Changes to shortage occupation list

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THE SHORTAGE OCCUPATION LIST HAS BEEN amended to remove some specialist jobs that are no longer considered to be under resourced within the resident labour market.

The 'shortage occupation' is part of the Tier 2 immigration route under the points-based system. The government has recently accepted recommendations from the independent Migration Advisory Committee (MAC) that will see the number of jobs covered by the list drop by 40,000. This will bring the total down from 230,000 to 190,000. The MAC recommended the changes where evidence from a range of industries and sectors showed resident workers are available to fill the vacancies. Those occupations that the MAC recommended to be removed from the list include:

- secondary education biology teachers;
- speech and language therapists;
- pharmacists;
- orthoptists;
- veterinary surgeons; and
- rank-and-file orchestral musicians.

However, some specialist roles have been added to the list including:

- actuaries;
- high integrity pipe welders;
- environmental scientists; and
- geochemists.

The government has accepted the MAC's recommended list in full however, rank-and-file orchestral musicians will not be removed from the list immediately, until further discussions take place with the industry to discuss the resident labour market test.

The revised list will come into effect from 14 November 2011. This means that:

- For applications covered by the annual limit – the new list will apply to all applications by Tier 2 sponsors for restricted Certificates of Sponsorship made on or after 14 November 2011.
- For applications outside the annual limit, the new list will apply to all unrestricted Certificates of Sponsorship assigned to migrants on or after 14 November 2011.

Employers can only bring someone in to the UK under Tier 2 (General) if the job is on the shortage occupation list or if they pass a resident labour market test.

Recent developments: EU law

WHEN AN EU CITIZEN IS ISSUED WITH a registration certificate valid for five years, or a family member is issued with a residence card also valid for five years, they will not automatically have acquired a right of permanent residence under Article 16 Directive 2004/38/EC at the end of that period. In *Secretary of State for Work and Pensions v Maria Dias* [2009], which was referred by the Court of Appeal, the Court of Justice of the European Union (formerly the European Court of Justice) has confirmed that the person must have fulfilled the underlying conditions of their residence during those five years. Thus, an EU citizen must have been labour employed/self employed or self sufficient (ie a qualified person) for five years. The five years do not have to be one continuous period. The continuity can be broken by gaps in employment of up to two years, and the qualifying periods can be aggregated in order to reach the five-year threshold.

FREE MOVEMENT AND FAMILY MEMBERS OF BRITISH CITIZENS.

Until a few years ago, people born in Northern Ireland were automatically citizens of the Irish Republic, as well as being British citizens. When a 'third country national' marries someone with dual British-Irish nationality, it is usually easier for the foreign spouse to obtain a residence card under the EEA Regulations 2006, as the spouse of a citizen of another member state, than to obtain leave to remain under the immigration rules. In *Shirley McCarthy v Secretary of State for*

the Home Department [2010] however, the Court of Justice of the European Union has ruled that if the British spouse has been living in the United Kingdom and has not moved from one member state to another in the exercise of free movement rights, then the foreign spouse cannot rely on European law as a basis for staying in the UK. The British spouse derives her own right to be in the UK from her British citizenship, not from the Irish citizenship which she also has.

On the other hand, in *Gerardo Ruiz Zambrano v Office National de l'Emploi* [2011], the European Court has held that two Belgian children whose parents were Columbian had the right, as citizens of the EU, to be bought up in the territory of the EU. In order for that to happen, they needed their parents to be with them. Hence the parents had to be given the right to reside and work in Belgium. The parents could in fact have registered the children, who were born in Belgium, as Columbians, but they did not do so. Hence the children became Belgium citizens, but they would otherwise have been stateless. The astonishing feature about the *Zambrano* judgment is that there had been no 'free movement' at all. The children had been born in Belgium, and had never moved elsewhere. This is difficult to reconcile with *McCarthy*, where there had been no 'free movement' either.

'In Zambrano, the European Court has held that two Belgian children whose parents were Columbian had the right, as citizens of the EU, to be bought up in the territory of the EU'

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Case C-34/09 Gerardo Ruiz Zambrano v Office National de l'Emploi [2011] C130/02

Case C-325/09 Secretary of State for Work and Pensions v Maria Dias [2009] OJ C256

C434-09 Shirley McCarthy v Secretary of State for the Home Department [2010] OJ C11/30