

**EXPLANATORY MEMORANDUM TO
THE EUROPEAN COMMUNITIES (EMPLOYMENT IN THE CIVIL SERVICE)
ORDER 2007**

2007 No. 617

1. This explanatory memorandum has been prepared by the Cabinet Office. The above Order in Council is laid before Parliament in draft by virtue of section 2(2) of the European Communities Act 1972.

2. Description

2.1 The Order in Council will amend the current rules for reserving certain posts to UK nationals only to allow Civil Service departments and agencies to open up a much greater number of their posts to non-UK European Economic Area (EEA) nationals and related persons, while providing revised criteria for restricting access to certain posts to UK nationals only where this is strictly necessary and in compliance with EC law.

2.2 The Order in Council does not deal with immigration or work permits and does not affect the requirements for those non-UK nationals specified in the Order to obtain leave to remain and to work in the UK before they can take up work.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Ankara agreement is one of the “Community Treaties” for the purposes of the European Communities Act 1972. Section 2(2) of the European Communities Act 1972 can be used to extend the application of section 1 of the Aliens’ Employment Act 1955 and regulation 3 of the European Communities (Employment in the Civil Service) Order 1991 to Turkish nationals who meet the conditions specified in Article 6(1) of Decision 1/80 of the Association Council of 19 September 1980 on the Development of the Association. In light of this, no specific reference is made to the Ankara agreement in the preamble to the Order in Council.

3.2 Similarly, section 2(2) of the European Communities Act 1972 can be used to extend the Aliens’ Employment Act 1955 and the European Communities (Employment in the Civil Service) Order 1991 to family members of Turkish nationals who meet the conditions set out in Article 7(1) of Decision 1/80 of the Association Council of 19 September 1980 on the Development of the Association.

3.3 Spouses and certain family members of EEA nationals were previously covered by Regulation (EEC) 1612/68. This was repealed and replaced by article 23 of Directive 2004/38/EC. However, at the date on which this Order in Council will be made, the EEA Joint Committee will not yet have adopted a decision to the effect that Directive 2004/38/EC applies to Norway, Iceland, and Liechtenstein. Accordingly, the inclusion of family members of nationals of EEA stated in the definition of “relevant European” is made pursuant to section 2(2)(b) European

Communities Act 1972, whereas the rest of the Order in Council is made pursuant to section 2(2)(a) of the European Communities Act 1972.

4. Legislative Background

4.1 The Act of Settlement of 1700 provides, in section 3, that no person born out of the Kingdoms of England, Scotland or Ireland or the Dominions thereunto belonging...shall be capable of enjoying any office or place of trust, either civil or military, under the Crown. This prohibition does not apply to Commonwealth citizens or citizens of the Irish Republic (see section 52(6) of, and Schedule 7 to, the British Nationality Act 1981) or to British protected persons employed in a civil capacity (see section 1(1) of the Aliens' Employment Act 1955).

4.2 Section 6 of the Aliens Restriction (Amendment) Act 1919 provides that no alien shall be appointed to any office or place in the Civil Service of the State. An alien is now defined in section 51(4) of the British Nationality Act 1981 as a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland.

4.3 Under the Aliens' Employment Act 1955 the prohibitions were relaxed so that aliens could be employed if they were either:

- a) appointed in a country outside the UK, the Channel Islands and the Isle of Man in a capacity appearing to the Minister to be appropriate for aliens; or
- b) employed in accordance with a certificate issued by a Minister with the consent of the Minister for the Civil Service (this was originally with the consent of the Treasury but the function was transferred to the Minister for the Civil Service by the Transfer of Functions (Treasury and Minister for the Civil Service) Order 1995 (SI 1995/269)). In this connection, either there must be no suitably qualified UK nationals available to do the work or the alien must possess exceptional qualifications or experience to do the job. Certificates last for 5 years and must then be renewed.

4.4 The European Communities (Employment in the Civil Service) Order 1991 (SI 1991/1221) amended the Aliens' Employment Act 1955 to allow nationals of member states of the European Communities (and their spouses and certain children) to take up civil employment under the Crown apart from "public service" posts within the meaning of the EC Treaty (see Article 48(4) of the EEC Treaty, now Article 39(4) of the EC Treaty, which excludes from the freedom of movement of workers posts in the "public service").

4.5 The rights of nationals of member states of the European Communities were extended to nationals of member states of the European Free Trade Association by section 2(1) of the European Economic Area Act 1993.

4.6 In 1996 an amendment to the Civil Service Management Code was made to restrict Commonwealth and Irish nationals (who are not subject to the prohibitions

in the Act of Settlement 1700 or the Aliens Restriction (Amendment) Act 1919) from being employed in posts which were reserved for UK nationals. This put Commonwealth citizens and Irish nationals in the same position as nationals of other EEA member states.

4.7 The effect of the existing rules, therefore, is that foreign nationals may be employed abroad in any civil post under the Crown (which includes HM Diplomatic Service) if the Minister considers it appropriate. As regards civil employment, or the holding of office, under the Crown within the UK, Commonwealth citizens, British protected persons and nationals of EEA member states may be employed in posts other than reserved ones. Nationals of other countries may be employed in UK non-reserved posts only if an aliens' certificate is in force.

5. Extent

5.1 This Order in Council applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Chancellor of the Duchy of Lancaster, Hilary Armstrong, has made the following statement regarding human rights:

“In my view the provisions of the European Communities (Employment in the Civil Service) Order 2007 are compatible with the Convention rights”.

7. Policy background

7.1 At present, the UK Civil Service reserves about 97,000 (18%) of all posts for UK nationals only. This is causing significant problems for the efficient running of organisations, in particular in recruiting eligible staff.

7.2 The Order in Council has been drawn up after an extensive consultation exercise throughout the Civil Service. There were no significant objections.

7.3 It is anticipated that the Order will achieve a reduction in the number of posts reserved for UK nationals throughout the Civil Service to something less than 5% of the total number of posts in the Civil Service. In terms of numbers, this means that a further 70,000 posts will be made available to non-UK EEA (and Commonwealth) nationals.

7.4 Guidance on the new arrangements will be circulated to all Civil Service departments and agencies and a revision made to the Cabinet Office Guidance on its website.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this Order in Council as it has no impact on business, charities or voluntary bodies.

9. Contact

Mr M C Dawson at the Cabinet Office can answer any queries regarding the Order in Council.

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