that certain medical conditions which under current law would render the applicant inadmissible would no longer apply to these members of the family class. This refers to conditions which would create excessive demands on medical services — it does not refer to medical conditions which would be contagious, or would put the safety of the public at risk.

US	<p>The immigration system in the United States includes the two broad categories: immigrants (permanent) and non-immigrants (temporary). Those who are admitted as Legal Permanent Residents (LPRs) receive a “green card” from the INS. LPRs are supposed to carry their green cards at all times, and use them to re-enter the country after trips abroad. The cards have various safeguards built into them to deter counterfeiting, including biometric identifiers. Since September 11, there has been discussion about issuing long-term temporary residents with similar cards to verify their identity and legal status.</p> <p>LPRs are admitted indefinitely, and may be naturalised after five years (three years if married to a US citizen).<sup>110</sup> The permanent residence granted to green card holders is one of the seminal characteristics of U.S. immigration. In effect, certain foreign nationals are admitted as presumptive citizens who are expected to remain permanently in the country. Although some choose to return home, the green card provides considerable security to those who have not yet been naturalised. During the past five years, however, some of this security has been eroded.<sup>111</sup></p>
----	--

## Comments

A permanent residence category provides a number of benefits both to the individual and the administration. It gives individuals certainty about their duration of stay and allows them to arrange their affairs accordingly. Certainty for individuals is one of the major selling points in an institutionalised regime for permanent residence, and is an effective drawcard in attracting skilled labour to a country. Further, permanent residence promotes administrative efficiency. Under the current Irish temporary permit system, work permits and leave to remain need to be renewed on an annual basis. A residence permit frees up administrative resources in the area of permit renewal and reduces the need to monitor and enforce the renewal process.

In the case of Ireland, the introduction of a permanent residence permit could alleviate a number of the administrative pressures faced by the current system of “leave to remain” which requires at least a second decision-making step on each such case. The various systems outlined provide examples of a structured system of temporary and permanent residence and highlight the diversity of approaches which can be taken. There is, however, no “best practice” offered by other countries. Each of the systems is based on research of the individual country’s needs in this area, what the population finds acceptable and the government’s experience in managing a permanent residence programme.

<sup>110</sup> Nonimmigrants have time-limited residency. The duration varies by the visa category. For example, foreign students are admitted for the duration of their studies toward a degree. Those admitted under the H-1B programme for professionals are admitted for three years, renewable for another three years. If they have applied for permanent residence, their H-1B status may then be renewed yearly until their green card is approved. An inter-company transfer (L visa), by contrast, is admitted for five years, renewable for another two years. Unlike other nonimmigrants, those admitted under the H-1B and L visas may enter even if they have the intent to become permanent residents—an intent shared by many of these supposedly temporary residents.

<sup>111</sup> Under legislation passed in 1996, LPRs are no longer eligible for the range of public benefits available to citizens. The legislation also expanded the grounds under which they can be deported and eliminated the discretion that immigration judges had to weigh the equities they had in the United States (e.g., US citizen spouse or children) against the seriousness of their offence. Many of these provisions were retroactively applied. These changes increased the value of citizenship but created problems for many long-time residents who had not naturalised.

European states are looking more closely at the tried models of the traditional immigrant-receiving states, for example, Denmark has included in its new draft legislation a provision for a “balance of family” test on family reunification cases (i.e. testing if the family ties are greater in another country) along the lines of the Australian provisions. In general, given that family reunification can be an open door to entry of lower skilled or unskilled persons, there is an increasing tendency, on the part of both traditional immigrant countries and newly emerging ones, to limit the entry of family members through more stringent tests of self-sustainability, closeness of ties to the country (balance of family), employability *et al.*



# IX. LABOUR IMMIGRATION SYSTEMS

Rapid growth in the Irish economy has resulted in a shortage of employees in a number of sectors; and Ireland is pursuing an active policy of encouraging labour immigration. The Department of Enterprise, Trade and Employment (DETE) is responsible for issuing work permits. Its policy in economic migration in recent years has been to mobilise the necessary labour supply in the quantity and quality needed to secure sustainable economic growth.

The work permit regime has been based on the notion of temporary migration: large numbers of temporary permits have been granted to respond to the immediate needs of the market. There are no quotas or ceilings on the number of applicants granted permits.<sup>112</sup>

The selection mechanism for labour migration to Ireland is largely employer driven, the granting of permits responding to the specific needs of the employer. Permits, valid for up to one year, are issued to the employer to employ a specific person to fill a specific vacancy. There are possibilities for employees to change employment in certain circumstances. Permits are now predominantly for low paid low skilled workers. 43 percent of the permits issued in 2001, i.e. 12,960 went to nationals of EU Accession countries. The remaining 57 percent were issued to nationals from a wide range of countries (over 120). In March 2000, the Government introduced a streamlined work visa/authorisation system applying to certain critical skill shortage areas. Under this scheme a person with a bona-fide job offer in these work areas may apply for a two-year work visa/authorisation and no work permit application is required.

## Issues

- Mechanism aimed at managing the quantity and quality of migrants being admitted to Ireland.
- How governments determine the overall number of migrant workers and the selection of migrant workers.
- How other systems achieve a balance between the short-term interests of employers and the long-term interests of the wider community and the migrants themselves.
- What measures are being taken elsewhere to attract skilled migrants.
- The emphasis given to attracting temporary workers in other systems.
- Lessons which can be learned from the administrative procedures adopted elsewhere.
- How the unintended effects of labour migration such as “substitution” effects and irregular migration may be avoided.
- Employer sanctions.

---

<sup>112</sup> Asylum seekers are not permitted to work in Ireland while their claim is being processed.

## International experience

National systems for admitting labour migrants vary significantly. Several distinct categories of workers migrate, differentiated by their skills, the permanence of their residence in the host country, and their legal status. Although the migration of the highly skilled is currently an important policy issue in most OECD countries, there is also a considerable demand by employers for less skilled foreign workers.

In the traditional immigration countries such as Australia, Canada, the United States and New Zealand policy-makers have considerable experience of managing programmes for admitting labour migrants. By contrast in Europe, it is only in the last one or two years that governments have begun to re-introduce measures to actively recruit economic migrants and the highly skilled in particular. This change of policy has been prompted by several factors, including concerns about skill shortages in certain sectors of employment and longer-term concerns about the ageing and decline of populations in Europe. The Commission has acknowledged that: "It is clear from an analysis of the economic and demographic context of the (European) Union and of the countries of origin, that the "zero" immigration policies of the past 30 years are no longer appropriate".<sup>113</sup>

But the trend is towards balanced regulation: a system of immigration, which meets economic needs while taking account of available labour elsewhere in the Union (EUREST) and the need to increase labour participation domestically (e.g. education or training, particularly of women).

A renewed interest in opening-up legal economic migration channels also reflects growing concerns about irregular migration and the perceived abuse of asylum systems in Europe. Despite European governments' efforts to combat irregular migration, the smuggling and trafficking of migrants appear to be on the increase. Many argue that smuggling and trafficking, and irregular migration in general, could be reduced if there were more regular migration channels open to economic migrants.<sup>114</sup>

Labour migration systems vary and broadly fall into two major categories: **demand-driven** and **supply-driven**. In supply-driven systems, the migrants themselves launch the admission process. For example, in Canada, Australia, and New Zealand, points systems test the education, skills, language ability, and other characteristics that these countries see as enhancing successful integration. Although points may be given for other ties to the new country, such as family members, the **points systems** are aimed primarily at testing likely economic success.<sup>115</sup> An applicant who meets these requirements is admitted and granted authorisation for employment.

In demand-driven systems, as in the US, employers request permission to hire foreign workers, thereby triggering a decision to admit the migrant. Governments sometimes require that the employers demonstrate that the migrant worker will not displace native workers from jobs or adversely affect wages and working conditions.

---

<sup>113</sup> Communication on a Community Immigration Policy at p.3.

<sup>114</sup> There are, however, opposing views on this matter.

<sup>115</sup> World Migration Report 2000 (IOM, Geneva, 2000).

In most countries, migrants are usually admitted as **temporary workers** and granted work authorisations for specified periods. They usually have no right to remain in the destination country beyond the period of authorised employment, although as shown below this condition tends to apply less often to the highly skilled. In some cases, if a permit is renewed several times, the international migrant is allowed to remain indefinitely. The traditional immigration countries — Australia, Canada and the USA — also have mechanisms for direct admission of foreign workers for permanent settlement.

Generally, international companies moving their personnel from one country to another find few barriers to admission. Employers requesting permission to hire highly skilled foreign workers also find few barriers to entry. Many countries have very restrictive policies, however, towards the formal admission of lesser-skilled international migrants for employment purposes. There are fears in many countries that lesser-skilled immigration may depress wages and working conditions and may take jobs away from native workers.

### *Traditional immigration countries*

#### *Permanent immigration*

Australia, Canada, the US and New Zealand have, in addition to their large permanent immigration programmes, substantial provisions for temporary residence of people with special employment skills. There has been a tendency in recent years for governments in these countries to place more emphasis on the recruitment of skilled workers and to increase the employment of workers entering on non-permanent visas (see below).

Several countries, including Australia, Canada and the US apply annual ceilings, planning levels or quotas to permanent admissions. For example in the US, under the Immigration Act of 1990, the number of visas available for permanent immigrants entering the US for economic or employment reasons is 140,000 p.a. (including family members). The establishment of a ceiling may be useful for planning purposes, but it also means that each year the setting of the immigration ceiling becomes an occasion for public discussion of the relative merits of increasing or decreasing immigration.

Setting such quotas or ceilings also does not mean that the target will be met. For example, in the US at present, because of the unwieldy bureaucratic processes for approving labour certifications and applications for admission, the permanent immigration numbers available for skilled workers go unused each year. Only about half of the 140,000 available visas are filled annually and there is a growing backlog of applicants waiting for their approval. To hire a foreign worker as a permanent resident, the employer must undertake a recruitment process that meets Department of Labour (DOL) guidelines and demonstrates that no minimally qualified U.S. worker is available. The process normally requires an attorney's help, and approval can take several years, first at DOL and then the INS. Employers and immigrants are frustrated by the delays, and tend to use temporary visa categories to bridge the gap between the decision to hire the worker and the government's grant of resident status. Hence, the current system serves the needs of neither employer nor the domestic work force.<sup>116</sup>

---

<sup>116</sup> A federal Commission on Immigration Reform (CIR) proposed a trade-off: employers could more quickly and easily hire the immigrants they wanted if they paid a substantial (\$10,000) fee to a fund that would provide scholarships for U.S. workers willing to be trained to fill the jobs going to foreigners. CIR argued that market forces would be a better determinant than the unwieldy bureaucratic process of a business' need for the foreign worker.

<b>Australia</b>	The emphasis in Australia’s permanent migration programme is on skills. <sup>117</sup> In 2000/2001 44,730 grants in the skill stream were made. This accounted for 55 per cent of the Migration Programme (80,610) compared to 50 per cent in 1999-2000. Certain categories of skilled migrants are subject to a points test, <sup>118</sup> the factors assessed depend on the migration category. <sup>119</sup>
<b>Canada</b>	Canada also operates a planned permanent migration programme. The permanent admissions system operates in part according to a points system, <sup>120</sup> which selects immigrants on the basis of their potential for successful establishment within the Canadian economy and society. The current points system favours candidates who seek to fill a job for which there is a scarcity of suitably qualified domestic labour, who possess English and/or French skills and who fall within a certain age range. <sup>121</sup>
<b>NZ</b>	New Zealand operates a planned permanent migration programme. Approvals for Skilled/Business Stream are set at least at 60 percent of approvals or to around 27,000 per annum. NZ operates a points system, the passmark confirmed quarterly by the Minister for Immigration.
<b>US</b>	There are 140,000 visas available each year for employment-based admissions, including both the principal applicant and his or her spouse and children. <sup>122</sup> US employers choose most of the immigrants admitted for economic reasons and a job offer is essential in order to obtain such a permit.

### *Points Systems*

The traditional immigration countries differ in the ways in which they seek to attract permanent labour migrants. The permanent admissions system in Australia, Canada and New Zealand operates in part according to a “points system” which selects immigrants on the basis of their potential for employability and integration in the receiving country. For

<sup>117</sup> Recently in Australia there has been a conscious move away from family categories to skilled categories of migrants.

<sup>118</sup> Independent, Skilled Australian Sponsored (SAS) (with the exception of those nominated by an employer) categories and Business Skills category. The qualifying number of points at present is 110 broken down into various categories.

<sup>119</sup> For Independent migrants they cover areas such as work skills (taking into account the acceptability of a person’s qualifications in Australia and the amount of experience they have in their job), age and English language competency. For SAS applicants, the above criteria apply, as well as family ties and the status of sponsors (SAS covers family members such as non-dependent children, brothers, sisters, working age parents, nieces and nephews). Bonus points are available to both Independent and SAS applicants for a range of criteria including: skilled work experience, occupations in demand, Australian qualifications, skilled spouse, Australian work experience and foreign language skills.

<sup>120</sup> Those who are able to match or exceed the minimum score (70 out of a total of 110 points) may be required to attend an interview where a consular officer personally assesses the applicant’s credentials. Applicants for independent admission must also demonstrate that they have sufficient funds to support themselves independently of public assistance for six months after arrival. Further, they must prove that they have at least C\$10,000 in transferable funds plus C\$2,000 for each accompanying dependent.

<sup>121</sup> Christian, B.P., *Facilitating High-Skilled Migration to Advanced Industrial Countries: Comparative Policies*, (Institute for the Study of International Migration, Georgetown University, 2000) at p.61.

<sup>122</sup> The employment-based immigrant category is divided into five preferences, or groupings, each with its own admission ceiling. The highest priority goes to “priority workers”: persons of extraordinary ability, outstanding professors and researchers, and executives and managers of multinational corporations. The second group includes professionals with advanced degrees and workers of exceptional ability. The third group is composed of other professionals, skilled workers and a limited number of other workers, with the fourth permitting entry of religious workers and the fifth including entrepreneurs admitted for activities creating employment. Unused numbers in higher priority groups can be passed down to lower priorities. However, there are also ceilings on the number of visas available to any given nationality that can limit an individual’s ability to enter even when numbers are unused.

prospective immigrants who do not have close family ties or an established job connection, admission is determined by the number of points gained for skill, age, and English/French language ability. As highlighted by a recent Australian study,<sup>123</sup> a points system offers a number of advantages to the administration. These include transparency, consistency and efficiency in the selection of immigrants, which is based on an assessment of skills from which the host country will benefit over the long-term. The shortcomings of a points system identified by the study include that a points test cannot discern gradations of skill within a profession (other than work experience), as well as the fact that a person's potential for economic contribution is governed by less tangible factors such as imagination, creativity, adaptability, factors also not assessed by a points system.<sup>124</sup>

The U.S. system is more employer-driven — employers choose most of the immigrants for economic reasons, and a job offer is essential. Thus most of those admitted to permanent residence in the employment-based categories are already in the United States. It is argued that employers are the best judges of the economic contributions an individual can make. There are some clear advantages to such a system. Not surprisingly, rates of employment among these immigrants are very high since they already have jobs and, generally, a supportive employer. A checklist, as used in a points system, may identify would-be migrants with academic skills, but these individuals may not have the more difficult to measure capabilities, such as an ability to work in teams, that employers find valuable.

### *Rising Temporary and Skilled Migration*

Traditionally, countries of immigration have felt somewhat uneasy about guest worker/temporary migrant programmes. In principle, such countries argue that they wish to welcome new prospective citizens who will integrate, rather than foreigners who will depart after a few years.

However, in practice, there has been a tendency in recent years for governments in traditional immigration countries to place more emphasis on the recruitment of skilled workers and to increase the employment of workers entering on non-permanent visas. Temporary work categories are increasingly important as the vehicle for admission of foreign workers, particularly professionals, executives and managers. Generally, the foreign worker requires a work permit, and, before it will be granted, employers are required to test the local market. Some countries allow the change from temporary to permanent status, without requiring the applicant to leave the country.

There has been a marked increase in temporary labour migration to traditional immigration countries in recent years. The quota for temporary workers in the US is now greater each year than the quota for permanent immigrants. In Australia, for example, Hugo<sup>125</sup> reports that there has been a policy shift towards non-permanent migration to attract skilled workers. This is said to be due in part to recognition by the authorities that “many skilled labour markets are international and temporary migration is in many ways better suited to competing globally for skilled workers than the longstanding settlement migration

---

<sup>123</sup> Yale-Loehr, S., Erhardt, C., *Immigration and Human Capital: A Theoretical, Comparative and Practical Perspective For Nation Skilling: Migration, Labour and the Law*, An International Symposium, Sydney, Australia, 23-24 November 2000.

<sup>124</sup> See Annex VII for a fuller outline of the advantages and disadvantages of a points system.

<sup>125</sup> Hugo, G., “Australia” in *Migration and the Labour Market in Asia*, Recent Trends and Policies, OECD, 2001 at p.65.

programme”<sup>126</sup>. However, it is clear that in both the US and Australia many of those seeking temporary entry are intending to settle permanently, and may simply prefer to use temporary channels because it is easier to gain entry via them.

In the US, hundreds of thousands of visas are issued to temporary workers and their family members each year. In addition, an unknown number of foreign students are employed either in addition to their studies or immediately thereafter in practical training. The growth in the number of foreign professionals admitted for temporary stays reflects global economic trends. In fast changing industries, such as information technology, having access to a global labour market of skilled professionals is highly desirable. Also, as companies contract out work, or hire contingent labour to work on projects, the appeal of temporary visas, rather than permanent admissions, is clear. Some foreign firms, understanding that it may not be possible to undertake an entire project offshore, obtain temporary work visas, so their employees can complete the job at the client’s facilities. The temporary programmes also give employers and employees a chance to test each other before committing to permanent employment. Multinational corporations use the temporary categories to bring in their own foreign personnel, to work or receive training.<sup>127</sup>

A number of traditional immigration countries have introduced schemes to encourage and expedite the admission of skilled foreign workers on a non-permanent basis.<sup>128</sup>

### *New labour migration policies in Europe*

In European countries, work permit systems are the main means of entry to employment for foreign workers from non-EEA countries. However, the conditions relating to the award of work permits and the types of permits which are granted vary enormously among European countries.<sup>129</sup> This diversity is highlighted in a comparative study on the admission of third country nationals for paid employment and self-employed economic activities prepared recently for the EC.<sup>130</sup> The study shows that both third country nationals wishing to be admitted to work in the EU and EU employers in need of third country workers are confronted with “sometimes highly complex administrative procedures and there are only a few common rules and principles applicable in all Member States”.<sup>131</sup>

The EU Member States also have diverse legal instruments, which are relevant for the admission of third country nationals for paid employment.<sup>132</sup> Some countries, such as Denmark, Finland, France, Greece, Italy, Luxembourg, Portugal and the UK regulate the admission for paid employment in one law that is usually called “Immigration Act”. A

---

<sup>126</sup> *ibid*

<sup>127</sup> Over time, a large number of different temporary admission visa categories have amassed, each referred to by the letter of the alphabet under which it is described in the Immigration and Nationality Act. As with other immigration matters, there are trade-offs in using temporary admission categories. While they may help increase business productivity and even generate job growth, they also render the foreign workers more vulnerable to exploitation and may, thereby, depress wages and undermine working conditions for U.S. workers. Generally, the foreign worker is tied to a specific employer who has requested the visa. Loss of employment may also mean the threat of deportation. Moreover, because the temporary visa is so often a testing period, the foreign professional may put up with any conditions imposed by the employer, fearing loss otherwise of the chance at permanent resident status.

