Response to the European Commission's consultation on 'EU Citizens' Rights – The Way Forward'

1. The AIRE Centre (Advice on Individual Rights in Europe) and ILPA (the Immigration Law Practitioners Association) submit these comments in response to the European Commission's consultation on 'EU Citizens' Rights – The Way Forward'.

I. Who We Are

2. The AIRE Centre is a London-based charity whose mission is to promote awareness of European law rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights. The Centre provides, among other things, specialist free written legal advice to EU citizens and their family members in the UK on their rights under EU law on the free movement of persons. Usually, the Centre provides this advice on a second-tier basis; that is, other voluntary-sector advice centres come to the Centre with complex questions about the rights of their clients and the Centre responds in writing, to enable them to help their clients get residence documentation or benefits, for example, or to make decisions to improve their situation. The primary issues the Centre advises on in this area are access to social assistance and social security benefits, residence rights, and labour-market access for accession nationals. In 2009, for example, the Centre provided expert written advice on EU free-movement law in response to 303 requests.

3. The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by

providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency and other 'stakeholder' and advisory groups.

II. What We Are Writing About

4. These comments respond to the third 'key question' found in the consultation document: '*What are the main obstacles faced by European Union citizens when moving to or residing in another EU country? What could be done to remove these obstacles and enhance this right?*' The focus is on obstacles facing those already residing in another EU country, using the UK as an example[1].

5. The aim of these comments is to provide the Commission with information about the obstacles marginalised EU migrants at risk face – with a particular emphasis on women, minorities, those on low incomes and persons with disabilities, when residing in the United Kingdom. It is true, as the consultation paper says, that EU citizens '*use transport services, buy products or book hotels on the Internet, watch cross-border TV channels in the hotel, consume leisure services in other EU countries, use real-estate agency services if they decide to buy a summer house in another EU country, use financial services and health care services, etc.*'. That 'etc.', though, covers a lot: EU migrants in the UK (as elsewhere in Europe) include those who face destitution and come to depend on the assistance of charities; become pregnant and are unable to access social assistance benefits made available to British Citizens; are victims of domestic violence but likewise are turned away from essential State services; are victims of human trafficking and/or exploitation who find themselves unable to access effective remedies in the UK for the human rights violations they have suffered; have developed drug and alcohol abuse problems and require social and medical assistance they have difficulty

[1] According to the most recent statistics available (the Eurostat statistics from 2008 cited in the consultation paper), the UK is the third-largest recipient of EU migrants in the Union, after Spain and Germany. The UK is probably the second or first largest recipient of migrant EU workers and self-employed persons. Since the waves of accession in 2004 and 2007, the UK has seen a large number of migrants from the new central and east European countries in particular.

accessing. Many of the EU migrants the AIRE Centre and ILPA have come into contact with did not simply come to the UK for a better life, but more specifically to escape discrimination, violence (within the family or otherwise), or poverty in the Member State from which they come.

6. Like other EU migrants, these people face two related problems:
    a. the authorities do not respect the rights they have under EU law; and/or
    b. their rights under EU law in certain respects are not clear.

7. Unlike many other EU migrants, these people have much more difficulty bringing their situation to the attention of the European institutions. They are also much less likely to engage in the protracted legal proceedings necessary to resolve their problems.

8. The major obstacle to these migrants' exercise of their free-movement rights is the failure to respect the rule of law: the State either violates EU law or systematically construes ambiguities in EU law in ways unfavourable to EU migrants (particularly those in vulnerable groups). We have identified four obstacles which are essentially manifestations of this rule-of-law problem:
    a. administrative obstruction;
    b. legislative and institutional barriers to social assistance and social security;
    c. inadequate response to the exploitation of EU migrant workers; and
    d. disregard for and confusion about the rights of EU migrant prisoners and their families.

9. These categories are interrelated (and in some respects the last three are simply examples of the first).

10. We address these four obstacles in the next part and then offer recommendations to the Commission.

III. The Obstacles

a. Administrative Obstruction

11. By 'administrative obstruction' the AIRE Centre and ILPA mean acts or omissions of the administration which fail to observe procedural or substantive legal guarantees and which result from ignorance of the law, carelessness and/or expediency. Administrative obstruction slows down the exercise of free-movement rights and imposes a cost on the EU citizen who asserts his/her rights before unwilling and/or unhelpful administrative authorities.

12. In the UK, administrative obstruction is legion. The AIRE Centre and ILPA have made the Commission aware of the problems with the UK Border Agency, the centralised agency responsible for all decision-making in matters concerning residence rights and residence documentation. The principal feature of the Agency's administrative obstruction in relation to EU migrants is delay; the Agency regularly violates the time limits set out in Directive 2004/38 (see, e.g., Article 8(1) and Article 19(2)). In many cases where the Agency does not believe an EU national is entitled to documentation on substantive grounds (e.g. where they believe that an individual has not resided legally in the UK for five continuous years because she was a jobseeker for an extended period of time), they return the application as 'incomplete' instead of taking a decision which could be appealed (in violation of Article 15(1)). The Agency has also refused to take the necessary action to amend administrative regulations that violate EU law (see, e.g., Regulation 12(1)(b) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 as amended), rendered unlawful by Case C-127/08 *Metock v Minister for Justice, Equality and Law Reform* two years ago).

13. Administrative obstruction in the distribution of social assistance and social security benefits is linked to the UK's decentralised benefits administration, who are untrained on basic matters of EU law and refuse benefits to migrants. Government departments do not notify those on the front line of changes in EU law (such as the recent Case C-480/08 *Texeira v London Borough of Lambet)h* about social assistance benefits for the EU national primary carer of a child in education of an EU worker); in a recent case an AIRE Centre client was told by a benefits officer that the decision could not be applied in her

favour because the officer had not yet received formal guidance from the Department of Work and Pensions on how to apply it.

14. The consequences for vulnerable groups of migrants in the UK can be dramatic. The AIRE Centre and ILPA have seen, the following, for example:
    a. EU migrant women who are victims of domestic violence, who have clearly resided in the UK for over five years, are frequently refused documentation confirming their permanent residence because they cannot meet onerous evidentiary requirements. Even though the UK authorities have access to the necessary information (e.g. evidence of the EU migrant's work or her spouse's through tax and National Insurance records), and even though '[t]he **burden of proof** lies on the authorities of the Member States when restricting rights under the Directive' (COM(2009) 313 final, paragraph 4.2, emphasis in original), the authorities refuse to acknowledge permanent residence. Even when they do, it is often many months after the applications are made. Without documentation, these women are refused vital State services such as housing and benefits and are left homeless.
    b. Low-income EU migrants, when applying for permanent residence cards, are forced to produce non-existent evidence (e.g. because they do not have bank accounts, notoriously difficult for migrants to open) that they had sufficient funds to avoid being a burden on the social assistance system during periods when they were economically inactive.
    c. Students on low-incomes from Romania and Bulgaria are refused registration certificates as students because they cannot prove they have comprehensive sickness insurance, when they are entitled to comprehensive health cover under the National Health Service as a matter of domestic law. As a result of the refusal, they cannot exercise their right to work 20 hours per week in the UK, guaranteed by domestic law (in line with the rights of third-country national students).
    d. EU migrants of minority race or ethnicity are treated as 'not European' and therefore not entitled to benefits by certain benefits officers. In particular, some former refugees the AIRE Centre has advised, who

have naturalised in their country of refuge in the European Union then moved to the UK in exercise of their free movement rights, have been encouraged to return back to the country that 'took them in' when they are entitled to reside in the UK and are in fact entitled to benefits.

15. The unlawful refusal to grant residence documentation or social assistance benefits is a human rights issue. See, e.g., *Aristimuño Mendizabal v France* (European Court of Human Rights, Application number 51431/99, judgment 17 January 2006), refusal to grant residence documentation under EU law to Spanish national in France a violation of Article 8 ECHR); *Stec and others v United Kingdom* (European Court of Human Rights, Applications 65731/01 and 65900/01 Grand Chamber judgment 12 April. 2006), finding non-contributory benefits fall within the scope of Article 1 of Protocol 1 ECHR). The administrative obstruction that causes it is a major obstacle to the exercise of free-movement rights of EU migrants in the UK

b. Legislative and Institutional Barriers to Social Assistance and Social Security

16. The AIRE Centre and ILPA have had extensive correspondence with the Commission about problems with accessing welfare benefits in the UK (an example is attached hereto). The Commission has already concluded that several aspects of UK policy are unlawful. Without revisiting those specific issues (which we nonetheless hope will be considered alongside these comments as part of the consultation), it is possible to draw an abstract picture of the problem.