<sup>128</sup> See Annex VIII for a comparative table of initiatives introduced to attract the highly skilled in traditional immigration countries.

<sup>129</sup> See Annex IX for a comparative table of national work permit requirements in Europe.

<sup>130</sup> Ecotec.

<sup>131</sup> *ibid* at p.6.

<sup>132</sup> *ibid*.

second group of countries, including Austria, Belgium, Germany, the Netherlands, Spain and Sweden, use two main legal instruments, for example an Aliens Act for residence purposes and an Aliens Employment Act for employment purposes.

The work permit systems in Europe are essentially employer-led: an employer is granted a permit for a foreign worker if the job and individual meet the required criteria. Whether or not a permit is awarded often depends on criteria such as the skill level of the post, a “test of the labour market”, the employer must show that no local workers are available to do the job, and that the pay and conditions are no less than those offered to native workers.

### *Skilled Labour*

In response to skill shortages and growing concerns about population decline and population ageing, European countries have begun to take new initiatives to admit more labour migrants, especially highly skilled workers. They have also eased conditions relating to work permits making it easier for foreign workers to be employed. But these steps are cautious ones.

For example, in the UK a series of measures were implemented in 2000 to make it easier and quicker for employers to obtain a work permit for a wider range of jobs. The skills threshold for posts eligible for a permit was significantly reduced (to graduates with no work experience) and the period of time for which a permit could be awarded was increased from 4 to 5 years. A new pilot scheme was launched to enable multinational companies to self-certify work permits for their intra-company transferees.<sup>133</sup> Work permit applications can now be made electronically. Labour market testing requirements were also reduced enabling foreign workers to change employers without the need for a new work permit provided the work is in the same field as the work permit employment.

To date, most of the new initiatives designed to facilitate admission of labour migrants remain relatively modest, and generally relate to the highly skilled.<sup>134</sup> For example, in August 2001 Germany introduced the “**Green Card**” initiative to enable a quota of up to 10,000 specialists from non-EU countries to be employed in an IT activity for five years. The procedures applying to the granting of a “Green Card” are in many ways similar to those applying to the award of work permits in other countries. There must be “a test of the labour market”; the employment office must demonstrate a need for a skilled employee which cannot be met by a domestic or an EU specialist. There is also a check on the certificates of the employee to ensure that s/he is qualified, and a check on the working conditions offered to ensure compliance with national standards. However, the spouse of a Green Card permit holder may only take up employment after a waiting period of one year.

A different type of scheme is the new “**Highly Skilled Migrants Programme**” launched in the UK in January 2002. This scheme is particularly notable because it enables highly skilled workers to seek work in the UK without a specific job offer from an employer, provided certain conditions are met. Applicants who score sufficient points and have sufficient financial means will receive permission to work in the UK in their own right independent of the employer.

---

<sup>133</sup> This has been subsequently discontinued.

<sup>134</sup> See Annex X for examples of recent initiatives by European states to attract workers.

The new UK pilot scheme is based on a points assessment scheme à la the Australian and Canadian models. The intention is to attract highly skilled and qualified persons, who need to score at least 75 points and can demonstrate that they can support themselves and their family without use of public funds. There is no intention in the first year to place a cap or limit on the number of admissions.

Although current efforts to open up new labour migration channels in Europe remain fairly modest,<sup>135</sup> they represent a significant change in policy and a wider recognition of the merits of opening up new labour migration channels. In Germany, in particular, there has been a much wider debate about the future of immigration and the contribution of immigrants to German society. In its final report published in July 2001,<sup>136</sup> the Süßmuth Commission argued that Germany will need immigrants throughout the 21<sup>st</sup> century and should officially recognise itself as an immigration country. It recommended opening up both permanent and temporary labour migration channels, notably also applying the Australian/Canadian points assessment-based model. The package would include:

- Labour immigration to Germany with selection of applicants based on criteria such as age, qualification, professional skills, linguistic competence, etc. Successful applicants would be granted a permanent residence permit.
- Possibility for German employers to recruit a limited number of foreign workers for up to five years if vacancies cannot be filled by Germans or foreign nationals already in Germany; during this 5 year period, entitlement to apply for permanent resident status. Selection criteria for permanent residence identical to the above mentioned points criteria.
- Immigrants, e.g. by early integration possibilities for immigrants receiving permanent resident population and should receive permanent resident status immediately with the prospect of naturalisation. A points system which takes their ability to integrate into society and the labour market into consideration will be crucial.
- Active recruitment of foreign students and apprentices. Later they would also be allowed to apply for permanent residence status.
- A programme for investors and people who want to create a business in Germany.

If these proposals are accepted by both chambers of Parliament, Germany may become “the first country in Europe actively recruiting immigrants on a broader base and officially defining itself as a country of immigration”.<sup>137</sup>

The Süßmuth commission also agreed upon guidelines on immigration to Germany in relation to the labour market. The commission particularly stressed the need for a flexible approach: “It is impossible to predict the future demand for labour accurately. That is why a flexible immigration system needs to be developed that reflects the relevant trends in supply and demand of the labour market”. The commission recommended that priority be

---

<sup>135</sup> Apap, J., *Shaping Europe’s Migration Policy, New Regimes for the Employment of Third Country Nationals: A Comparison of Strategies in Germany, Sweden, the Netherlands and the UK*, CEPS Working Documents, No.179, 2001.

<sup>136</sup> *Structuring Immigration — Fostering Integration* (Report by the Independent Commission on Migration to Germany), 2001.

<sup>137</sup> Münz, R., “Germany’s Immigration Reform” in *Policy Recommendations for EU Migration Policies* (German Marshal Fund, Washington D.C.), *Fondacion José Ortega y Gasset* (Madrid) and *Compagnia di San Paolo* (Torino) 2001) (*Policy Recommendations for EU Migration Policies*).

given to the recruitment of skilled migrants, with the primary objective of creating additional employment opportunities for the domestic workforce. The Commission confirmed that, at present, the immigration to Germany of poorly qualified workers is not a viable option, with the exception of seasonal employment.

### *Unskilled Labour*

Most EU countries are reluctant to re-open new labour migration channels for unskilled workers, which have been largely closed since the early 1970s, given current high levels of unemployment. However, some policy-makers believe that the introduction of schemes to attract unskilled workers might help reduce irregular migration.

In the UK, for example, there has been a great deal of discussion recently about the introduction of such a scheme. On 3 October, 2001, the UK Home Secretary, under the headline “a concerted drive against illegal immigration” announced his intention to begin talks with employers and trade unions on creating greater opportunities for unskilled workers to find employment in the UK. He argued for a “sensible and managed basis” for those seeking legal employment in the UK, claiming that “a properly managed system of legal migration would be a body blow to the gangmasters and people traffickers who bring people to the country illegally”.<sup>138</sup>

Re-opening a channel for unskilled workers in the UK is likely to raise difficult policy and political questions.<sup>139</sup> Despite the clear demand for such labour, some argue that the government should consider the potential impact of unskilled migrants on public services and public opinion, and the support they will need to integrate successfully during their stay.<sup>140</sup>

Even where states are creating opportunities for less skilled workers, the emphasis is on short-term employment to meet specific demands in the labour market and the conditions on offer are quite different from those available to skilled workers. Austria, for example, has decided to extend seasonal employment to more sectors than just the traditional tourism, agriculture and construction; and has set a quota at 15,000 persons per annum. However, the seasonal workers will not legally be able to bring their family to Austria, nor will they be able to upgrade their residence status or work permit.

### *European Commission Proposals*

In the future, fundamental decisions relating to immigration policy are likely to be made at European level as a result of the Treaty of Amsterdam which assigns wide-ranging competencies in this area to the EC. It is therefore important to consider what is likely to be the future EC policy framework in the labour migration sphere.

In its recent Communication on a Community Immigration Policy, the European Commission has suggested a common legal framework on admission of economic migrants and the launching of an open co-ordination mechanism on Community immigration policy. In its

---

<sup>138</sup> Cited by Spencer, S., UK Migration Policy 2001 in Policy Recommendations for EU Migration Policies (*Spencer*).

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.*

Communication the Commission sets out the main aims and principles upon which the common legal framework should be based:

1. Transparency and rationality: in the conditions under which third country nationals may enter and stay in the EU as employed or self-employed workers, setting out their rights and obligations and ensuring that they have access to this information; and mechanisms are in place to apply it fairly.
2. Differentiating rights according to length of stay: giving secure legal status to temporary workers who intend to return to their countries of origin, while at the same time providing a **pathway** to a more permanent status for those who wish to stay and who meet certain criteria.
3. Clear and simple procedures: application procedures should be clear and simple.
4. Regard for the domestic labour market situation: a post may only be filled with a third country worker after a thorough assessment of the domestic labour market situation is currently applied in all Member States and it is not intended to touch this principle.

The draft directive for the admission of third country nationals for the purpose of paid employment and self-employed economic activities proposes the establishment of a single residence and work permit for third country nationals. There are various options to fulfil the “economic needs test” to provide practical solutions for different labour shortages,<sup>141</sup> including the possibility of “individual assessment”, “generalised assessment” (or green-card type programmes as in Germany), and special provisions to facilitate entry for executives and highly skilled individuals required by employers. “Individual assessment” provides a practical tool for employers unable to fill a job vacancy within a given period. If employers have published a job vacancy via the employment services of several Member States for some weeks and have not received an acceptable application from within the EU labour market, they could recruit from abroad. A “generalised assessment” is a flexible tool to react to worker shortage in a specific sector. “National ceilings” are provided as a regulatory instrument for those states preferring such an approach. The draft directive does not, however, prescribe the numbers to be admitted — there is no proposal for the setting of European quotas.

### *Employer Sanctions*

In-country enforcement to ensure compliance with any conditions imposed on entry is essential to the integrity of any Immigration regime. In the case of illegal work by migrants, most countries, with the exception of the US, tend to aim sanctions against the migrant, mostly on grounds of contravening immigration rules. Also, in countries like Australia, New Zealand and Europe, the burden of proof appears to be mostly with the authorities attempting to prosecute which is difficult and results in relatively few successful (if any) prosecutions.

---

<sup>141</sup> Pratt, S., *The European Dimension*, PPR Seminar Series on the Future of UK Migration (September 2001).

The control element is often operated through other agencies, because the immigration services are neither resourced within the country nor have the relevant expertise. Thus, employers are often expected to police the employment sector. Evidence suggests that employer willingness to ensure only those with work permits are employed varies depending on the employment sector, the profitability of the industry as a whole, the profitability of an individual company and the size and nature of a company.<sup>142</sup>

The US provides one of the best examples of the range of initiatives available and the conditions necessary for their success. The Government employs three principal mechanisms to deter employment of unauthorised aliens. First, the 1986 Immigration Reform and Control Act placed sanctions on employers who knowingly hire aliens without authorisation to work in the United States. Employers must fill out a form for each new hire in which the employee affirms his or her eligibility to work, and the employer affirms that he or she has checked a prescribed list of documents to verify identity and work authorisation. The two documents most commonly used for this purpose are the driver's license and social security card. Unfortunately, both are easily counterfeited. As a result, employer sanctions have largely failed to deter the hiring of unauthorised workers since most employers can contend that they did not *knowingly* hire unauthorised workers. Employer sanctions have also failed because of the lack of political will to tighten and implement them. Congress has rejected repeated proposals for a more effective verification system.

A related mechanism is the enforcement of a broader set of labour standards that are incorporated in U.S. law. The Department of Labour is responsible for sanctioning employers who violate wage and hour standards, occupational safety standards and the employment of child labour. Since firms that hire unauthorised migrants are more likely to violate these other labour practices, the rigorous enforcement of labour standards helps reduce the exploitive hiring of these foreign nationals. The Labour Department's activities are seriously under-funded, however, reducing the effectiveness of these enforcement measures.

A third activity aimed at deterring employment of unauthorised migrants focuses on worksite raids to apprehend and remove those working illegally. The raids serve a second purpose-to disrupt business sufficiently to encourage employers to be more careful in their hiring of workers. This strategy often backfires, however, when employers complain to members of Congress who apply pressure on INS to halt the raids. This occurred with such frequency during the economic boom of the late 1990s that INS announced that it would cease routine worksite raids.

The OECD concluded in 1999 that sanctions have a limited effect in deterring illegal entry and employment. Two key reasons for this are the difficulty of enforcing the sanctions, given

---

<sup>142</sup> Under s.8 UK Asylum and Immigration Act 1996, it is an offence for employers to knowingly or negligently employ people who have no permission to work. A maximum penalty of £5,000 per illegal employee can be imposed on the employer. An employer has a defence where s/he can prove that they were shown one of a number of documents showing entitlement to work which s/he believed to be genuine. In the recent Home Office report "Secure Borders, Safe Haven, Integration with Diversity in Modern Britain" (February 2002) a number of measures were outlined to strengthen enforcement arrangements. These include:

- Reducing scope for fraud by limiting the range of identification acceptable as evidence of s.8 compliance;
- Developing joint Immigration Service and police teams with specialist skills to target illegal working;
- Using the Proceeds of Crime Bill to remove the profits of those who exploit illegal working for their own advantage;
- Strengthening penalties against those involved in people smuggling;
- Improving security of the National Insurance Number.

the ease with which false documents can be obtained, and the legal and political obstacles to prosecuting persons with false documents. Failure to prosecute is due both to political pressures from enterprises that do not want to or cannot pay the market rate for labour, and the risks that cessation of activities would create for the employment of nationals.<sup>143</sup>

Another reason why sanctions have a limited effect is that employers are willing to risk penalisation if the cost is less than the difference between labour costs of undocumented and documented workers. Such policies can also lead law-abiding employers to discriminate against employees who have low skill levels and a poor command of the language, since they fear that the worker's documentation may be forged.

The ILO comments that with powerful and often mutual worker and employer incentives to violate labour/immigration laws, sanctions can only work if they are aggressively enforced and constantly fine-tuned to keep up with changes in employer and worker behaviour.<sup>144</sup>

## Comments

To be competitive, Ireland will need to consider the full range of open labour immigration options already tried elsewhere, including a mix of employer-driven and Government-regulated approaches. Within the EU's efforts at a common European approach, there will be considerable flexibility for Ireland to regulate the numbers and skills required to satisfy employers' labour needs and the Government's regulatory needs:

- permanent / temporary immigration
- employer-driven /points assessment
- labour market testing / no labour market testing
- job-specific / non job-specific
- quotas /ceilings / indicative planning levels /none of these.

One thing is clear from the experiences of other countries: to meet both the needs of Government and the labour market the "front door" needs to be opened more for employers and the "back door" closed for the credibility of good governance. Labour force and migration flow planning informs the most advanced of all immigrant labour-employing countries' programmes, for example through the support of specialised research mechanisms (sometimes attached to the immigration Ministry) and through regular multi-agency consultations involving Government, Employers' Associations, Unions and the general business community. Public consultations guarantee endorsement and back-up for the Government on who, how many, where and how labour immigrants should be recruited. Such consultations should ideally also establish a culture of understanding about the need to control labour immigration, e.g. through employer sanctions (a culture which in many European states does not yet exist thus hampering essential enforcement).

---

<sup>143</sup> Tapinos, G., *Irregular Migration: Economic and Political Issues in Combating the Illegal Employment of Foreign Workers*, OECD 2000 at p.15.

<sup>144</sup> Martin, P & Miller, M., "Employer Sanctions: French, German and US Experiences", ILO: 2000, *International Migration Papers*. No.36.

In its new draft Immigration legislation, Germany has opted for the Australian/Canadian concept of Points Assessment as the most transparent, objective and flexible (though not always ideal) way of selecting labour immigrants with a view to longer term socio-economic planning. The criteria built into such a scheme allow selection also on grounds of integration planning; which also serves the inevitable evolution from temporary to permanent immigration (the proven adage “there is nothing quite so permanent as temporary migration”). Integration planning is critical for such immigration categories, as the problems associated with poorly integrated migrants have serious implications for any immigration policy. When properly anchored in legislation, Australia has also found this “mathematical” approach useful in keeping labour migration decisions out of Courts.

In a similar way, ceilings or indicative planning levels can serve the Government’s management needs; but can become cumbersome, expensive and a political liability if there is no will or mechanism to cut the pipeline at the end of each year. The US has experienced unmanageable, and in terms of political optics damaging, backlogs that have been carried over for years.

Germany’s new legislation proposes to fill that country’s labour market gaps in two ways: recruitment from abroad and change of status within the country. This is in keeping with the more flexible arrangements in other countries such as Australia, Canada and the UK. As the Belgian Senate’s report on Migration recommends,<sup>145</sup> the most flexible and progressive entry and residence arrangements should exist for highly skilled and qualified persons, including no labour market testing, change of status possibilities and work rights for spouses and children. Increasingly, highly skilled are being selected for their general employability — no job link, no labour market testing. In those cases, the Points Assessment approach is a useful employability/integration-check. Longitudinal studies in Australia have shown that this works in terms of self-sufficiency and successful settlement in the medium term.

Regarding the employment of unskilled migrant workers — which from many studies has the potential for longer term unemployment and social problems, particularly in times of economic downturn — some options have been tried to limit the conditions of such employment. Austria, for example, is electing to open up the seasonal worker category to a larger range of enterprises, while limiting the period of residence and disallowing family accompaniment. Italy’s draft law proposes something similar. These arrangements often work best in the context of bilateral or framework agreements and trilateral discussions domestically (Government, employers, unions).

But no labour migration system will function without effective enforcement; and some governments have found that in the interests of facilitating beneficial immigration, no enforcement can be fully effective without some incentives for the employers. Some of them (Germany, France) are increasingly offsetting the control focus on employers with such incentives as tax rebates for those recruiting persons properly documented, or fast-tracking the visa process in exchange for a fee/tax per employee. The latter scheme is currently being tested in the US; and even EU documents allow for the possibility of waiving the requirement for an EU-wide labour availability check on payment of a fee per overseas employee.

---

<sup>145</sup> Sénat de Belgique, La politique gouvernementale à l’égard de l’immigration. — Rapport de suivi (2-565/2- 2000/2001), Rapport fait au nom de la Commission de l’Intérieur et des Affaires administratives par M. Cornil, Mme Nagy, M. Wille, 3 juillet 2001.

Managed labour migration, though not the whole solution to labour shortages, can play an important part in alleviating shortages in specific sectors, both high and low skill. But any labour migration policy aimed at meeting labour shortages must be formulated in the context of a broader employment policy.

# X. IMMIGRATION FOR STUDY AND RESEARCH

Ireland hosts a large number of foreign students undertaking university degrees and short-term English courses. On completion of their studies, they are eligible to seek employment in Ireland, but generally must apply abroad for their work permit. Prospective students from visa-required countries must obtain a visa prior to arrival. Ireland has a policy to proactively attract foreign students and to promote its education industry.

## Issues

- How other jurisdictions regulate their student industries and with what success.
- Access of students to the labour market on completion of their courses in other jurisdictions.
- Systems of regulating foreign researchers.<sup>146</sup>
- How the English language sector is controlled in other jurisdictions.

## International experience

The 2001 edition of the OECD's regular report on "Trends in International Migration" has a major focus on student mobility between and towards OECD countries. During the last few years, sustained economic growth in most OECD countries and the development of the information economy has led to a considerable increase in migration of human resources in science and technology. Some OECD countries have relaxed their immigration laws to attract qualified and highly qualified foreigners including students to sectors where there are labour shortages. Student mobility is rising — the total number of foreign students enrolled in OECD countries rose by an average of 5 percent between 1995 and 1998.<sup>147</sup> An analysis of the geographical distribution of foreign student flows shows that 80 percent currently go to only 5 countries: the USA, UK, Germany, France and Australia.<sup>148</sup> The US currently has around 500,000 foreign students in the country.

The proportion of entries of students from OECD countries varies between 20 percent for Australia to 70 percent for Switzerland and Ireland.<sup>149</sup> In fact only 31 percent of foreign students in Ireland come from countries outside the European Union.<sup>150</sup>

The OECD study suggests that student mobility could be increased by more transparent procedures for equivalence of degrees or simplified conditions for obtaining student residence permits. The introduction of safeguards to limit the risk of brain drain and ensure

<sup>146</sup> See Annex XI for a comparative table of the way in which foreign researchers are regulated.

<sup>147</sup> OECD, Trends in International Migration, 2001 at p.102.

<sup>148</sup> *ibid.*

<sup>149</sup> *ibid* at p.103.

<sup>150</sup> *ibid* at p.104.

an adequate rate of foreign students returning home could ease the concerns of countries of origin which might be tempted to put a brake on the international mobility of their students. The OECD suggests that a greater number of bursaries made conditional on return could minimise the brain-drain risk.<sup>151</sup>

### *Systems for regulating foreign education industry*

All countries examined regulate principally through checks imposed on the prospective student, rather than the industry.<sup>152</sup> As part of the visa processing/pre-clearance, all these countries impose more or less the same requirements: evidence of course acceptance, ability to pay fees, and sometimes health checks.

Once in the country, checks to ensure that the student is actually undertaking the course for which s/he was admitted appear to be minimal. Since the events of September 11, particularly in the US, a major concern with the foreign student programme is the inability to track the whereabouts of those who are admitted. In the US, when foreign students appear at US ports of entry, the INS notifies the school that the foreigner entered the US. If the student does not enrol, the school is supposed to notify the INS, which can choose to devote some of its interior enforcement resources to finding the student and removing him from the US for violating the terms of his visa. This rarely happens. Since September 11, US colleges and universities have dropped their opposition to a tracking programme for foreign students, and the Student and Exchange Visitor Programme tracking system is expected to be fully operational in 2003.

In the UK, in an attempt to regulate the English language sector, immigration officers make checks to see whether language schools are actually running classes and, if not, their names are placed on a list, so that anyone applying for a visa to learn English at the particular establishment is refused a visa.

## **Comments**

Export education is a multi-million dollar industry in many countries. Governments around the world have begun to see their overseas student programmes as a ready pool of qualified/skilled personnel for their labour market needs, have adjusted their change of status provisions accordingly,<sup>153</sup> and included incentives such as work rights for spouses. Increasingly, studies abroad are the first step in labour migration. In an environment, such as Ireland, where there is a high demand for foreign skilled labour, recruitment of foreign students educated in the local market can overcome problems often associated with the transfer of human capital. These include recognition of qualifications, mastery of the local language, proven ability to adjust, and knowledge of the local society and norms.<sup>154</sup>

The most popular courses are tertiary education and short term language courses. Both generate a considerable income, the former for the state administration, the latter for the private sector. However, the downside of the industry is that students may illegally remain

---

<sup>151</sup> *ibid* at p.115.

<sup>152</sup> See Annex XII for a comparative table of requirements which prospective students must fulfil prior to the grant of a student permit.

<sup>153</sup> See Annex XIII for a comparative table on change of status provisions.

<sup>154</sup> OECD SOPEMI Report 2001.

in the country on completion of their course, or use the student programme to gain access to the country, and then disappear. This is a problem currently faced by Ireland. Thus, the issue is how to best avoid the student programme becoming an open door for illegal migration.

The countries examined show a variety of ways in which the education industry is supervised. In Australia, the system is highly regulated, having undergone a number of reforms in response to apparent abuse of the system. Further, DIMIA, the Department of Education, Training and Youth Affairs and the key industry bodies meet on a regular basis to monitor issues of importance to the Government and industry in the student visa programme and make necessary adjustments.

In the UK and US, a lesser degree of regulation is evident. Particularly in the US, until September 11, the monetary and other benefits to colleges and universities of foreign students outweighed any interest in regulating educational institutions, given the general aversion to government regulation in the US. The strength of the economy and perceived shortage of highly skilled labour also contributed to the tolerance of student visa abuse. However, since September 11, there has been a greater recognition of the security threats which the foreign student visa may pose if not properly regulated.

In Ireland there is a need for the development of controls to counter potential abuse by the student. Each of the systems outlined provides various options for how the industry can be regulated, and highlight the fact that both the Government and the institution have a vital role to play. Whilst the institution can be responsible for ensuring the applicant has appropriate qualifications to be admitted, and for reporting on his/her attendance, the Government is responsible for conducting security checks on the person prior to visa issuance, and for providing the means by which the sponsoring institution can track and report as needed and take follow-up steps to sanction abuse. Finally, comprehensive regulation requires a system of ensuring the bona fides of the educational institution.



# XI. ADMINISTRATIVE STRUCTURES

A number of bodies are involved in the provision of immigration related services for migrants in Ireland. The Department of Justice, Equality and Law Reform is the main Department, and its Immigration and Citizenship Division is responsible for developing and administering the law and policy in relation to non-nationals in respect of admission, residence and citizenship. Other government bodies dealing with immigration matters include the GNIB, Department of Foreign Affairs and the Department of Enterprise, Trade and Employment. A number of other Departments also have a role in relation to the provision of services to migrants (social welfare, health, education, housing, etc). The GNIB is the first point of contact for persons arriving in Ireland and applying for entry.

## Issues

- Immigration administrative structures of other jurisdictions.
- Mechanisms for co-operation between Ministries and relevant agencies in the immigration arena.
- Pros and cons of a centralised/decentralised approach.
- Examples of information systems underpinning the immigration regime in other jurisdictions.
- Immigration research being done by Government departments and how this is fed into Government policy.
- Costs of administering the Immigration programme where known.

## International experience

<b>Europe</b>	The European Commission has recently released a Proposal for a Council Decision Adopting an Action Programme for Administrative Co-operation in the Fields of External Borders, Visas, Asylum and Immigration (ARGO). The aim of ARGO is to strengthen European administrative co-operation to facilitate the achievement of a common European immigration policy. Community action will focus on developing and spreading best working methods with particular emphasis on the computerisation process and electronic exchange of data, defining and strengthening a common training policy and developing a common working methodology and culture between the Member States to foster a better understanding of administrative processes in the immigration contexts.
---------------	--

UK	<p>The UK Immigration Service is part of the Immigration and Nationality Directorate, which, in turn, is part of the Home Office. Within Government, the Home Secretary is the Minister responsible for immigration matters but his ministerial team includes a Minister of State with responsibility for immigration and asylum matters. At official level, IND is headed by a Director General with two Deputy Director Generals, one of whom is head of the Immigration Service and also holds the title “Chief Inspector”. The UK Government operates a system of collective responsibility within its Cabinet. Thus, the overlapping interests of other departments, particularly the Foreign and Commonwealth Office, Department for International Development and the Lord Chancellor’s Department will have been weighed in the balance of national interest.<sup>155</sup></p>
Denmark	<p>Danish Immigration Service is a part of the Danish Ministry for Refugees, Migration and Integration. The Government has recently centralised most immigration issues into one department, the Ministry for Refugees, Migration and Integration. This in an attempt to streamline government ministries as well as to exercise greater “control” over migration issues.</p>
Germany	<p>Under the draft Immigration Act, the current fragmentation of responsibilities between federal agencies will be centralised at the <u>Federal Office for Migration and Refugees (BAMF)</u>. It will be based on the existing Federal Office for the Recognition of Foreign Refugees (BAFL) and cover:</p> <ul style="list-style-type: none"> <li>• Co-ordination of information on labour migration between the foreigners authorities (“Ausländerbehörden”), job placement centres and German Embassies and Consulates;</li> <li>• Implementation of the optional selection via a point system;</li> <li>• Assisting the Government in the area of integration;</li> <li>• Co-ordination and implementation of integration courses;</li> <li>• Maintenance of the Central Foreigners Registry (“Ausländerzentral-registers”);</li> <li>• Implementation of measures to promote voluntary returns.</li> </ul> <p>A <u>Federal Institute for Population and Migration Research</u> will be established as an independent research institute at the Federal Office for Migration and Refugees. It will be based on the current Federal Office for Population Research. An independent <u>Council for Immigration and Integration</u> will be established at the Federal Office for Migration and Refugees. Its purpose is the regular assessment of Germany’s admission and integration capacities as well as the development of migration movements.</p>
Netherlands	<p>The Immigration and Naturalisation Service (INS) is part of the Ministry of Justice in the Netherlands. The service decides on behalf of the State Secretary of Justice which aliens are admitted to the Netherlands for a long-term stay, and deals with requests from aliens who want to become Dutch nationals. In addition, the service is responsible for border enforcement, monitoring legal domicile in the Netherlands and the removal of illegals. A number of government departments, in addition to the Ministry of Justice, are involved in immigration issues in the Netherlands including the Department of Foreign affairs (visas) and the Ministry of Interior (integration).</p>

<sup>155</sup> The Immigration Service is essentially an operational organisation and it has no role in the asylum process: broader policy questions covering such things as visa regimes or concessions outside the rules on compassionate grounds are the province of IND policy directorates.

<p><b>Australia</b></p>	<p>The Minister for Immigration and Multicultural and Indigenous Affairs is the central repository of power under the Migration Act 1958. DIMIA is answerable to the Minister, and is split into divisions which are each responsible for an area of immigration, including the budget for the work undertaken in the division.<sup>156</sup> Each Division has a branch and section structure. Each branch and section has a particular area of responsibility taken from the matters for which the division has overall responsibility.</p> <p>There is a large degree of consultation both within government and the bureaucracy and with appropriate community organisations in respect to the planning process and formulation of Australia’s migration programme. This ensures the Government’s accountability in the process. In order to maintain the integrity of its programmes, the Australian Government has also invested considerable resources in the development of appropriate data collection and information management systems. These systems also assist the efficiency of the visa application and decision-making process.</p>
<p><b>Canada</b></p>	<p>Citizenship and Immigration Canada is involved in the planning and development of immigration and citizenship policies and the annual immigration plan, the selection of immigrants, the protection and resettlement of refugees, and the admission of visitors, temporary workers and students. It works with provinces, municipalities and community groups to assist in the integration of newcomers, grants citizenship, promotes awareness of immigration programs and conducts research on immigration issues.</p> <p>CIC has numerous partners in the delivery of immigration and citizenship programmes: other departments, governments, and international organisations, as well as provinces, municipalities, private sector and non-profit organisations. Other departments involved in carrying out immigration and citizenship programmes include: Department of Foreign Affairs and International Trade; Health Canada; Canada Customs and Revenue Agency; Department of Justice; Solicitor General; Human Resources Development Canada; Industry Canada; Department of Canadian Heritage.</p>
<p><b>US</b></p>	<p>In the United States, immigration is a federal responsibility. The major federal agency is the Immigration and Naturalisation Service (INS), a part of the Justice Department, which has the responsibility for regulating admissions and enforcing laws aimed at deterring and removing unauthorised foreigners. Other federal agencies involved include the State Department, which issues visas overseas, and the Department of Labour, which is involved in labour certification and enforcement of labour standards. The INS is in the throes of restructuring following the recommendations of the Commission on Immigration Reform.<sup>157</sup></p>

<sup>156</sup> For example, in the Migration and Temporary Entry Division (TED), there are branches dedicated to policy responsibility for the migration programme and permanent migration generally, temporary migration of various kinds but particularly overseas students and visitors, and the governments business migration programme. Within it, TED has a section which has carriage of all aspects of the government’s overseas students programme and another responsible for the Government’s tourism and visitors programme.

## Comments

The sample countries examined reveal a diversity of administrative arrangements to deal with immigration. Key determinants of those arrangements are the nature and scope of immigration and the priority accorded it by Government. Immigration invariably encompasses all aspects of a country's inward and outward movements of people, including nationals of the country. It covers the management of regular and irregular migration, settlement and integration of migrants, and nationality/citizenship issues. These issues cross-cut with foreign relations, national security, labour, trade, development aid, health, education, housing, welfare and tax policies. Clearly, a "whole of government" approach is called for, whether it is administered/co-ordinated centrally or de-centrally.

At one end of the spectrum of the models examined, Australia exhibits a highly centralised approach to managing immigration. The Minister for Immigration and Multicultural and Indigenous Affairs and his Department are responsible for overall immigration policy, legislation both primary and subordinate, immigration operations both nationally and globally, refugees, border control, enforcement, integration and settlement and citizenship. In carrying out this responsibility, the administration liaises closely with other interested Departments such as those responsible for education, health, social welfare, labour issues and business, overall legal, constitutional and international policy and so on. It also liaises closely with relevant key industry bodies to ensure that its policy settings are appropriate.<sup>158</sup>

The Canadian system also operates on the basis of a centralised approach with broad responsibilities across the immigration spectrum, including citizenship. In the UK, the Immigration Service is a self-contained arrangement that forms part of the Home Office. It is essentially responsible for primary and subordinate immigration legislation to operate immigration operations. Wider policy issues affecting issues such as asylum and visa regimes are not part of its responsibilities. The wider issues fall within the domain of the broader Immigration and Nationality Directorate.

In the case of the US, the Commission on Immigration Reform (CIR) identified four major components of the US immigration system (border and interior enforcement, immigration services and visas, workplace labour standards and appeals). The CIR and other analysts have concluded that the centralised regime in place to administer this, in the form of the INS, is overloaded, that aspects of parts of the INS duties conflict with others and that other agencies are required to duplicate some of the efforts of the INS. Various proposals have

---

<sup>157</sup> CIR recommended that the service, enforcement and appeal processes be separated out into three independent agencies: An Undersecretary for Citizenship, Immigration and Refugee Admissions would be established in the State Department, and it would have responsibility for adjudicating all applications for visas and admission, change of status, naturalisation, passports, asylum and refugee claims, etc. Staff would be assigned to both overseas and domestic locations, replacing current consular corps and INS examiners. A Bureau for Immigration Enforcement would be set up in the Justice Department with responsibility for all immigration enforcement activities — inspections, border patrol, investigations, intelligence gathering, apprehension and removal, detention, etc. An independent Agency for Immigration Review would have responsibility for administrative review of all immigration decisions. It would not be part of any Cabinet agency.

The Congress and Administration generally agreed with the need to separate services and enforcement, but it is more likely it will occur within the Justice Department. State Dept will continue to do visa processing overseas.

<sup>158</sup> The Business Advisory Panel is an example of a body that the Government has created to report to the Minister for Immigration and Multicultural and Indigenous Affairs on issues in respect to Government's relationship with industry and to obtain advice on industry specific issues. In other areas such as the development of student policy, for example, Government liaises directly with industry through key industry bodies. This ensures that there is appropriate consultation between Government and industry in the development of policy and in dealing with other issues of mutual interest.

been mooted to deal with this perceived problem but it is widely thought that a restructure is needed in order to address these administrative inefficiencies.

It is hard to opine on the degree of centralisation or decentralisation required to address the broad spectrum of immigration issues. Again, it depends on what a government considers are its needs and the efficiencies of using current structures to deliver the desired results. The holistic approach used by Australia appears to serve it well. It has determined that it is in its best interests to closely monitor movements in and out of the country; and, barring the comparatively small numbers involved in irregular migration, Australia, through its universal visa arrangements has maintained a fair control over the annual influx of immigrants. Other countries such as the US, EU Member States, UK and Canada have to contend with land borders, which clearly changes the dynamics of immigration in ways that demand somewhat different administrative arrangements from Australia.

Whatever the administrative structure, there is no doubt that appropriate data collection is vital for quick and efficient immigration services. The ability to crosscheck passenger bio-data with a range of lookout data<sup>159</sup> helps protect both the integrity of immigration programmes and other areas of impact such as education, housing and labour, as well as the general security of a country. It is also essential for analysing the longer-term effectiveness of programmes, e.g. through monitoring, and future research into the effects of any given aspect of immigration. Australia's integrated data system also allows for cross-checking among a number of discrete databases, such as Immigration, Passports, Taxation, Social Services, to reduce the scope for fraud or abuse of services across these different areas.

Most sample countries have the facility to conduct research based on data collected over a number of years. In the UK, the Immigration Research and Statistics Section compiles statistics for publication twice annually, drawing on a number of internal databases. The information is used to target resources and to focus activity in response to developing trends, for example, a marked increase in the number of asylum applicants or inadmissible passengers according to nationality.

The Research Section of the Australian Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) manages many research projects on immigration, population and settlement issues, including the Longitudinal Survey of Immigrants to Australia (LSIA). This survey provides reliable data for Commonwealth Departments and other agencies to monitor, evaluate and facilitate the development of immigration and settlement policies, programmes and services. Research projects are usually undertaken by individuals and organisations outside DIMIA on behalf of and at the request of the Department. Topics of current research projects can be broadly grouped as follows: demographic, economic, environmental, health and language.

The Australian Government's deliberations on the Immigration Programme are based on projections of Australia's likely future population, the role of net overseas migration and fertility and mortality rates in influencing the population, especially regarding ageing and likely future rates of labour force growth. For information on such issues, the Government greatly relies on targeted research.