17. The AIRE Centre and ILPA appreciate that the Directive does not permit 'social tourism' (Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles*, opinion of Advocate General Geelhoed, paragraph 18). However, as we understand it the Directive does envisage at least temporary non-discriminatory access to the social assistance system for those EU migrants who have been exercising residence rights under Article 7(1) of the Directive. That understanding is based on:
    a. Rectital (16) to the Directive: '*As long as the beneficiaries of the right of residence do not become an <u>unreasonable burden</u> on the social*

assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be an automatic consequence of recourse to the social assistance system'. (emphasis added)

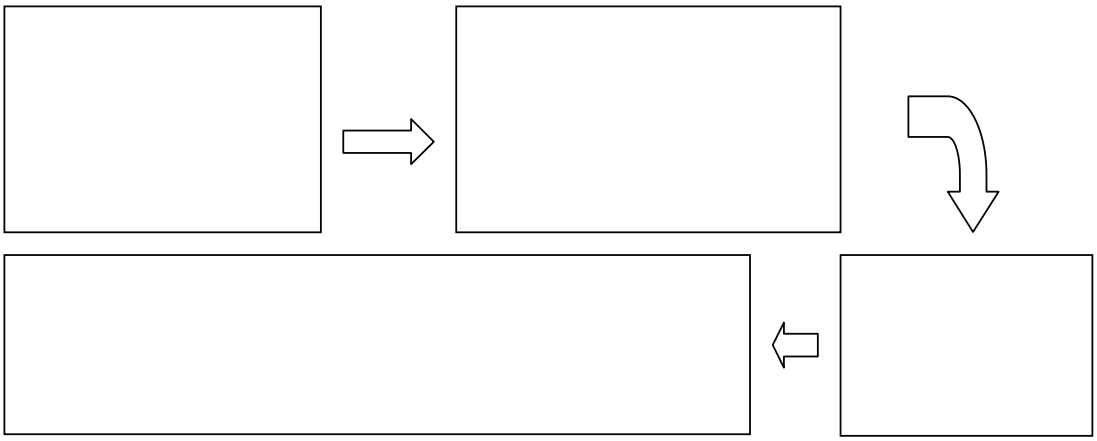
b. Article 14(2), second paragraph: '*In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Article 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically*.' (emphasis added)

c. Article 14(3): '*An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State*.' (emphasis added)

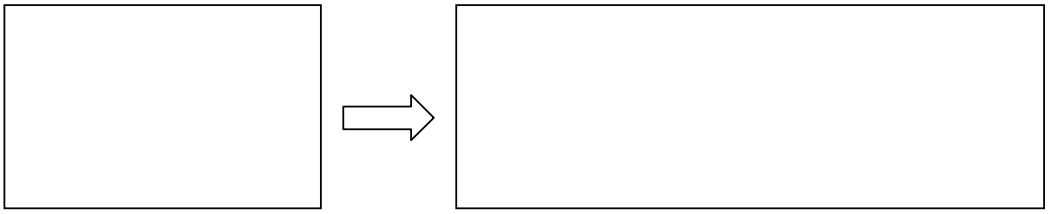
d. Article 24(1): '*Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of the Member State within the scope of the Treaty*.' (emphasis added)

18. For those individuals who have been exercising residence rights under Article 7(1)(a), (b), (c) and/or (d), the Directive implies that they will automatically be granted non-discriminatory access to the social assistance system: to check systematically that they have maintained residence rights at that stage would violate the Article 14(2) prohibition on systematic verification. It would also deprive the other provisions cited above of meaning: if an individual who has been exercising residence rights in the host Member State could not access the social assistance system, at least temporarily, why should it be emphasised that an expulsion measure should not be the automatic consequence of having recourse to that system, or that individuals shall not become an unreasonable burden? These provisions clearly do not only refer to those who have been exercising residence rights jobseekers, workers or the self-employed – they benefit from a further, absolute exemption from expulsion (Article 14(4)).