---

<sup>159</sup> Lookout data is that data which is used to alert migration decision-makers to problems or potential problems with decisions to grant visas to individuals or groups of individuals. The data could indicate that the visa applicant has a criminal record which s/he has not revealed or has some other matter of character which arises such as possible connections with an undesirable group.



## XII. INTEGRATION

Given Ireland's former history of emigration, there has hitherto been no urgent need to develop a comprehensive integration policy for the country's own immigrants. Yet, while Ireland has no formal policy or law on integration, it makes considerable provision, on an administrative basis, for care and access to services. After a year, working migrants are considered "ordinarily resident" for health care purposes; but subject to a discretion-based needs test. Currently, also, all immigrants have access to social insurance payments and the same rights and entitlements to social insurance as Irish contributors to the system. A major concern is the growing risk of socio-economic problems associated with the immigrant community.

Ireland also has ample legislation and multi-agency action to promote equality and equal rights, including anti-racism, towards a more inclusive, multicultural Ireland. The National Council for Curriculum Development is looking at ways of introducing multicultural studies into the regular school curricula.

### Issues

- The models of integration internationally and their success.
- The extent to which such policies are based in legislation/administrative processes.
- Whether targeted selection (e.g. points scheme) facilitates easier integration.

### International experience

<b>Europe</b>	<p>The European Council in Tampere in 1999 agreed that, in developing a <i>common EU policy</i>, consideration should be given to a) the fair treatment of third country nationals residing legally in Member States and b) granting such persons rights and obligations comparable to those of EU citizens, including the possibility of free movement within the EU.</p> <p>In its recent Communication on a Community Immigration Policy, the European Commission proposed concrete ways of setting up integration programmes, including community information and awareness campaigns, programmes to promote the social and economic integration of women and second generation migrants, and settlement programmes for new migrants and their families. The focus is on language training and information on cultural, political and social issues; and exploring the concept of civic citizenship. A number of Community programmes are already in place to support such actions (cf. the EQUAL programme within the framework of the European Social Fund); but they invariably seek to balance benefits to the migrants with obligations and responsibilities of the migrants.</p>
---------------	--

**Europe—contd.**

In **Belgium**, the reform of the Nationality Code 2000 now provides more flexibility for the acquisition of citizenship. The German Immigration Commission (Süssmuth Commission) among others has sought to co-ordinate migration and integration under the same system. The proposed Immigration Bill calls for the integration of immigrants into German life, but also obliges both migrants seeking entry, and those who have been in the country for less than 6 years, to take courses in German language, history, culture and law.

**Germany** has also introduced in law new, relaxed criteria for right to citizenship of longstanding migrants; as well as easier access to work permits for asylum seekers and refugees. With respect to the latter, the new law allows asylum seekers and foreigners with temporary protected status to start working after a waiting period of one year.

With regard to the labour market, in **Austria** a number of measures have been introduced in order to facilitate and promote the integration of immigrants. The new **Danish** Act on Integration was amended by rules promoting family reunification,<sup>160</sup> but new draft law before the Danish Parliament proposes tougher measures, including a reduction of social benefits for immigrants by 30-50%; and foreigners will need to have been resident in Denmark for at least 7 out of 8 years to obtain full welfare benefits.

In the **Netherlands**, the Law on the Integration of Newcomers obliges all new immigrants to participate in a programme of acculturation focusing on the Dutch language and social studies.

To promote employment of minority groups, under the Stimulation of Labour Participation Among Minorities Act 1998, Dutch employers with at least 35 people on their payroll must employ a certain number of immigrants.

Some of the most progressive initiatives are being taken in the southern European countries — Italy, Spain, Portugal and Greece, which have introduced, or are considering introducing, laws to support the mainstreaming and “settling” of new immigrants. In **Spain**, amendments have been made to existing legislation relating to discrimination and social exclusion, focusing on social and civil rights for established immigrants. A global programme adopted in 2001 by the Spanish Government for the regularisation of foreigners and the co-ordination of migration policy (GRECO). Interventions are foreseen at the level of central government, autonomous regions and local municipalities. This programme tries to balance an approach between a ‘zero’ and an ‘open door’ migration policy, and focuses its intervention on four areas: the design and co-ordination of immigration policy in Spain within the framework of the EU; integration of foreigners legally residing in Spain; regularisation of irregular migrants; and the reinforcement of the system to protect refugees and asylum seekers.

<sup>160</sup> The Act provides for a comprehensive set of rules and measures applying to all aliens lawfully resident in Denmark, including immigrants through family reunification. The Integration Act shifted responsibility for the integration measures for the newly arrived from the State/Danish Refugee Council to the municipalities, which are implementing a comprehensive and co-ordinated set of integration measures in areas such as housing, community information, education and introduction to the labour market. The main elements of the Integration Act is an introduction programme, which requires municipalities to develop an individual plan of action for each immigrant or refugee, organise training in basic understanding of Danish society, organise Danish language training and provide measures aimed at the education system and the labour market.

UK	<p>In contrast to programmes for refugees, the UK has no formal programme of induction or assistance for immigrants arriving in the UK. Integration activities are left to employers (in the case of work permit holders), families and community groups to provide the necessary information and support.<sup>161</sup></p>
Australia	<p>DIMIA provides a wide range of settlement services to both refugees and other migrants. These include:</p> <ul style="list-style-type: none"> <li>• On arrival accommodation for up to 13 weeks (or 26 weeks in hardship cases);</li> <li>• Community Settlement Services Scheme which is a grant-in-aid. The grants programme comprises Migrant Resource Centres, A Grant-in Aid Scheme, Migrant Access Projects Scheme and Community Relations Agenda Grants Scheme;</li> <li>• Adult Migrant English Programme where the Federal Government funds organisations in each State and Territory of Australia to provide AMEP courses;<sup>162</sup></li> <li>• Translating and Interpreting Services (TIS) to assist migrants to access services.<sup>163</sup></li> </ul> <p>The cost of providing settlement services is AUD\$217.094 million.</p>
Canada	<p>CIC has overall responsibility for integration and provides funding. Settlement Realignment Agreements have been signed with two provinces in which those provinces have assumed full authority for design and delivery of settlement and integration programmes. Quebec also delivers settlement programmes in that province. In the rest of Canada, CIC administers delivery of settlement services in partnership with local service providers. CIC also ensures coherence in settlement and integration policies. Through the Immigrant Settlement and Adaptation Programme (ISAP), funds are provided for the following services: reception and orientation, translation and interpretation, referral to community resources, para-professional counselling, general information and employment-related services.</p> <p>ISAP also funds projects designed to complement or improve the delivery of settlement services. These include research projects on settlement and integration, seminars and conferences to share information about settlement and integration activities, and training of ISAP-supported agency staff. Funding is also available through ISAP for pre-departure orientation sessions in selected countries overseas.</p>

<sup>161</sup> Spencer at p.8.

<sup>162</sup> In 1996/97 43,200 adult migrants received such training at a cost of AUD\$75.6 million. The cost of AMEP then went to AUD\$92.992 million in 2000/01 and is estimated to cost the same for 2001/02 and AUD\$94.159 million in 2002/03. Informal tuition is also available through a Home Tutor Scheme which is run by trained volunteers;

<sup>163</sup> In 1996/97 this was provided at a cost of AUD\$20.4 million (\$13.2 million from Federal Government and \$7.2 million from user charges i.e., revenue generated from the TIS for external work it contracts for). In the current year this cost is said to be AUD\$18.49 million. This is not a comparative figure because the accounting system has changed and apparently the two figures cannot be safely compared. It is therefore better to say the cost of TIS is in the region of AUS\$18 — 20 million.

<p>NZ</p>	<p>By comparison with other major migrant-receiving countries, NZ provides only limited publicly funded settlement services for immigrants. The Settlement Information Programme (SIP) has two strands. First, the provision of pre-arrival information that will help potential migrants prepare for life in NZ. Second, ongoing post-arrival information, which is focused on informing migrants about how to access services, find employment etc. The provision of settlement related information is funded by means of the Settlement Information Fee, which is currently NZ\$90.</p> <p>Local governments, community and church groups also provide a range of settlement services to immigrants.</p>
<p>US</p>	<p>The U.S. has tended towards explicit policies regarding <i>immigration</i> but a laissez-faire attitude regarding <i>immigrants</i>. Family, ethnic organisations, religious institutions and other private sector groups have the principal responsibility to help immigrants after arrival. Except for refugees, there are few federal programmes that target newly arrived immigrants for assistance, although some programmes aimed at particular groups have become, in effect, federal immigrant assistance programmes, such as programmes serving Migrant and Seasonal Farm Workers.</p>

A laissez-faire system as in the US has both benefits and costs. The labour market is the major economic integration mechanism. There have generally been plenty of jobs, so few immigrants are unemployed, but many of them do not pay a 'living wage' or offer health and other benefits. Thus, economic and job growth in the U.S. is associated with the working poor and increased inequality, which leads to suggestions for higher minimum or living wages and government mandates or provision of job-related benefits.

Keys to success in the U.S., Australian and Canadian labour markets are education and English. In the US, it was found that, when arrayed by years of education, immigrants generate a different distribution than U.S. born adults twenty-five and older. In 1996, about 12 percent of the foreign-born had graduate or professional degrees, compared with 8 percent of the U.S.-born. At the other end of the distribution, some 37 percent of immigrants did not finish high school, compared with 16 percent of the U.S.-born. U.S. born residents form a diamond shape, with a broad middle, while immigrants form an hour-glass shape. The difference in educational level at both ends of the skills spectrum benefits the economy because immigrants complement, rather than substitute for, U.S. workers. However, the higher the level of education, the more likely the immigrant will be employed at an income-level well above the poverty line. Thus, the selection criteria for admission (e.g., high skilled immigrants with job offers) affect immediate and longer-term integration.

### *Ability to integrate*

A recent New Zealand study<sup>164</sup> found that English language skill was key to the employment success of migrants in the age group 24-54. For example, immigrants of Eastern European origin who could converse in English had an employment rate of 62.4%, while that of those

<sup>164</sup> New Zealand Department of Labour, "Migrant Settlement, A Review of the Literature and its Relevance to New Zealand", September 1999 at p.48.

who could not converse was 26.6%.<sup>165</sup> These findings are supported by similar studies in the US, Canada, and Australia.<sup>166</sup>

Demographic and geographic factors in the receiving country were also found to critically influence the link between successful settlement and language skill. In destination countries with more heterogeneous, multicultural populations, lack of proficiency in the dominant language can be a lesser hindrance to integration than in smaller, more monolingual countries like New Zealand (and Ireland), with relatively smaller immigrant communities.

In the context of education and skills, it was found that a male immigrant of non-English speaking background with a university degree required 16 years in the country before reaching the earning level of a New Zealand born male with the same qualifications. A male immigrant of non-English speaking background with a school leaving certificate required 25 years to catch up to his New Zealand born equivalent. It was also found that at the initial stage of immigration, skilled immigrants suffer from greater wage differentials *vis-à-vis* New Zealand-born workers with the same qualification than less skilled immigrants do compared to their counterparts.

## Comments

Successful integration can be an important way of gauging the success of an immigration policy; and can actively contribute to the integrity of regular immigration programmes. Integration policies help promote a cohesive, inclusive and tolerant society, where the immigrant population lives in harmony with the local population. Failure to promote tolerance in a society is often a precursor to discrimination, social exclusion and the rise of racism and xenophobia.<sup>167</sup> Socio-economic and political disaffection among migrant communities can in turn breed social violence, even terrorism — or at least provide conditions conducive to recruitment to such asocial actions.

The impact of five years of sustained immigration is beginning to be felt within Ireland, and will only increase in the future. Temporary migration is likely to become increasingly permanent and the secondary and flow-on migration effects in the future will need to be weighed in the balance of a more comprehensive approach that may need to involve proactive integration strategies, beginning with wider consultation with social partners. This should be an area of growing interest to Ireland given its tendency towards regular labour immigration and longer-term residence for such immigrants. While there is considerable access for migrants to health care, housing and education, there is scope for strategic planning of future needs in exactly those areas.

Integration policies in the traditional countries of immigration tend to focus on permanent migrants. Given, however, the increasing long term presence of temporary migrants in

---

<sup>165</sup> For the employment rate of immigrants from Southeast Asia, English speakers had an employment rate of 68.3%, and non-English speakers, 41.4%. For North Asian, the rate was 50.8% and 34.7% respectively. Western European immigrants with English skills had an employment rate of 78.9%, whereas that of non-speakers was 60.1%.

<sup>166</sup> See Chazwick B. R. & P.W.Miller, "Language in the labour market: the immigrant experience in Canada and the United States", in Chazwick, B.R.(ed.), *Immigration, Language, and Ethnicity: Canada and the United States*, (American Enterprise Institute Press, Washington, 1992); Wooden, M., "The labour market experience of immigrants," in Wooden, M., *et al* (ed.), *Australian Immigration: A Survey of the Issues*, (Australian Government Publication Service, Canberra, 1994).

<sup>167</sup> Communication from the Commission to the Council and the European Parliament on an Open Method of Co-ordination for the Community Immigration Policy, 11.7.2001 at p.11.

Ireland, similar programmes should be explored in the interests of social stability. A number of countries have various strategies in place to assist with the socio-economic integration of migrants, regardless of whether they are permanent. These include language training, translation services, information referral, migrant resource centres, access to health care, employment possibilities for spouses and the right of family members to accompany the migrant.

The above country survey illustrates the two possible extremes of Government involvement in this area. Australia demonstrates how a highly regulated approach by the Government, drawing on community partners, can play a key role in the integration process. The success of the system can be measured by a largely well functioning and harmonious multicultural society. At the other end of the "regulation" spectrum are the US and UK, where the integration and adaptation to life in the host country is largely up to the immigrants themselves. There does not appear to be the same centrally cohering integration policy in either of these jurisdictions; so they rely to a large extent on support of the private sector and church and community groups. Notably, both the UK and US have witnessed some of the most extreme forms of community/ethnic violence, including forms of terrorism (or at the least terrorist recruitment). These may be as much a reflection of the scale/density of populations involved as any lack of integration policy.

The dilemma which integration poses for Governments is clear from the mixed approaches being tried in Europe, particularly in the wake of the September 11 events. On one hand, there is a growing concern about xenophobic and anti-migrant backlash, and politicians in North America and Europe have intensified their dialogue with ethnic and religious leaders. On that same track, some Governments are actively pursuing anti-xenophobia/anti-discrimination programmes and easing the integration process for newcomers. On the other hand, some Governments are also tightening the conditions under which immigrants may become part of the new community (e.g. longer waiting period for residence; or for citizenship).

Europe's economic prospects and demographic trends make immigration a necessity and a contributor to its development. Policy developments in recent years at the EU level reflect the need for clear and effective policies for the social integration of migrants. These may differ from one Member State to another due to prevailing cultural diversities. The principle of equality of rights and duties, however, should be a common denominator upon which integration practices, including the concept of citizenship, would be further built.

# XIII. REVIEW

A decision to refuse a visa application can be appealed to a Visa Appeals Officer within the Immigration Division of the Department of Justice. Other examples of possibilities of written appeal include the refusal of a business permission or a family reunification application, refusal of leave to remain for the spouse of an Irish national and for a parent of an Irish born child. In contrast to the refugee system, Ireland has no separate system of statutory-based, merits review for immigration matters except in relation to provisional decisions to deport.<sup>168</sup> Those affected by administrative decisions in the immigration context can avail of the general right of judicial review to challenge the procedural aspects of such decisions.

## Issues to be considered

- The levels and degree of review provided for in legislation in other systems.
- Review procedures, complexity, costs, timeframes.
- Impact of judicial review on immigration policy and legislation.
- Special arrangements for review involving security issues.
- Individual review mechanisms v. Ministerial executive discretion
- The suspensive effect of an appeal on removal.<sup>169</sup>

This section focuses primarily on countries with common law legal systems.

<b>Australia</b>	Beneath the judicial review system, <sup>170</sup> there also lies a system of merits review from migration decisions. <sup>171</sup> The Administrative Appeals Tribunal (AAT) has fairly limited powers to review decisions under migration legislation, usually related to the deportation of persons deported on the grounds of bad character. There are also specialist merits review tribunals especially created under the Migration Act to conduct merits review of decisions taken under migration legislation. The Migration Review Tribunal (MRT) has jurisdiction to review immigration decisions of a non-humanitarian nature, while the Refugee Review Tribunal (RRT) deals with the review of refugee and humanitarian decisions. Appeal lies to the Federal Court <sup>172</sup> of adverse decisions taken by merits review
------------------	--

<sup>168</sup> S.3 Immigration Act 1999.

<sup>169</sup> This has also been considered at various other points throughout the report.

<sup>170</sup> Australia has recently legislated restrictive rights to judicial review before the Australian Federal Court of immigration decisions. This does not affect the ability of the High Court of Australia to judicially review such matters.

<sup>171</sup> Under an accrual based costing system, DIMA is funded by the Department of Finance and Administration for judicially reviewable cases at the rate of about AUD\$10,000 per case but only after base funding for litigation has been exhausted. In the 2000/01 programme year, the base funding for such litigation was AUD\$2.893 million.

<sup>172</sup> In 2000/01, 1340 applications were made to the Federal Court of Australia for the judicial review of decisions made by the merits review tribunals. During that year, the Court dismissed 611 applications after hearing, and 306 before hearing (cases discontinued by applicants). 71 decisions were remitted for reconsideration. In addition, the Government withdrew from 205 matters agreeing to their remittal back to the tribunals for reconsideration.