19. It might be said that the Directive envisages the following scenario in relation to social assistance:



20. The UK operates a different system. For certain very basic forms of social assistance for those most at risk, EU migrants are specifically excluded by primary legislation in all cases, unless, '*and to the extent that*', provision '*is necessary for the purpose of avoiding a breach of (a) a person's Convention* [i.e. ECHR] *rights, or (b) a person's rights under the Community Treaties*'. Nationality, Immigration and Asylum Act 2002, Schedule 3 paragraph 3. For other forms of social assistance individuals must pass the right-to-reside test. See, e.g., The Social Security (Persons from Abroad) (Amendment) Regulations 2006 (SI 2006/1026) or The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294). Whatever residence documentation an EU migrant who presents at a benefits office may have is irrelevant: s/he must prove at the time of application that s/he is currently a worker, self-employed or the family member of such a person. (And in many cases, due to administrative obstruction, even clear proof of that will not suffice.) The only exception in relation to documentation is for permanent residence: in the AIRE Centre's experience, it appears that, despite what is stated in Article 25 of Directive 2004/38, permanent residence documentation is a necessary condition of proving that one is permanently resident in the UK (or the family member of a permanently resident EU national) for benefits purposes. Because of administrative obstruction in providing such documentation, this is often an insurmountable challenge. The result is that the process looks more like this:



21. The benefits refused include certain special non-contributory benefits covered under Article 70 of Regulation 883/04/EC. Jackie Morin from DG Employment, Social Affairs and Equal Opportunities has responded to a complaint from the AIRE Centre and ILPA that this is also unlawful under that Regulation; Mr Morin agrees with us and we understand the Commission is investigating the issue. Mr Morin has also agreed with us that certain further restrictions on social assistance benefits to central and east European EU migrants in the UK are illegal. (See attached letter of 2 February 2010.)

22. Recently, the UK Border Agency has added a new step: certain homeless EU migrants are facing expulsion from the UK on the basis that they are not exercising residence rights. We have attached a paper about this issue, but the problem essentially is this: the authorities claim that certain migrants who are not a burden on the social assistance system (because, as a matter of domestic legislation and practice, they cannot be) but who are receiving healthcare from the National Health Service are threatened with expulsion on the basis that they are not exercising residence rights. This seems difficult to square with Article 7(1)(b) of the Directive.

23. Other EU migrants do not face formal expulsion but informal expulsion from local authorities when they apply for benefits (see paragraph 24(d) below).

24. The UK system is surely unique, as is every Member State's system for the distribution of social assistance. It provides an important example of the kinds of obstacles EU migrants can face once they have been residing in the UK. The AIRE Centre and ILPA have seen, for example, the following:
    a. Pregnant women receiving Jobseeker's Allowance (a special non-contributory benefit and '*a benefit of a financial nature intended to*

facilitate access to employment in the labour market', Cases C-2&3/08 *Vatsouras & Koupatantze v Arbeitsgemeinschaft Nürnberg 900*, para 37), are told by benefits officers eleven weeks before they are due to give birth, to switch to Income Support, another special non-contributory benefit for those who cannot work. They are then refused Income Support by decision makers on the basis that they no longer have a right to reside. The refusals have been held up by the English tribunals even though the EU migrant may have been working in the past, intends to begin seeking work very soon after they give birth and/or, as a result of administrative obstruction, was advised to give up Jobseeker's Allowance by benefits advisers. See, e.g., [2007] UKSSCSC CIS_4010_2006.

b. EU migrant women escaping domestic violence have been unable to access benefits because they are forced to demonstrate that they are currently workers or self-employed or that their abusive spouses are. In one case, a woman the AIRE Centre was advising and whom the Centre was going to represent in her appeal against a refusal of benefits (as she had, in the Centre's view, acquired permanent residence in the UK) was evicted from social housing and told that she would only be housed temporarily if she agreed to accept a coach ticket to return to Warsaw. The Centre was unable to convince her not to go, as her circumstances had become so difficult, and now it appears that the appeal will fail as she has left the UK.

c. EU migrants with disabilities who come to the UK to seek work are not permitted to access income-based Employment and Support Allowance, a social security benefit introduced in 2008 to '*offer you personalised support and financial help, so that you can do appropriate work, if you are able to*' (Government website about the benefit[2]). See The Employment and Support Allowance Regulations (SI 2008/794), Regulation 70(3)(b)(i). This appears to violate the *Vatsouras* judgment, cited above.

c. Inadequate Response to the Exploitation of EU Migrant Workers

[2] http://www.direct.gov.uk/en/DisabledPeople/FinancialSupport/esa/DG_171894. accessed 14 June 2010.