<p><b>Australia—contd.</b></p>	<p>tribunals. In 2000/01, the AAT resolved 320 matters, the MRT received 7,211 applications for review and resolved 6,575 matters and the RRT received 6,545 applications and resolved 5,969 matters.<sup>173</sup> If a person lodges an appeal against a removal order, s/he will not be removed until the appeal is finalised.</p> <p>In Australia, the Minister does not have any over-riding discretion to make migration decisions other than in certain well-defined situations covered by legislation. The exceptions are only triggered when an individual has been through an unsuccessful review process, i.e. has been found, whether on the merits or in law, not to be entitled to a visa. When this occurs, the Minister has a non-compulsory power to re-consider a person's case and order the grant of a visa — in other words, an individual cannot force the Minister to go through this process. In all other cases, ministerial delegates make migration decisions that may be the subject of merits review.</p> <p>The Administrative Appeals Tribunal is able to deal with issues involving matters of security, the merits review tribunals set up under the Migration Act do not deal with such issues. It is extremely rare for such issues to arise in migration cases.</p>
<p><b>Canada</b></p>	<p>Created by an Act of the Canadian Parliament in 1989, the Immigration and Refugee Board (IRB), is an independent administrative tribunal performing quasi-judicial functions. The IRB consists of three divisions: the Convention Refugee Determination Division (CRDD), the Immigration Appeal Division (IAD), and the Adjudication Division.</p> <p>The CRDD deals exclusively with the determination of refugee claims. The IAD hears appeals from removal orders, refusals of sponsored applications for permanent residence by members of the family class, and appeals by the Minister of decisions made by adjudicators.</p> <p>The Adjudication Division became part of the IRB in 1993. Adjudicators are independent decision-makers who determine whether a person will be allowed to come into or remain in Canada under the Immigration Act. In addition they must review, on a regular basis, the detention of any person detained pursuant to the Immigration Act.<sup>174</sup></p> <p>Decisions rendered by the three Divisions can be judicially reviewed by the Federal Court of Canada, however, leave of a Federal Court judge must first be obtained.</p>

<sup>173</sup> The applicant pays a fee of \$1400 for the right of review which may be waived in appropriate cases. The fee is refunded if the application is successful. Australia's MRT is funded by the Government at the rate of \$1879 per case finalised, based on an estimate of what it costs to fund review cases. On the basis that the MRT will finalise 8700 case in a year, the annual cost of the tribunal is AUS\$16,347 million. This is offset by the fee regime which, at AUD\$1400 for each of 8700 cases, would net AUD\$12.18 million. With waivers and handbacks, the revenue offset is in the region of only AUD\$5 million. Therefore, the overall cost of the MRT to the Government is around AUD\$11 million per annum. The reason more than half of the revenue is lost incidentally is not because the primary decision-making is necessarily bad but because the MRT, being a merits review system, looks at the facts as they are when the matters come before them not at the time they were before the primary decision-maker.

<sup>174</sup> The CRDD and Adjudication Division have the powers of a superior court of record. Proceedings before both are adversarial in nature with appellants having the right to be represented by counsel. The Minister responsible for the Immigration Act is also represented. The proceedings are generally public; however, on application, a hearing can be held in camera or other measures can be taken to protect confidentiality if there is a serious possibility that the life, liberty or security of any individual would be endangered.

<p><b>Canada—contd.</b></p>	<p>Where a person appeals to the IRB against a removal order, a stay of the order will be granted until the appeal is finalised. It is departmental policy to defer removal if the person concerned makes an application to the Federal Court for a stay of removal. In these cases, removal is deferred until the application for a stay is disposed of. Outside of the CIC,<sup>175</sup> only the courts in Canada can stay a removal.</p>
<p><b>UK</b></p>	<p>The Immigration Appellate Authority (IAA) deals with all migration appeals on the merits of the case. This includes appeals against decisions made to refuse entry to the UK, appeals to extend a visa or for leave to remain in the UK, appeals against decisions made by the Home Secretary to refuse a person asylum in the UK and appeals against deportation decisions. The first appeal tier usually involves an immigration adjudicator (independent judge) reviewing the case. If the appeal is rejected, the case can be appealed to the Immigration Appeal Tribunal. There is also the subsequent possibility of judicial review.<sup>176</sup> Even though a person may have unsuccessfully exhausted all his avenues of appeal, it still remains open to the secretary of State to grant permission to remain outside of the Immigration Rules.</p> <p>In those cases where issues of national security arise, a discrete case-working unit processes applications for asylum and any subsequent appeals. A specific appellate authority, the Special Immigration Appeals Commission (established under the Anti-terrorism, Crime and Security Act 2001) considers any appeals from security cases. Applications are held in camera, as is any subsequent judicial review.</p>
<p><b>US</b></p>	<p>The Executive Office of Immigration Review, (EOIR) which is in the Justice Department, is the principal review mechanism. EOIR is composed of an immigration court which does the first level of review on removal cases and the Board of Immigration Appeals (BIA) that hears appeals from removal orders and denials of certain petitions for benefits (family reunification). Another part of EOIR makes judgements on employer sanctions cases and employment-based discrimination.</p> <p>In removal cases,<sup>177</sup> the INS issues a notice to appear before an immigration judge when they apprehend someone. The case goes to an immigration judge, who makes a decision. Either can appeal to the BIA.<sup>178</sup> Many BIA decisions can be appealed by either party to the Circuit Court of Appeals for the district in which the case was first heard, and then to the Supreme Court. It thus goes from an administrative appeals mechanism to full judicial review. Congress has</p>

<sup>175</sup> Account is taken of other legislation i.e. if a person is an important witness in a trial or is to attend a custody hearing there may be an obligation not to remove as it could be considered contrary to other legislation that requires the persons presence to attend a legal proceeding. Similarly, if CIC receives a formal request from certain organizations to whom the subject has submitted a complaint — such as UN CAT — deferral will be considered. Actual deferral is rendered by CIC. CIC has legal opinion to the effect that officers — as well as the Minister — have authority to defer removals that are not “reasonably practicable” at the time.

<sup>176</sup> Where a person is to be removed from the UK for reasons involving national security or the public interest, there are no rights of appeal under the Immigration and Asylum Act 1999. However, there are equivalent rights of appeal to the Special Immigration Appeals Commission under the Special Immigration Appeals Commission Act 1997.

<sup>177</sup> There is no review for visas. If INS refuses a petition for family reunification, the denial can be appealed to the BIA but no further. The Attorney General can overrule any BIA decision. If Labour Department refuses a labour certification for an employment-based application, there is a separate administrative review process.

<sup>178</sup> Either party can also ask the Attorney General to review the case and he can change the BIA opinion or remand it to the BIA for further consideration.

US—*contd.*

tried to reduce access to judicial review but the courts have generally frowned on these efforts.

The Attorney General has the discretion to use his parole authority or deferred enforcement authority to permit someone to enter or remain in the country who would not otherwise be eligible. On an individual basis, this is usually used only for highly unusual cases of emergency or national security.<sup>179</sup> Congress has tried to restrict the authority, but the Administration finds it too useful for foreign policy or humanitarian reasons to give it up altogether.

Generally, an appeal has suspensive effect. Once a person goes into removal proceedings, though, the clock stops on eligibility for other forms of relief, to reduce the incentives for delay. For example, those in the country illegally can request suspension of their removal if they have been in the country for ten years and deportation would be extraordinarily harmful to a US citizen relation.<sup>180</sup>

There is a separate review procedure for security related cases, particularly for terrorists. It permits the government to keep classified information secret. The legislation is quite complicated, creating a special removal court consisting of five circuit court judges appointed by the Chief Justice of the Supreme Court. It allows for designation of a panel of attorneys, with appropriate security clearances, who are able to see the classified information but cannot share it with clients.

## Comments

Over the last ten to twenty years, administrative law in general and its application to the field of immigration decision-making, in particular, has been an active area of jurisprudence. In this time, the experience of the sample countries is that recourse to judicial review of immigration decisions continues to rise. The shrinking size of the world in terms of ease of travel and communication, the failure of some countries to properly cater for the needs of all their people and the corresponding growth of irregular migration which has fostered people smuggling and trafficking, together with decisions by other countries affecting the ability of individuals to select for themselves and their families a country of residence have created fertile ground for this branch of the law.

Immigration policy and practice are significant aspects of the exercise by a country of its sovereignty. In general terms, a state has the right to choose which non-nationals to admit and which not to admit to its territory, and to decide what they may do while in the territory and when they should leave. Those rights are not absolute: where a state subscribes to an international humanitarian instrument such as the 1951 Refugee Convention, or where it is a member of an entity such as the European Union which involves rights of free movement for nationals of member states across each other's territory, the state limits accordingly its otherwise extensive discretion over the entry, residence and removal of non-nationals. The

---

<sup>179</sup> The discretion is used more regularly to stay the removal of a group, for example, the AG deferred the deportation of Salvadorans after the civil war when the new President of El Salvador requested a delay because remittances were so important to El Salvador's recovery.

<sup>180</sup> However, the ten-year clock stops if they are apprehended.

exercise of this discretion is generally vested in the government of the state or in an executive arm of the government, operating within a framework of statute and other law.

The courts are slow to encroach on matters which are properly the preserve of executive discretion. They are, however, assiduous in ensuring that, to the extent that matters are governed by legislation or by legal principle, the rule of law and the principles of fair procedure are observed in immigration matters as in other aspects of the operation of government. Hence the existence in many jurisdictions of a lively judicial review jurisprudence directed at ensuring compliance with law and proper procedure in immigration matters. And the international experience tends to demonstrate that where immigration procedures themselves contain opportunities for decisions to be the subject of a merits review, the process is more likely to be viewed by the courts as meeting the requirements of fair procedure and due process. The existence of procedures to enable decisions at first instance to be re-examined on their merits increases user confidence in the systems as well as encourages higher standards of initial decision-making.

Each of the countries examined has a system of appeals from administrative decisions by immigration officers involving both merits and judicial review. Merits review of immigration decisions can offer the opportunity for a quick, efficient and relatively inexpensive check on primary decisions and allow individuals an important second opinion about their own particular circumstances. Merits review does not set precedent, and therefore does not have a dramatic impact on government policy. Legislative change as a consequence of merits-based decisions is therefore rare. On the other hand, merits review generally also permits an additional tier of decision-making that could be said to delay the earliest possible resolution of an individual's case.

The countries examined have had various degrees of success in implementing a system of merits review. The UK has recently introduced changes to the appeals system to create a streamlined "one-stop" shop in an effort to achieve greater efficiency. Australia has various layers of merits review, although the MRT and RRT conduct most of the merits review of migration decisions. In both countries, the review tribunals are independent from the primary decision-making authority. This is to be contrasted with the US, where the review body is part of the Justice Department. The great benefit of having a merits-review body that is separate from the administrative agency making the initial decision is in the independence of the review body. This is of importance in the context of the second tier providing justice to the parties. The UK and Australia have well-developed systems of judicial (procedural) review. Falling broadly under the heading of administrative law, all superior courts are able to review the legality of migration decisions on certain well-defined grounds.<sup>181</sup> In Australia there has been an attempt to cut back on the amount of judicial review open to appellants of immigration decisions. Most recently this has been manifested by the introduction into legislation of a privative clause barring immigration decisions being reviewed by the Federal Court. It should be noted, however, that the constitutional right of the High Court of Australia to review immigration decisions has been unaffected by this legislation.

---

<sup>181</sup> Such as bias, exceeding jurisdiction or breach of natural justice.



## XIV. NATIONALITY/MARRIAGE TO IRISH CITIZEN

Article 2 of the Irish Constitution gives every person born in the island of Ireland, its islands and its seas, an entitlement and birthright to be part of the Irish nation. In effect, this means that any person born in Ireland is entitled to be an Irish citizen, irrespective of the nationality of either parent or their entitlement to be in the State. The effect of the 1990 case of *Fajjonu* is that the non-national parents of an Irish citizen have a strong claim to be allowed to reside in the State. A non-EEA national who marries an Irish citizen is generally granted leave to remain.

### Issues

- Rights of a child born in a country to non-national parent/s.
- Marriage of a non-national to a citizen of the country.

### Comments

As can be seen from the comparative table,<sup>182</sup> many developed, western countries have citizenship laws, or have changed these laws, requiring at least one of the parents of a child born in the country be a citizen of that country in order for the child to obtain citizenship by birth. The notable exception, apart from Ireland, is the US. The US offers a right of citizenship to a child born in the US to non-US parents. The US has chosen to maintain this constitutional entitlement due to historical reasons related to slavery. However, case law in that jurisdiction has consistently held that parenthood of a US citizen does not bestow any rights on the non-national parents who are illegally in the territory, and they can be deported. Such deportation is held not to deprive the child of its constitutional rights. This therefore imposes a natural barrier for potential exploitation of the law.

Undoubtedly, particular features of a country's citizenship laws can have an influence on the inward migration pressures experienced and, as a consequence, on that country's immigration policies. It must of course be acknowledged that questions of a country's citizenship and of the circumstances in which it may be acquired whether by right or as a privilege are often questions of a highly philosophical and political nature that may go to the heart of a nation's perception of its own identity. Where particular features of citizenship law (such as, in Ireland's case, citizenship derived from place of birth and the associated residence consequences for the parents and possibly other members of the family of a person who becomes a citizen in this way) are seen to attract significant numbers of non-nationals, the issue arises as to how this type of immigration can be managed. The ability to manage migration in this area is essential when planning for the consequences of that migration, not only the immediate ante-natal and maternity needs of immigrant parents but also the consequences for the duration of the stay in the State for employment, provision of State

---

<sup>182</sup> Annex XIV.

services, education and so forth for the new citizen and his or her family. Other consequences that need to be considered include the relative ease of movement to other states within the European Union that this can offer to persons who are not Irish nationals. It may be necessary, when the migration management aspects are being examined, to go deeper and consider whether the particular feature of citizenship law itself should be changed. It is acknowledged that, depending on the approach finally adopted, it might be necessary to consider a change to the Constitution.

Another area of potential immigration abuse has been the question of spousal entitlement to acquire either permanent residence or even citizenship or nationality by the act of marriage. All the countries surveyed have developed structured procedures, which must be followed where a non-national marries one of their citizens and wishes to travel to or remain in the country of the spouse. This generally involves application for a conditional visa, an interview and proof of the availability of sufficient maintenance funds. Moreover, systematic checks are undertaken by the administrations after one or two years of residence to ensure that marriage is on going. In Australia, the exploitation of marriage, marriages of convenience and serial marriages has led to limitations being placed over the number of spouses that may be sponsored by any one person; the limitation is two and there has to be a period of five years separating each sponsorship.

One key lesson to be learned from the experience of other countries involved in the regulation of these issues in particular, and immigration generally, is simply that where there are potential weaknesses in the immigration system left unattended, they will continue to be exploited by unscrupulous elements. Moreover, the continued exploitation of these weaknesses will grow exponentially the longer they are left unattended.

## ANNEX I

### IATA CONFERENCE 3-5 FEBRUARY 2002: AVIATION ISSUES POST 11 SEPTEMBER

This note prepared by IOM records the main points emerging from the recent IATA conference as they relate to matters of interest to Ireland in this study.

#### *Biometric Applications*

There are numerous trials underway across the world involving iris scans, facial geometry, hand geometry and finger print scans. All have their pros and cons and there seems to have been contradictory evaluations. For example, facial geometry has been introduced at Fresno airport, yet the police department in Tampa, Florida, rejected facial recognition after a six week period dominated by false positives. Iris scans offer quick, non-intrusive, accurate matches but are more expensive than fingerprint scanning devices.

The sheer volume of passenger traffic makes visualising a global integrated database difficult. The way forward for the travel industry will be by way of trusted passenger schemes where frequent travellers volunteer to undergo background checks prior to issue of a smart card. Such systems should be used with other systems to avoid the risk of over reliance on and confidence in a single methodology. Whilst this is not likely to identify those posing security risks, it takes out people from the system thereby enabling better targeted control mechanisms at points of entry and general intelligence work. There is currently a view that in the USA such travel passenger cards will be Government issued because of the perceived risks of getting it wrong. However, for such a voluntary and necessarily limited scheme to work with carriers an institutional framework and interfaces with different carriers, commerce and government needs to be established.

A question which does not seem to have been thought about is what to do with those who apply for such a scheme but are rejected. Can this be challenged or reviewed? Does this mean the person should not be carried by air at all? And how often should such checks be revalidated? The issue of smart cards should not be permitted solely on the production of documents because of the relative ease with which birth certificates and other identity documents can be acquired in many countries.

#### *Risk Profiling*

Alongside the voluntary schemes there needs to be a means of assessing or identifying the risk posed by other travellers. Risk profiling is already used under a number of guises whether it be for the issue of visas or other forms of travel authority or for managing immigration checks and controls on certain flights from certain destinations. If it is to be used in respect of individuals it needs to be more sophisticated, yet at the same time be recognised that it has limitations. Profiling would not have identified the majority of those involved in the September 11 attacks. There are also the same difficulties of what to do when an individual is rejected. When a government employs such methodology for visas etc., the decision is open to challenge. If airlines undertake activities which include rejection they are more likely to be at risk from litigation. This would be another factor pointing to government being responsible for decision making. The USA is developing a data sharing system which

has a points based system for scoring risk which may be applied to air travel. Under the Aviation and Transport Security Act the new terrorist and security agency (TSA) requires advance passenger information to be provided to US authorities, and carriers are required to use information they have on passengers as part of boarding checks.

One lesson learned from the events of September 11 is that the focus of risk profiling should be on intention. Traditionally, the emphasis has been on physical screening to eliminate “means”. But as was shown on September 11, intention was sufficient given the involvement of a number of people acting in concert on each plane. Bringing weapons on board was not required. The strengthening of cockpit doors will assist in the elimination of opportunity.

### *Information Sharing*

Without effective data sharing systems, information collected by specific carriers or individual governments will be of limited effect in what is inherently a global issue. Privacy and civil rights issues will still need to be safeguarded but arrangements must be made for information to be shared within the usually permitted exceptions for matters relating to law enforcement and security. It will still be possible to maintain the regulation of these activities under, for example, a data protection regulatory authority. Issues of compatibility of systems and format will need to be addressed before too many non-compatible systems proliferate. A role for IATA in managing this would seem appropriate. Acceptable interfaces will have to be found between legislation which points in different directions such as the US Freedom of Information Act, the EU Privacy Directive and the ECHR.

## ANNEX II

### SUMMARY OF RESPONSES TO THE EVENTS OF 11 SEPTEMBER

<b>Austria</b>	<ul style="list-style-type: none"><li>• Schengen border and visa controls have been strengthened. The existing list of 21 visa-required countries has increased to 26.</li><li>• The number of countries for whom automatic referral back to Austria is required before issuance of a visa is also being increased. Discussions on visa issuing standards under Schengen are underway.</li><li>• Security and intelligence sharing partnerships with Candidate countries are being sought.</li></ul>
<b>Belgium</b>	<ul style="list-style-type: none"><li>• Measures to increase the amount of information collected about refugees to enable better questioning are being put in place and a more robust use of the exclusion clause of the Convention is expected.</li></ul>
<b>Canada</b>	<ul style="list-style-type: none"><li>• Approximately 49 million CAD is being earmarked to strengthen certain areas of immigration and citizenship.</li><li>• A new Residence Card will be introduced for new immigrants. This will have security features and replace the paper document currently in use.</li><li>• The use of detention for new arrivals will increase where compliance with entry conditions is thought to be in doubt.</li><li>• A new emphasis is to be placed on pre-entry screening procedures with in-depth interviews and risk profiling.</li><li>• There will be a great deal of work with the US on border issues to maintain the present status quo including joint border intelligence and joint training.</li></ul>
<b>Denmark</b>	<ul style="list-style-type: none"><li>• Tougher regime for asylum seekers and biometrics being considered.</li></ul>
<b>Finland</b>	<ul style="list-style-type: none"><li>• Increasing the number of countries where referral to the police takes place before issuance of a visa.</li></ul>

<b>Germany</b>	<ul style="list-style-type: none"> <li>• Three billion DM budget against terrorism has been announced and the Border Guard will receive a share. The focus of measures will be on prevention of entry, and the passport format is being reviewed with a view to enhanced security features.</li> <li>• Biometric data will be collected from visa applicants falling into certain categories. Those who are suspected of terrorist activities will be refused.</li> <li>• Provision is being made for the selective fingerprinting of visitors on arrival.</li> <li>• Central photo database of passport photos will be established to combat identification substitution.</li> <li>• Greater application of the Convention exclusion clause will be made.</li> <li>• Measures are being taken to reduce restrictions on exchanging data, particularly in the exchange between carriers and authorities on passenger bookings and disclosure of information rules.</li> <li>• The current exemption of religious groups from the restrictions imposed by the law of association is being removed.</li> <li>• Changes in the banking laws to permit greater disclosure of information in cases involving suspected terrorists.</li> <li>• Biometric features to be incorporated into passports, visas and other ID.</li> <li>• Legal basis to be established for language analysis to be recognized as a nationality determiner.</li> </ul>
<b>Italy</b>	<ul style="list-style-type: none"> <li>• Recent events will have an impact on the current draft Bill, but it is too early to do more than speculate what these amendments might be.</li> <li>• The use of biometrics in identification seems likely.</li> </ul>
<b>Netherlands</b>	<ul style="list-style-type: none"> <li>• Anti people-trafficking units are being established.</li> <li>• The circumstances under which the police may demand identification from people within the territory will be increased.</li> <li>• Airline gate checks will be intensified and visa controls enhanced by means of fingerprinting.</li> <li>• Increase in funding for biometry.</li> <li>• Examining role of other biometrics for ID in passport.</li> </ul>
<b>Spain</b>	<ul style="list-style-type: none"> <li>• New legislation has been drafted to tackle smuggling and trafficking with \$10,000 fine plus 10 years imprisonment for traffickers</li> <li>• Tougher laws on illegal employment with increased penalties for employers.</li> </ul>
<b>Switzerland</b>	<ul style="list-style-type: none"> <li>• New laws on carriers sanctions.</li> <li>• Provision to tackle bogus marriages.</li> <li>• Increased smuggling penalties.</li> <li>• API agreements with carriers.</li> <li>• Biometric application.</li> <li>• New permanent residence card.</li> <li>• Data exchange provision between agencies.</li> </ul>
<b>Sweden</b>	<ul style="list-style-type: none"> <li>• Migration Board and the appellate authorities will more regularly look into and test the possibility of asylum seekers being terrorists.</li> <li>• Migration Board will work more closely with the police and intelligence services on cases to make better-informed decisions.</li> </ul>

<b>UK</b>	<p>A complete overhaul of Immigration and Asylum Legislation will take place with new legislation in 2002 seeking to redress some of the deficiencies revealed in implementing the 1999 legislation.</p> <p>They include;</p> <ul style="list-style-type: none"> <li>• Measures relating to the reception, induction, detention and removal of failed asylum seekers.</li> <li>• Changes to the offences and penalties relating to smuggling and trafficking.</li> <li>• Compliance with security measures such as biometric tests and exclusion from the asylum system of suspected terrorists.</li> <li>• The issue of smart cards to applicants to help identification and tracking.</li> <li>• Greater use of the exclusion provisions of the Convention is also likely to emerge. This will be in addition to the emergency legislation currently being processed.</li> <li>• New provision for the exchange of information between government departments and government and the private sector, including bulk data exchanges, to more easily screen for risk-profiled passengers.</li> </ul>
<b>USA</b>	<p>The USA has now published comprehensive proposals tackling internal and external measures against terrorism.</p> <ul style="list-style-type: none"> <li>• Funding is being sought to triple current staffing of the northern border.</li> <li>• Inadmissibility provisions on grounds of suspected terrorist activity are to be introduced.</li> <li>• Measures relating to easier data exchange are proposed, including the exchange of information between governments.</li> <li>• Mandatory detention for those certified to be a threat to national security.</li> <li>• Greater use of technology and improvements of such things as machine readable passports will be examined, as will procedures for the better screening of the entry of immigrants and other individuals applying for visas for entry to the US, particularly students and those entering under the US Refugee Programme.</li> <li>• Increased funding for more INS personnel at borders and overseas</li> <li>• Joint exercises with Canada (see above).</li> </ul>
<b>Central America</b>	<p>Central American governments are reacting at the regional level. Issues are being discussed in such fora as the Legal, Defence and Security Sub-Committee of the Central American Commission of Security and the Pueblo Process.</p>
<b>IATA</b>	<p>Special conference in Arizona to discuss legal and some security issues in February 2002. Working group, CAWG and airlines will focus on airline and airport security and the use of booking and ticketing information in the context of risk profiling.</p>
<b>European Commission</b>	<p>Harmonising judicial co-operation, border control and expanding the field of exchange of information (a new working group is being set up to focus on exchanges relating to combating terrorism.)</p>
<b>IGC</b>	<p>A workshop in October 2001 focused on immigration control measures designed to reduce terrorist risks. It provided information on who is doing what, and will no doubt lead to further discussion at the full round at end June 2002 in UK.</p>

Source: MMS/ IOM December 2001.

## ANNEX III

### CARRIERS SANCTIONS

		France	Germany	UK
Legal basis		Art.20 bis, (1993) Ordonnance 1945	Art. 73-74, Alien Act (1987)	Carrier's Liability Act 1987 as amended
Enforcing body		Ministry of Interior	Ministry of Interior	Home Office
F i n e s & c o s t s	Administrative fine per person	Max. FF 10,000 (1,500 EUR).	Max. 5000 DM (2,500 EUR). Max. 20000 DM(10,200 EUR) for negligence.	UK £2,000 (3,200 EUR).
	Carrier pays deportation cost? Other costs?	Yes. No.	Yes. No.	Yes. Yes.
Asylum Seekers		Does not apply to asylum seekers who are later recognized, or whose claim is found not unfounded.	Carriers are liable for three years following passenger's arrival (liability removed when a person receives permission to stay).	When asylum seekers acquire refugee status, the sanction is removed.

		Canada	Australia	US
Legal basis		Art. 85, Immigration Act 1976-77	Art.229, Migration Act 1958	Sec 273, Immigration and Nationality Act
Enforcing body		Citizenship and Immigration	Department of Immigration and Multicultural Australia	Immigration and Naturalisation Service
F i n e s	Administrative fine per person	Max. 6,000 CAD	Max. 5,000 AUD	1,000 USD to 3,000 USD
	Carrier pays deportation cost? Other costs?	Yes (Included in fee) Yes (removal and medical costs).	N/A	Yes.
Asylum Seekers			Does not apply to those who receive refugee or humanitarian status.	Does not apply to those who receive refugee or humanitarian status.

ECRE, Carriers' Liability, Country Up-date on the Application of Carriers' Liability in European States (London, 1999).

## ANNEX IV

### SMUGGLING AND TRAFFICKING

<b>Europe</b>	<p>In September 2001 the JHA Council reached political agreement on a Framework Decision on combating trafficking in human beings. The Framework Decision provides in particular a common definition of trafficking<sup>1</sup> and a common level of penalties set at a level of not less than eight years' imprisonment if the offence has been committed in specifically defined circumstances. European Justice Ministers planned to sign an agreement on February 28, 2002.</p> <p>In the recent Communication on A Common Policy Against Illegal Immigration,<sup>2</sup> the Commission highlighted a number of future enforcement initiatives. These include an advanced role for Europol, further work in the area of trafficking and smuggling, the promotion of trilateral talks between Member States, the transport industry and the Commission to achieve greater harmonisation of carrier sanctions. In addition, the Commission will also present a legislative proposal on short-term residence permits for victims of trafficking who are prepared to co-operate in investigations and criminal procedures against their exploiters.</p>
<b>Australia</b>	<p>Under the Migration Act, a person who organises or facilitates the coming or entry to Australia of five or more non-citizens who do not have a visa, is guilty of an offence punishable by imprisonment for twenty years and/or a fine of 2000 penalty units.<sup>3</sup> Boats used to smuggle illegal entrants can be seized, sold or destroyed. It is also an offence under the Migration Act to harbour illegal entrants. Under the <i>Border Protection Act 2001</i> vessels in international waters can be boarded and searched if suspected of being involved in people smuggling. There is no legislation in Australia dealing with trafficking.</p>
<b>Canada</b>	<p>Currently the penalties for smuggling migrants range from fines of \$10,000 (7,100 EUR) to \$500,000 (356,700 EUR) and/or imprisonment of up to 10 years. Bill C-11 includes many provisions to increase deterrence for serious immigration offences including:</p> <ul style="list-style-type: none"> <li>• Maximum penalties for smuggling offences increased for persons involved in smuggling less than 10 persons increased from 5 to 10 years imprisonment, \$500,000 (356,700 EUR) instead of \$100,000 (71,300 EUR) fine. Subsequent convictions would be punishable by up to 14 years in prison and a \$1 million fine.</li> <li>• Maximum penalties for the smuggling of 10 or more persons to be raised from 10 years to life in prison and from a \$500,000 (356,700 EUR) fine to \$1 million (713,400 EUR).</li> <li>• New offence of trafficking in persons, including penalties of up to life in prison and/or a fine of up to \$1 million (713,400 EUR).</li> </ul>

<sup>1</sup> These definitions make it clear that smuggling is connected with the support of an illegal border crossing and illegal entry. Smuggling, therefore, always has a transnational element. This is not necessarily the case with trafficking, where the key element is the exploitative purpose. Trafficking involves the intent to exploit a person, in principal independent from the question as to how the victim comes to the location where the exploitation takes place. This can involve legal as well as illegal entry into the country of destination.

<sup>2</sup> COM (2001)672 final.

<sup>3</sup> One penalty unit equals AUS\$110.

<p><b>Canada</b>—<i>contd.</i></p>	<ul style="list-style-type: none"> <li>• New list of aggravating factors for courts to take into account when sentencing people traffickers and smugglers. The current Act does not have any such provisions.</li> <li>• Increased sentences for other offences. Bill C-11 increases fines for general offences such as failure to comply with a term or condition imposed under the Act, escaping lawful custody or detention, and employing persons not authorised to work (on indictment from \$5000 (3,560 EUR) to a maximum of \$50,000 (35,600 EUR); on summary conviction from \$1000 (710 EUR) to a maximum of \$10,000 (7,100 EUR).</li> </ul>
<p><b>Belgium</b></p>	<p>Article 77bis of the Aliens Law 1980 makes it an offence to <i>contribute in any manner, directly or through an intermediary to facilitate entry or stay and employ, directly or indirectly, deception, violence, threats or any form of constraint towards a foreigner; or abuse a particularly vulnerable situation in which a foreigner finds him/herself due to his/her illegal administrative or precarious situation, pregnancy, sickness, disability, physical or mental deficiency.</i> Breach of this section may result in up to 5 years imprisonment and a fine of between five hundred and twenty-five thousand francs.</p> <p>An inter-departmental group set up to co-ordinate the fight against international trafficking in human beings brings together representatives from various ministries; the College of Public Prosecutors and Magistrates; the Police; and the government office dealing with foreigners.</p> <p>The Center for Equal Opportunities and Opposition to Racism was established in 1995. It has responsibility for promoting, co-ordinating, and monitoring the political struggle against international trafficking. The Centre is responsible for co-ordinating three shelters providing a protection and assistance programme for the victims of trafficking. A temporary residence permit is granted by the Belgian authorities to the victim providing that the victim co-operates in legal proceedings against the alleged trafficker/exploiter. When the victim's statement or complaint is considered serious enough in the case against the trafficker/exploiter, the victim may apply for a permanent residence permit.<sup>4</sup></p>
<p><b>Germany</b></p>	<p>The notion of 'trafficking in human beings for the purpose of sexual exploitation' is defined in Germany's criminal code.<sup>5</sup> Article 180b, which addresses the issue of trafficking in human beings, sanctions the inducing or forcing of a person into prostituting him/herself by taking advantage of vulnerabilities or difficulties caused by his/her presence in a foreign country.</p> <p>Article 181 defines serious trafficking as the inducing or forcing of an individual to prostitute him/herself; and as the engaging of an individual for the purposes of prostitution either by taking advantage of the person's vulnerability or through the use of force, violence, or any other form of fraudulent behavior.<sup>6</sup></p> <p>In certain <i>Länder</i>, internal administrative texts allow victims four weeks to leave Germany. During this period, victims can decide either to make preparations for their departure or to lodge a complaint. The lodging of a complaint results</p>

<sup>4</sup> No text has yet dealt with what should happen if the defendant is finally acquitted. Cases are examined on an individual basis, taking into account humanitarian concerns and the possibility of reintegration.

<sup>5</sup> The definition the law gives of this practice is limited to the exploitation of another person's prostitution and does not take into account any form of economic exploitation.

<sup>6</sup> Other articles of the criminal code condemn situations inherent in trafficking conducted for the purpose of sexual exploitation, such as the exploitation of prostitution (article 180a), acting as a pimp (article 181a), abduction (article 177), sexual coercion (article 178), sexual abuse of a person incapable of self-defence (article 179), or the exploitation of child prostitution (article 180).

Germany— <i>contd.</i>	in the “postponement of deportation in the general public interest” for the course of legal proceedings. <sup>7</sup> Such a deferment depends upon the usefulness of the victim as a witness in the legal enquiry. Once a judgement has been made, victims must leave Germany. Article 54 of the law concerning the residence of foreigners provides for the granting of a permanent residence permit if it is judged that the victim/witness would risk his/her life by returning home. This type of permit is only granted in exceptional circumstances.
UK	Trafficking is currently caught under the offence of “facilitation.” <sup>8</sup> There is no specific reference to the exploitative element which is a key element of trafficking, and the offence is framed as “knowingly to facilitate the entry of illegal entrants, to facilitate for gain the entry of asylum claimants and knowingly to facilitate the obtaining of leave to remain by deception”. The offence does not apply to the actions of those who are employed by any bona fide organisations whose purposes include providing assistance to persons in the position of asylum claimant. The 1999 Act increased the penalty for facilitation to a maximum of 10 years imprisonment. <sup>9</sup>
US	<p>Law enforcement strategies have been a mixture of disruption and deterrence. They include: making human smuggling an explicit crime, increasing legal penalties for alien smuggling, improving intelligence, breaking up smuggling rings, increasing arrests and prosecutions of smugglers, disrupting traditional routes and safe houses, and improving co-operation both with state and local law enforcement officials and foreign law enforcement officials. The 1994 Violent Crime Control and Law Enforcement Act provides that persons who knowingly bring illegal aliens into the U.S. are subject to possible imprisonment of 10 years (and/or fines) per alien. The maximum penalty was increased to 20 years per alien when bodily injury occurs or life is placed in jeopardy in connection with the smuggling offence. Should death result from the smuggling offence, life imprisonment or the death penalty may be imposed.</p> <p>New federal prosecution guidelines increased smuggling prosecutions. The guidelines indicate prosecution when a defendant has endangered others, has a substantial prior criminal record, has smuggled 12 or more aliens at one time, is a smuggling leader organiser, has smuggled an aggravated felon, or was on federal supervised release or probation for any federal offence at the time of arrest for alien smuggling.<sup>10</sup> In addition, the U.S. Attorney offices began prosecuting smugglers on felony illegal re-entry charges when they could not meet the heavier burden of proving the smuggling charge itself.</p> <p>Significant levels of inter-agency and inter-country co-operation is needed to combat smuggling. Since 1990 an interagency Border Security Working Group focuses upon smuggling by sea and air. Also the INS has deployed staff in overseas locations (Operation Global Reach). The Justice Department also has a taskforce on human smuggling that aims to ensure co-ordination among the various federal law enforcement agencies involved in efforts to deter, apprehend and prosecute smuggling operations.</p>

<sup>7</sup> When a victim files a complaint and when the police judge that the victim is actually in danger, s/he may choose to take advantage of a protection programme. In Germany, victim assistance and protection is provided by social centres.

<sup>8</sup> S.25 Immigration Act 1971.

<sup>9</sup> The 1999 Act also includes a provision to deal with the growing problem of sham marriages where a marriage is entered into for the purpose of avoiding immigration controls. Section 24 of the 1999 Act places a duty on a Registrar of Marriages to report any suspicions he may have about the purpose of a marriage as quickly as possible.

<sup>10</sup> Endangerment to others is defined to include: transporting aliens in the trunk of a car by a defendant who was previously convicted of alien smuggling, concealing aliens in a specially built compartment, and guiding aliens on foot on a highway.

## ANNEX V

### TYPES OF RESIDENCE PERMITS IN EUROPE

	Types of permits		
<b>Austria</b>	<ol style="list-style-type: none"> <li>1. Temporary residence permit (always tied to a specific purpose)</li> <li>2. Permanent residence permit (may or may not be tied to a specific purpose).</li> </ol>	<ol style="list-style-type: none"> <li>1. Time limited, period of time differs according to the type of work</li> <li>2. First 1 year, possible to prolong it twice for two years. Then an unlimited permit may be granted. For the first years a definite purpose is compulsory</li> </ol>	<ol style="list-style-type: none"> <li>1. No quotas.</li> <li>2. Quota restricted. Valid passport; police registration paper; proof of legal claim to housing; proof of full coverage health insurance; proof of secure financial means. If a person wants to change the status, the quota requirements and the other conditions in the law have to be met.</li> </ol>
<b>Belgium</b>	<ol style="list-style-type: none"> <li>1. Long term residence permit</li> <li>2. Permanent residence permit</li> </ol>	<ol style="list-style-type: none"> <li>1. Unlimited but needs to be extended every year</li> <li>2. Unlimited. Not subject to extension every year.</li> </ol>	Good life and behaviour certificate, Registration.
<b>Denmark</b>	Residence Permit	Usually 1 year. In the case of 3 years or more, permanent right to reside in Denmark is possible.	Change of employer requires new application
<b>Finland</b>	<ol style="list-style-type: none"> <li>1. Fixed term</li> <li>2. Permanent (divided in sub-classes A, B and D)</li> </ol>	<ol style="list-style-type: none"> <li>1. Mostly 1 year</li> <li>2. Can be permanent after 2 years</li> </ol>	<p>Work permit granted together with residence permit.</p> <p>Different criteria depending on permits (A or B).</p>
<b>France</b>	<p>Combined residence and work permit</p> <ol style="list-style-type: none"> <li>1. Temporary card</li> <li>2. Permanent card</li> </ol>	<ol style="list-style-type: none"> <li>1. 1-year card limited to a region and a specific job</li> <li>2. 10-year card valid all over France and for all kinds of jobs.</li> </ol>	<p>The applicant must hold a visa of more than 3 months and an authorisation to work.</p> <p>Eligibility criteria depend on the country of origin.</p>
<b>Germany</b>	<ol style="list-style-type: none"> <li>1. Residence permit</li> <li>2. Residence title for specific purposes</li> <li>3. Right of unlimited residence</li> <li>4. Residence title for exceptional circumstances</li> </ol>	<ol style="list-style-type: none"> <li>1. Usually limited, after 5 years unlimited</li> <li>2. Limited to 2 years, possible to prolong for the same purpose only</li> <li>3. Unlimited</li> <li>4. Differs from case to case</li> </ol>	Valid passport or visa, registration with competent authorities, work permit, receipt of income, continuous work, proof of sufficient living space, health insurance, no grounds for expulsion basic knowledge of German (for 1. And 3.). The right to unlimited residence is only granted after the applicant holds a residence permit for 8 years. No. 4 is granted for humanitarian reasons.

	Types of permits		
<b>Greece</b>	<ol style="list-style-type: none"> <li>1. Residence permit</li> <li>2. Permanent residence permit</li> </ol>	<ol style="list-style-type: none"> <li>1. Annual duration (possible to renew for a total of 5 years)</li> <li>2. Unlimited duration</li> </ol>	<ol style="list-style-type: none"> <li>1. Completed applications for work- and residence permits, employer statement, travel documents, medical statement, social insurance.</li> <li>2. 5 years of living/working in Greece, adaptability of the individual, taxation, social security conditions, knowledge of the Greek language etc.</li> </ol>
<b>Italy</b>	<ol style="list-style-type: none"> <li>1. Permit of Stay</li> <li>2. Residence permit (often equal to permanent stay)</li> </ol>	<ol style="list-style-type: none"> <li>1. Time depending on reasons</li> <li>2. Long term permit</li> </ol>	<ol style="list-style-type: none"> <li>1. No specific information available in the text.</li> <li>2. May be obtained after 5 years in the country, sufficient income needed, no criminal record.</li> </ol>
<b>Luxembourg</b>	Authorisation of Residence.	Twelve months	Valid passport and/or visa, sufficient means of travel, application for a Foreigner Identity Card (valid up to 5 years).
<b>Netherlands</b>	<ol style="list-style-type: none"> <li>1. Residence permit</li> <li>2. Permanent residence permit</li> </ol>	<ol style="list-style-type: none"> <li>1. Maximum 1 year (extended as long as the work permit is valid)</li> <li>2. Unlimited</li> </ol>	<ol style="list-style-type: none"> <li>1 and 2: Authorisation for temporary stay for purposes of paid employment, sufficient means of support, decent housing, no risk to the state.</li> <li>2. After 5 years as residence permit holder.</li> </ol>
<b>Portugal</b>	<ol style="list-style-type: none"> <li>1. Residence Permit</li> <li>2. Permit to remain</li> </ol>	<ol style="list-style-type: none"> <li>1. Either permanent or temporary</li> <li>2. Initially maximum 2 years but can be extended</li> </ol>	<ol style="list-style-type: none"> <li>1. Work permit not needed, contract of employment.</li> <li>2. Work permit needed.</li> </ol>
<b>Spain</b>	<p>Types of relevant residence permits:</p> <ol style="list-style-type: none"> <li>1. Initial</li> <li>2. Regular</li> <li>3. Permanent</li> <li>4. Exceptional</li> <li>5. Title for family reunion</li> </ol>	<ol style="list-style-type: none"> <li>1. Up to 2 years</li> <li>2. Up to 3 years</li> <li>3. Unlimited or 5 years</li> <li>4. Up to one year, possible to extend</li> </ol>	<p>Work permit needed at the same time.</p> <p>No specific eligibility criteria mentioned. After 6 years living in Spain, the permit might become unlimited.</p>
<b>Sweden</b>	<ol style="list-style-type: none"> <li>1. Temporary residence permit</li> <li>2. Permanent residence permit</li> </ol>	<ol style="list-style-type: none"> <li>1. Maximum duration 18 months</li> <li>2. Unlimited</li> </ol>	Work permit and/or offer of employment. The persons ability to lead a “respectable life” in Sweden.
<b>United Kingdom</b>	Residence permit	The time of the work Permit	Work permit required, age within limits of employment, capable, accommodation arranged.

ECOTEC, Admission of Third Country Nationals for Paid Employment or Self-Employed Activity, (2001) p.10-11.

## ANNEX VI

### THE RIGHTS ACCORDED TO THOSE ENTERING UNDER FAMILY REUNIFICATION PROCEDURE

	Authorization of stay granted		Access to the labour market	Social Security	Protection against expulsion	Reexamination of family reunification in the case of:	
	Permanent	Temporary				Death of the sponsor	Divorce
<b>Australia</b>	After 2 years of stay	2 year visa (quota) 9 months visa (quota) for fiancé(e)	X	Usually after 2 years			
<b>Belgium</b>		1 year	X	X	X		X If it occurs within 1 year
<b>Bulgaria</b>		5 years	X				X If it occurs within 5 year
<b>Canada</b>	Permanent visa (Canadian citizenship may be obtained after 3 years of residence)		X	X (same rights as other categories of permanent residents)	X (same rights as other categories of permanent residents)		
<b>Czech Rep.</b>		5 years	X				
<b>Finland</b>	If the sponsor has this status	1 year	X				X If within 2 years
<b>France</b>	10-year permit if the sponsor has this status	1 year if the sponsor holds this kind of permit	X	X	X	Cases are treated on their merits	X If within 1 year
<b>Germany</b>		1 year (3 year for the family members of a national)	Only year to obtain <i>Befugnis</i> ; 4 years to obtain <i>Aufenthalts-erlaubernis</i> ; 6 years to have unrestricted access to the labour market	X	X		X If within 4 years
<b>Italy</b>	If the sponsor has this status	If the sponsor holds this kind of permit	X Except for parents	X			
<b>Netherlands</b>		1 year	X			X	X If within 3 years

	Authorization of stay granted		Access to the labour market	Social Security	Protection against expulsion	Reexamination of family reunification in the case of:	
	Permanent	Temporary				Death of the sponsor	Divorce
<b>Slovak Rep.</b>		1 year	X			Death is treated in the same way as divorce	X
<b>Spain</b>	Information not available.	Information not available.	X				X
<b>Switzerland</b>		2 year (permanent permit) or 1 year if the applicant holds a temporary residence permit	X			Death is treated in the same way as divorce	X
<b>United States</b>	Information not available.	Information not available.	Depends on the kind of visa	Partial	X		

SOPEMI 2000 at p. 122

"X" indicates that the rights are accorded

## ANNEX VII

### POINTS SYSTEM

#### *Advantages*

##### *Transparency*

- Allows the migrant to conduct self-assessment of his/her own chances of being able to migrate.
- Enables policy makers and voters to better understand how immigrants are being selected.
- Helps to ensure that the system is implemented in a consistent fashion for all applicants.

##### *Efficiency*

- Promotes “self-selection” thereby preventing case overloads.
- Efficient means of assessing skills from which the host country will benefit over the long-term.

##### *Economic benefits*

- Selects migrants who have a mix of skills. The test awards points to an applicant in areas such as work experience, education, and language ability-measurable qualities that may help predict long-term success in the labour market.
- The cost of skills acquisition is mostly borne overseas, rather than by the selecting Government.

##### *Other benefits*

- A country may add elements designed to meet its specific needs. For instance, if a country wants to populate a certain geographical area with skilled workers, the host country could give extra points to migrants willing to settle in designated areas.
- A point system enhances the “offer” made by the host country to the potential migrant.
- Under a “pooling” system, applicants who did not reach the pass mark are kept in anticipation of an official reduction of the qualifying score.
- Better labour market outcomes for skilled immigrants relative to unskilled immigrants have been proven.
- Skills transfer to residents.
- In the Australian context, the decisions are more likely to stay out of Court, since they are mathematically derived (and based) in law.

## *Disadvantages*

### *Unclear long term economic benefits*

- Skilled migration may discourage local provision of training.
- Potential for over-supply of skills on the market.
- Evidence suggests that historically the difference in earnings between family-based migrants and migrants selected for their skills disappears after 10-20 years
- A points test cannot discern gradations of skill within a profession (other than work experience), an employer can. For example, two journalists might be assessed similarly on a points test if their training and levels of experience are comparable, but one journalist may nevertheless be a better writer than the other. A computer programmer who knows several programming languages would look the same on a points test as a programmer who is adept in only one.
- Limited predictability of successful applicants. A person's potential for economic contribution, is governed by less tangible factors such as imagination, creativity, adaptability, motivation and resourcefulness. A points test is limited in its ability to predict a migrant's potential economic contribution to the host country.
- Measurable characteristics have a determinative effect on the employment rates of migrants, however, those with characteristics that are positively correlated with economic success fare better whether they are admitted through a point system, for humanitarian or family reasons, or by some other method.

### *Problem with validation of skills or qualifications*

- Applicants' claimed qualifications must be validated. In order to facilitate this task, DIMIA for example has been trialing a pre-application skills assessment scheme (PASA) which allows prospective applicants to seek a skills assessment before deciding whether to lodge a migration application.
- There may be a problem of skills recognition or under-utilisation of skills obtained overseas.
- Entry of unskilled or semi-skilled accompanying persons.

### *Political difficulty in starting such a program*

- In the US, employers prefer the current relaxed and speedy system for issuing work permit (H-1B) for highly qualified foreign workers and are reluctant to support a points system that involves "uncertainty".

## ANNEX VIII

### INITIATIVES TO ATTRACT THE HIGHLY SKILLED IN TRADITIONAL MIGRATION COUNTRIES

<b>Australia</b>	<p>In the Information Communication and Technology Sector, certain initiatives have been taken to boost the numbers of ICT professionals from overseas: ICT professionals are priority processed (fast-tracked); overseas students qualifying in Australia as ICT professionals are permitted to apply for visas to remain in Australia; as key activity occupations, ICT positions do not have to be labour market tested; and by allowing contingency reserves in the migration program to be taken up by ICT professionals.</p>
<b>Canada</b>	<p>Canada has recently undertaken two pilot programs to encourage and expedite the admission of skilled foreign temporary workers:</p> <ol style="list-style-type: none"> <li>1. Pilot Project for Software Professionals Under the pilot project, the job-specific validation was replaced by a national validation letter which states that certain software positions cannot be filled by Canadian citizens or permanent residents. This removed the delay associated with the job-specific validation process.<sup>11</sup></li> <li>2. Spousal Employment Authorisation Pilot Project. Allows husbands and wives of key professional foreign workers to take advantage of a “facilitated validation process”, which amounts to automatic employment authorisation provided the principal worker fulfils certain criteria.<sup>12</sup></li> </ol> <p>C-11 will bring changes to the Temporary Worker program. The access of Canadian employers to the global skilled temporary labour force will be improved through faster approvals, in exchange for employer commitments to hire and train Canadian workers. Expanded provisions to allow the spouses of temporary foreign workers to apply for work authorisations will improve Canada’s competitive edge in the global competition for skilled workers.</p> <p>A new in-Canada landing class for certain temporary workers will be created, including recent graduates from Canadian schools who have Canadian work experience and meet the selection criteria as skilled workers. The aim is to better address the needs of people who arrive to fill a specific temporary shortage but ultimately prove that they can fill a permanent need.<sup>13</sup></p>

<sup>11</sup> Job categories open to a process of expedited admission include: Telecommunications, Software Services, Management Information Systems, Embedded Software, Software Products, Animation and Multimedia Applications. Software professionals require only a job offer and employment contract.

<sup>12</sup> In order for a spouse to qualify, the established worker must be employed in a highly skilled occupation category in the National Occupational Classification System (known as the “Management Occupational Level” or Skill “Level A”) and must hold an employment authorisation valid for at least six months. The principal worker must possess a university degree or higher and the spouse must possess a prior offer of employment from a Canadian enterprise.

<sup>13</sup> These measures will be set in regulations, as is currently the case with selection criteria for skilled workers and rules for the admission of business immigrants and temporary workers.

NZ	<p>On 1 December 2001, the NZ government announced the introduction of a Talent Visa and Skills Shortage Visa aimed at making New Zealand more competitive globally and to make it easier for New Zealand employers to attract highly skilled and talented people from overseas to help boost New Zealand's economic development.</p> <p><i>Talented Visa</i> is proposed for highly skilled and talented people, particularly in the innovation and enterprise sectors. The application is submitted to by an accredited employer. A permanent visa is accessible after two year temporary visa.</p> <p><i>Skill Shortage Visa</i> will allow employers to fill specific vacancies by hiring people from abroad. The occupation has to be listed on the Labour Market Skill Shortage List, but employers will no longer go through the standard labour market test to prove that no NZ worker is available. The visa will normally be valid for two years with the possibility of permanent residence thereafter.</p>
----	--

## ANNEX IX

### TYPES OF WORK PERMITS

	Types of permits	Duration	Eligibility criteria
<b>Austria</b>	<p>1. Restricted work permit</p> <p>2. General work permit</p> <p>3. Employment authorisation</p>	<p>1. Varies according to the type of work</p> <p>2. Maximum 2 years</p> <p>3. 5 years, renewable</p>	<p>1. Quota restricted. May be granted if the situation on the labour market allows. Required are: residence permit allowing employment, no past cases of illegal employment, registered for social security, etc. Tied to specific job, employer has to apply.</p> <p>2. No quotas, legal right. Granted after one year of legal work. Can be used throughout the country</p> <p>3. Equal rights to Austrians after 5 years of work</p>
<b>Belgium</b>	<p>1. Type A permits</p> <p>2. Type B permits</p>	<p>1. Unlimited duration</p> <p>2. 1 year</p>	<p>Applicant must be in principle a national of a country with which Belgium has a bilateral agreement. Type A: 5 years of legally living in Belgium.</p> <p>Type B: Demand exists on job market, medical certificate, work aptitude examination, employer has to apply. Change of employer after one year.</p>
<b>Denmark</b>	Work Permit	Normally 1 year (possible to extend) After 3 years, permanent right to reside in Denmark is possible.	Contract, exceptional qualifications
<b>Finland</b>	Temporary and permanent work permit, divided into status A and B.	Issued for minimum of 1 year. Generally renewable, also the B3 status for temporary work.	Health record, professional skills, etc. The first permit is tied to a specific employer.

	Types of permits	Duration	Eligibility criteria
<b>France</b>	Combines residence and work permit 1. Temporary card 2. Long term card	1. 1-year card limited to a region and a specific job. 2. 10-year card valid all over France and for all jobs.	Depending on the country of origin.
<b>Germany</b>	1. Work permit  2. Work permission	1. Limited to maximum 3 years  2. Unlimited	1. Residence authorisation may be tied to a specific purpose. Geographically limited 2. Residence authorisation, social insurance, etc. 5 years of work in Germany or 6 years of legal residence in Germany
<b>Greece</b>	1. Work permit  2. Permanent work permit	1. Annual duration (possible to renew for a total of 5 years) 2. Unlimited duration	Employer statement, visa, medical certificate, social insurance.
<b>Italy</b>	Work Permit	No longer than 2 years. Renewal possible	Free space in the quota, contract, accommodation
<b>Luxembourg</b>	1. Work Permit A 2. Work Permit B  3. Work Permit C  4. Work Permit D	1. 1 Year 2. 4 Years  3. Unlimited  4. Duration of the apprenticeship or training	1. No specific rules attached. 2. Having lived and worked 1 full year in the country. 3. Being born and having lived for at least 2 full years in the country or having lived and worked for 5 years in the country.
<b>Netherlands</b>	1. Work Permit	Maximum 3 years for a permanent job, otherwise, 1 year	1. Residence permit or authorisation for temporary stay, need on the labour market. Employer has to apply. 2. No work permit needed after 3 years of a residence permit.

	Types of permits	Duration	Eligibility criteria
<b>Portugal</b>	Type I: for salaried activities in the field of sport. Type II: for salaried activities in the field of entertainment.  Type IV: for any other type of salaried activities	Type I and II: one year maximum  Type IV: initially up to two years, extensions possible	Seasonal work is tied to a specific employer, for other titles the employee may not change occupation.
<b>Spain</b>	1. Work permit "A" 2. Work permit "b"  3. Work permit "B renewed" 4. Work permit "C"  5. Permanent	1. Up to 9 months 2. Maximum 1 year  3. Two years 4. Three years  5. Unlimited	1. For seasonal workers. 2. Specific profession in specific region. 3. Granted for type "b" if it expired. 4. Granted for type "B" if expired. 5. Granted if type "C" has expired and depends also on qualifications. Employer has to apply.
<b>Sweden</b>	Work permit	Not more than 1 year at a Time. Permits are granted for a maximum of 18 months if the employment is to be taken up in consequence of a temporary labour shortage. No possibility to obtain a permanent work permit	Written offer of employment, guaranteed minimum salary, accommodation.
<b>United Kingdom</b>	Work Permit	Duration corresponds to the duration of the work. Normally between 3-4 years. Possibility to obtain a permanent work permit	Genuine vacancy, skills and qualifications. Employer has to apply.

ECOTEC, Admission of Third Country Nationals for Paid Employment or Self Employed Activity, (2001) p.16-18

## ANNEX X

### NEW EUROPEAN INITIATIVES TO ATTRACT WORKERS

<p><b>Europe</b></p>	<p>The draft Directive for the admission of third country nationals for the purpose of paid employment and self-employed economic activities proposes various options to fulfil the “economic needs test” so as to provide practical solutions for different labour shortages (Pratt, 2001). These include the possibility of “individual assessment”, “generalised assessment” (or green-card type programmes as in Germany), and special provisions to facilitate entry for executives and highly-skilled individuals.</p> <p>The “individual assessment” option is designed to provide a practical tool for employers who have not succeeded in filling a job vacancy within a given period. If employers have published a job vacancy via the employment services of several Member States for some weeks and if they have not received an acceptable application from within the EU labour market, they would be allowed to recruit from abroad. The possibility for a “generalised assessment” is offered to provide Member States with a flexible tool to react to worker shortage in a specific sector. “National ceilings” are provided for in order to meet the wish of those Member States which decide to use such measures as a regulatory instrument. The draft Directive does not, however, contain provisions about the numbers of persons to be admitted — there is no proposal for the setting of European quotas.</p>
<p><b>France</b></p>	<p>To attract highly skilled labour, the new immigration law (1998) created special status for scientists and scholars. In the same year, simplified procedures for highly skilled professionals such as IT specialists were introduced. Highly qualified persons earning more than 23000FF (3,500 EUR) per month (180000FF (27,500 EUR) per year for computer experts) can easily access a one-year permit with a right to family reunification. Foreign students were also given access to the French labour market.</p>
<p><b>Germany</b></p>	<p>In response to the high-tech boom in early 2000, the Government introduced a program to recruit foreign IT specialists to fill the gap in the labour market. The Government grants five-year green cards to up to 20,000 foreigners with computer skills who had either obtained a university degree in IT or were employed in Germany at a yearly salary of at least DM 100,000 (51,000 EUR).</p>
<p><b>Greece</b></p>	<p>In order to meet domestic labour demands, the Greek Government has signed bilateral agreements with Albania (1996) and Bulgaria (1997) for seasonal work, particularly in the agricultural sector. They allow migrants to take up employment for 2 to 6 months. The number of applications, however, remains small as employers can easily access undocumented workers.</p>

<p><b>Italy</b></p>	<p>The Italian Government controls its immigration by a Decree on the inflow of labour migrants (Decreto Flussi) issued every year which stipulates quotas for various immigrants. Although the quota varies according to the political situation, the general trend suggests a rapid increase. For example, the 1998 quota of 38,000, increased to 63,000 in the following year. In the 2001 Decree “privileged quotas” were given to migrants with preferred skills, such as nurses and IT specialists.</p> <p>Several bilateral agreements have been signed between Italy and major labour sending countries: Albania (1996), Tunisia (1998) and Morocco (1998) granting privileges over other country nationals. In 1999, a sponsorship program was introduced allowing residents, immigrants, and organisations to sponsor immigrants who require a work permit before they come to Italy. This is subject to a quota.</p>
<p><b>Spain</b></p>	<p>Spain’s labour migration is based on a quota system. Due to the high labour demand, the annual quota has been increased: between 1993 to 1999, the quota was set at 20,000, and in 1999, it was increased to 30,000. Work permit applications are conducted in a generous manner for nationals of Latin America and certain African countries.</p> <p>In September 1999 a Spain-Morocco Bilateral Agreement on Seasonal Workers was signed allowing approximately 300,000 Moroccan men per year to apply for entry visas tied to temporary work in the agriculture or construction sectors. Similar agreements are envisaged with Equador, Colombia, Romania, Poland and Mali.</p> <p>In regard to highly skilled migrants, the Spanish Ministerial Order 1996 provides that foreign specialists and scientists are exempt from work permit requirements (provided that they obtain a separate resident permit).</p>
<p><b>UK</b></p>	<p>The work permit system is currently undergoing review with a view to its expansion as part of a fundamental overhaul of the immigration and asylum system. In particular the system of work permits will be examined to see how it might provide for managed opportunities for economic migrants. This will assess opportunities for highly skilled and qualified people, students converting to employment and seasonal workers.</p> <p>In January 2002, the UK Government announced a new scheme Highly Skilled Migration Programme. This involves a point tests, taking account of prior earnings, work experience, education and qualifications of highly qualified foreign nationals. No ceiling is imposed.</p> <p>Other programs include the pilot Innovator category (July 2000) aimed at attracting creative entrepreneurs.</p>

## ANNEX XI

### SYSTEM OF REGULATING FOREIGN RESEARCHERS

<b>Europe</b>	A proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of study and vocational training is expected in the first half of 2002.
<b>UK</b>	There is no discrete provision within the Immigration Rules governing “research”. Applications for leave to enter the UK in order to carry out research are considered under the appropriate provisions of the work permit rules where a person is being employed, for example by a University, or under the appropriate entry clearance procedures where, e.g., the person is a self employed writer.
<b>Australia</b>	Visas for research, while not included under the specific nomenclature of research are covered by other temporary visa categories such as Educational visas and Visiting Academic visas. Educational Visas allow educational and research institutions or organisations to fill academic, teaching and research positions, unable to be filled from the Australian labour market. Visiting Academic Visas may be granted to academics whose presence in Australia is regarded as contributing to the sharing of research knowledge.
<b>Canada</b>	A foreign researcher in Canada must obtain a student authorisation or an employment authorisation, depending on whether the researcher will be remunerated.
<b>US</b>	Researchers can enter the US under a variety of visas. The J visa is for exchange scholars and researchers-the university or research institute has to be approved by the State Dept. prior to the issuance of the paperwork needed for a visa. The visa is valid for the duration of study/assignment. The H1-B can be used if the researcher has a Bachelor’s or higher degree and the employer pays a fee. However, there is an exemption from the fee and the ceiling on admissions for universities and research centers that sponsor H1-Bs. If the researcher is particularly well known and acclaimed, s/he can enter under the “O” visa. This is used when the person is not being sponsored by a US institution but has excellent credentials.

## ANNEX XII

### HOW OTHER JURISDICTIONS REGULATE THEIR FOREIGN EDUCATION INDUSTRIES AND WITH WHAT SUCCESS

<b>Europe</b>	<p>A proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of study and vocational training is expected in the first half of 2002.</p>
<b>Australia</b>	<p>Overseas students are required to identify their study intentions in advance and apply for the appropriate visa for their particular course or courses of study. Students have to be properly enrolled in a recognised education institute to do a recognised course of study. Switching from more difficult courses to easier courses is subject to fresh assessment of the student's genuineness because of the requirement to have a visa for the particular type of study to be undertaken.</p> <p>In order to obtain a student visa in any of the categories<sup>14</sup> students must satisfy English language proficiency levels and the financial requirements. Depending on certain risk profiles, prospective students will fall into one of four assessment levels which will determine what criteria the student has to be assessed against in any of the categories of visa.<sup>15</sup></p> <p>Australia permits students to work for 20 hours per week while their courses are in session and full time during periods of vacation. The spouses of students also have the right to work for 20 hours per week for the duration of their stay in Australia. Masters and Doctorate students have similar work rights but their spouses are permitted unlimited work rights for the duration of their stay in Australia.</p>
<b>Canada</b>	<p>All persons who want to study in Canada and who are not a Canadian citizen, a permanent resident of Canada or a dependant of a diplomat accredited to Canada need to obtain a student authorisation.<sup>16</sup> The student authorisation document identifies the level of study and length of time the individual may study in Canada. Whether or not a student can change schools depends on the terms and conditions attached to his or her Student Authorisation.</p> <p>In order to obtain a student authorisation the individual must: present an acceptance letter from the institution s/he plans to attend; present proof of sufficient funds to cover tuition and living costs; satisfy a visa officer that s/he plans to return home at the end of the studies and pass a medical examination if required. Spouses and dependent children may accompany the student to Canada provided they have met visitor requirements.</p>

<sup>14</sup> The seven categories cover Masters and Doctorate degree studies, Higher Education studies (bachelor degrees, graduate certificates or graduate diplomas), Vocational Education and Training (certificate level courses), School (Primary and Secondary schooling), English Language (for non formal vocational English language training). There are also separate visas for non-award/foundation courses and for AusAID and Defence sponsored students.

<sup>15</sup> The highest level of risk has appropriately high threshold criteria for language and financial ability. There may also be restrictions on where a student is able to obtain finance to pay for study in Australia. It is not acceptable for students in the highest assessment level categories to borrow money and become indentured to a loan shark, for example. Australia would view this as a precursor to the break down of such a student's ability to study properly in order to seek work to pay off the loan.

<sup>16</sup> If the proposed course is for less than three months duration, such as a language course, no authorisation is required.

<b>Canada—contd.</b>	Generally, foreign students are not allowed to work while studying in Canada. A spouse of a full-time student at a community college or university may apply for authorisation to work in the general labour market. A spouse may work only during the validity of the student authorisation.
<b>NZ</b>	A Student Visa is an endorsement in the holder's passport which allows the holder to travel to NZ. It shows that the holder has permission to travel to NZ and may be granted a Student Permit on arrival. A Student Permit is an endorsement in the holder's passport which allows him/her to study in New Zealand. It states the expiry date and outlines the conditions of the permit. The conditions of the Student Permit will include details about the holder's course of study, the educational institution and its location, and any restrictions (such as not being allowed to work). <sup>17</sup> A student may work in certain circumstances.
<b>UK</b>	<p>The entry of students is considered under the general entry rules. A student must therefore obtain entry clearance if they fall within the required categories.<sup>18</sup> A number of requirements must be satisfied including the bona fides of the institution and the course, that there will be a minimum of fifteen hours supervised daytime study and that on completion of the course there is an intention to leave the UK. The applicant will also need to demonstrate that he has sufficient financial means to support himself and that he is capable of following the intended course of study. There is a prohibition on taking other than vacation or part time employment.</p> <p>An in-country application to switch into work permit employment may be considered on a discretionary basis outside of the Rules provided certain criteria are met. This is primarily to enable those with qualifications in the skills shortage area to remain in the UK and to facilitate a specific need of a business.<sup>19</sup></p>
<b>US</b>	There are three principal visa classes for foreign students and scholars: F visa for students pursuing academic studies, M visa for vocational students, and J visa for students and scholars engaged in cultural and educational exchange. F and M students generally pay for their own studies, while J visa holders generally receive support from their own governments or the U.S. government.

<sup>17</sup> A person requires a Student Permit if:

- he/she is a visitor or a worker in New Zealand and wish to study full time; or
- he/she needs to extend a Student Permit for further study or training; or
- the applicant's spouse is in New Zealand on another type of temporary permit i.e., Work Permit; or
- the applicant is a child and wishes to study while the family is in New Zealand.

<sup>18</sup> A person may also enter as a prospective student if he or she meets the usual entry criteria and can demonstrate a genuine and realistic intention to undertake studies within six months of entry.

<sup>19</sup> A student may successfully have his stay extended if he can satisfy a number of conditions. These include that s/he is enrolled on a course that meets the original entry criteria, that he satisfactorily attended and progressed on the earlier course of studies and that by virtue of any extension he will not spend more than four years in the UK on courses lasting less than two years.

## ANNEX XIII

### CHANGES OF STATUS — STUDENTS

	<b>Possibility to change residence status</b>
<b>Australia</b>	Students who have gained Australian qualifications are exempt from the skilled work experience required if they apply for a skilled visa within 6 months of completing their diploma. If eligible, students can apply for most permanent visas e.g. spouse visas and skill under points-tested entry.
<b>Austria</b>	No in general, but students who graduated in IT can change their status and access the labour market. Free labour market access for students during their stay on the basis of an inter-university student exchange program or educational program of the EU. Seasonal work permits in tourism or in the agricultural sector possible for all foreigners including foreign students and graduates.
<b>Canada</b>	Students can work (with employment authorisation) for one year after completion of post-graduate degree (no validation required).
<b>Finland</b>	Stay of a foreign student is seen in Finland as temporary but a student can apply for a permit with new grounds through a Finnish representation abroad. A student does not need a work permit for part time works. (max. 20h/week) during the academic year of education and during the holiday seasons of the institution of education.
<b>France</b>	Yes, in general but students who graduated in IT in France (engineers) can change status on demand.
<b>Germany</b>	Yes after they have successfully passed their examination (new legislation).
<b>Ireland</b>	Employers may seek to have work permits issued in respect of students if employment relates to their field of study and the students themselves, in certain skills area, may apply for a work authorisation/working visa when they have an offer of employment.
<b>Japan</b>	Students may apply for residence when they have an offer of employment.
<b>Korea</b>	Students who have gained a Masters degree or higher in the field of IT can apply for a work permit. Those who have obtained a work permit can change her/his status from student to employment status for a maximum period of 3 years.
<b>Mexico</b>	Yes, but no special procedure.
<b>New Zealand</b>	Yes, students may apply for residence. The General Skills Category (GSC) awards additional points for qualifications gained in New Zealand. In addition, students with a New Zealand qualification are not required to have any work experience to qualify under the GSC. Students may also apply to remain in New Zealand as temporary visitors or under work permit policy.

	<b>Possibility to change residence status</b>
<b>Norway</b>	Yes, for students who have not received financial benefits from Norwegian authorities. No, for students who have received such benefits.
<b>Czech Republic</b>	Yes, but no special procedure.
<b>Switzerland</b>	Yes. But no special procedure (new legislation).
<b>United Kingdom</b>	In-country changes into work permit status for students completing degrees in the UK are allowed in certain circumstances. As a general rule, in-country changes to work permit status are not allowed, except for trainees who can apply for a Training and Work Experience Scheme visa. Settling procedures are more flexible for Commonwealth, EEA, and EU residents.
<b>United States</b>	Yes, but no special procedure

OECD SOPEMI Report, 2001.

## ANNEX XIV

### NATIONALITY

	Rights of a child born to non-nationals	Marriage between a citizen and a non-national
<b>Australia</b>	A child acquires Australian citizenship if one of the parents is either an Australian citizen or a permanent resident. A child born to parents illegally in the country has no claim to citizenship and may be removed with the parent/s in accordance with normal removal procedures.	<p>A <b>Spouse Temporary Visa</b> is issued to a spouse of an Australian citizen/resident. Required conditions for acquiring this visa include minimum 12 months spouse relationship and the proof of a genuine relationship.</p> <p>No preferential provision for the spouses of Australian citizen/residents for acquiring citizenship.</p>
<b>UK</b>	Prior to 1 January 1983, almost every child born in the United Kingdom was a citizen of the United Kingdom and Colonies. Under the British Nationality Act 1981, a child born in the United Kingdom on or after 1 January 1983 will be a British citizen if either the father or the mother is a British citizen or is legally settled in the UK. <sup>20</sup> If neither parent is a British citizen or legally settled in the UK the child will not be a British citizen at birth.	A <b>Settlement Visa</b> is available for non-UK national marrying a British citizen or a person with permanent residency in the UK. The visa is valid for one year and candidates are usually interviewed. If the marriage is subsisting at the end of that year, then an application can be made to the Home Office for permanent residency. An application for British citizenship can be made after having been in the UK for three years if married to a British citizen (or five years if married to a non-British citizen).
<b>USA</b>	A child born in the US is entitled to US citizenship. The parents do not get citizenship unless they have some legal basis for obtaining legal permanent resident status/otherwise meet the naturalisation eligibility requirements. The parents can take the child with them when they leave the country or arrange for someone to take care of the child in the US. <sup>21</sup>	<p>The spouse is given 90 days entry status and given conditional permanent residence status based on marriage. The condition can be removed when re-interviewed two years later to make sure that the marriage is valid.</p> <p>The US offers naturalisation to spouses of US citizens three, rather than the more typical five, years after admission as a permanent resident. The US has marriage fraud provisions that help deter marriages made solely for immigration purposes.</p>

<sup>20</sup> Special consideration applies where a child's parents are EEA nationals who are exercising Treaty rights under European Community law.

<sup>21</sup> Further, immigration judges have held that having a US citizen child is no bar to deportation. It may be a basis for obtaining a waiver of deportation only if the deportable alien has been in the US for more than 10 years and the deportation would cause extraordinary harm to the US citizen child. The US citizen child does not have the right to sponsor the parent until the child is 21 years of age.

	<b>Rights of a child born to non-nationals</b>	<b>Marriage between a citizen and a non-national</b>
<b>New Zealand</b>		<p><b>Visitor visa</b> can be issued to fiancée/ fiancé of a New Zealand citizen and resident.</p> <p>If foreign nationals are married to a New Zealand citizen or resident, a New Zealand spouse can apply for a permanent visa provided that his/her foreign spouse meets <u>health and character</u> requirements. New Zealand citizens and residents who have sponsored two or more spouses, have applied for spouse sponsoring within the last 5 years, or have a record of domestic violence are not eligible to apply for visa for spouses.</p> <p>After two years residency, the spouse is eligible for NZ citizenship.</p>
<b>France</b>	<p>A child born in France to foreign parents automatically becomes a French national at the age of majority (18). If a child is over 13, he/she can also attain citizenship with the parent's consent. If over 16, a request can be made for nationality. A third generation immigrant born in France is automatically entitled to French nationality.</p>	<p>Resident permit is given to foreigners married for at least one year rather than the usually 3 years to a French national, provided that the marriage is still subsisting, and that the spouse has maintained French nationality. An undocumented foreigner marrying a French national can not acquire French citizenship.<sup>22</sup></p> <p>Foreign spouse may acquire naturalisation papers after two years. Within a year, the authority has the right to oppose the naturalisation process. France maintains strict measures against marriage of convenience.</p>
<b>Germany</b>	<p>If one parent has been a legal resident in Germany for at least 8 years permanently and has a permanent resident permit, children acquire German citizenship at the parent's request.<sup>23</sup></p>	<p>Aliens fulfilling the requirements can be naturalised on request with the requirement of legal permanent residence for at least eight years.<sup>24</sup></p>

<sup>22</sup> When a couple applies to get married and one of them is an undocumented foreigner, the marriage can be postponed and investigated. The undocumented foreigner may be asked to leave France or be deported.

<sup>23</sup> These children usually acquire the citizenship of their parents. Between ages 18-23, they have to opt for one or the other citizenship, dual citizenship is accepted only in exceptional circumstances and requires special procedures.

<sup>24</sup> However, spouses and children under age meeting extra requirements may be naturalised without fulfilling the minimum residence time, such as possession of a resident permit, no conviction of a major crime.

	<b>Rights of a child born to non-nationals</b>	<b>Marriage between a citizen and a non-national</b>
<b>Denmark</b>	A child of non-Denmark citizen will not receive nationality at birth. Since 1999, young foreigners aged 18-23 with minimum 10 years of residence in Denmark (5 years within the last 6 years) can request naturalisation.	While seven years consecutive residency is required for a foreigner applying for naturalisation, a foreign spouse married to a Danish citizen can do so after 4-6 years of residence (depending on the length of marriage). Renunciation of previous nationality is required. More relaxed provisions for Nordic, or EU citizens are available.
<b>Sweden</b>	A child born to non-Swedish parents does not acquire nationality at birth. It is accessible by making a declaration when a child is between 21-23 years old. <sup>25</sup>	Five consecutive years of residency for a foreigner, but exception can be made for applicants marrying a Swedish citizen. More relaxed provisions for a Nordic or EU citizen. Previous citizenship will be lost.
<b>Spain</b>	Spain does not grant Spanish citizenship to a child born to non-Spanish citizens. A child can gain citizenship during the age of 18-20 by declaration. Residence requirement is a minimum of 1 year. A third generation foreigner is granted citizenship if one of the parents also is born in Spain.	A spouse of a Spanish national can acquire Spanish nationality after a one-year preferential period.  In order to avoid marriage of convenience, applicants are requested to prove the authenticity of the marriage (no <i>de facto/de juri</i> separation).
<b>Greece</b>	No entitlement to nationality on birth. When a child reaches 18, he/she can apply for naturalisation. The requirement that the applicant must lodge their naturalisation application 5 years prior does not apply to a Greece-born child. Naturalisation is not a right, but based on discretion.	There is a relaxed naturalisation requirement for spouses.
<b>Italy</b>	With continuous residence since birth, a child can apply for Italian citizenship at the age of 21.	Since 1992, spouses married to an Italian no longer receive automatic citizenship, however the spouse is entitled to apply for citizenship after six months residency in Italy, or three years of marriage.

<sup>25</sup> Requirements are 5 years of residency before the age of 16, and additional permanent residence between the age of 16-21. By the provision of Nordic Agreement of 1969, the period of residency in other Nordic countries is recognized by any Nordic countries at the acquisition of nationality (valid only the period spent before reaching 16 years old).