25. Between April and December 2009, 86 of the 527 individuals (16%) referred to the UK's National Referral Mechanism for identifying victims of human trafficking were EU migrants.[3] From this data, and based on the AIRE Centre's experience operating a specialist second-tier advice service for victims of human trafficking, it appears that those most at risk of trafficking and exploitation are from the central and east European countries that joined the EU in 2004 and 2007. The AIRE Centre and ILPA both work closely with the Anti-Trafficking Legal Project, a London-based group of lawyers working on trafficking issues who have noted considerable confusion about the rights of EU migrant trafficking victims.

26. The way in which the UK authorities (and perhaps other Member States) have handled accession has exacerbated the potential for trafficking and exploitation already inherent in a free-movement regime where individuals are allowed to cross borders but not allowed to take up work. We have attached a recent training paper on the rights of accession nationals in the UK, which should give the Commission some idea of the problems resulting from the UK's accession regimes.

27. In relation to the Worker Registration Scheme ('WRS') for A8 nationals (whose countries joined in 2004), the UK Government's own Migration Advisory Committee has noted: '*Immigrants' confusion about the WRS could also mean that, in practice, the scheme affects employment relations. Unscrupulous employers could potentially take advantage of immigrants who are unaware of their rights under the scheme. This possibility was reflected in evidence received from the Association of Labour Providers, the Gangmasters Licensing Authority and the governments of Poland, the Czech Republic and Estonia who also raised concerns about the registration process which requires A8 immigrants to send their passports by post. The Trades' Union Congress also stated that differential A8 employment restrictions in EU countries lead to bogus self-employment and undocumented working that left such workers vulnerable to exploitation.*' ('Review of the UK's transitional

[3] Statistical data from the UK Human Trafficking Centre can be found at http://www.soca.gov.uk/about-soca/about-the-ukhtc/statistical-data.

measures for nationals of member states that acceded to the European Union in 2004', Migration Advisory Committee, April 2004, para 5.20.)

28. The principal mechanism of control of the WRS is found in Regulation 9 of the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219), which creates an offence for employers (not workers) to employ unregistered A8 workers. It appears that there have been no prosecutions or investigations of this offence, leaving employers free to abuse the registration system and take advantage of accession workers. Workers who did not register (because they do not understand the complex scheme or because their employers did not tell them about it) cannot generally access social assistance and social security benefits, leaving them more vulnerable to unscrupulous employers.

29. Bulgarian and Romanian nationals, who must obtain worker authorisation in the UK, often do not understand this requirement. As a result, many appear to have been exploited by those who take advantage of their 'illegal' status.

30. As a matter of English law, employees who have 'illegal contracts' cannot, in most circumstances, bring claims against employers for unscrupulous employment practices, such as not paying minimum wage (although they can bring race discrimination claims). It is not clear if this affects unregistered A8 workers, who have not committed an offence but whose employers (in theory) have, but the AIRE Centre has worked with many exploited A8 workers who are unwilling to bring claims because their employers have told them that they are 'illegal' and they fear the consequences of asserting their rights. Many Romanians and Bulgarians, who do not understand the authorisation system, have been registered by employers as self-employed and then exploited in the workforce (e.g. not paid wages). It appears in these cases it is likely that the Bulgarian or Romanian workers will be convicted of an offence and will not be able to bring their employers to justice.

31. All EU citizens of course have a right to be self-employed in another Member State. This is also a poorly understood right. The AIRE Centre has worked

with many A2 nationals in vulnerable circumstances who are seeking to take up self-employment in order to provide for themselves and, if necessary, access social assistance and social security benefits. The UK authorities are extremely unlikely to accept that an individual is self-employed without that person providing extensive proof (e.g. invoices) of the kind a British Citizen would never have to prove she is self-employed for other purposes. The tribunals in the UK have made it clear, recently, that such onerous standards are not allowed. See [2009] UKUT 58 (AAC). However, it appears the authorities continue to apply them when self-employed accession nationals seek benefits or residence documentation.

d. Disregard for and Confusion about the Rights of EU Migrant Prisoners and Their Families

32. The AIRE Centre and ILPA work with Hibiscus, a charity in the UK providing assistance to foreign women in prison; the AIRE Centre and Hibiscus work closely together to advise foreign EU migrant women in prison. The authorities systematically disregard basic provisions of EU law in relation to this group. There is already a brisk litigation practice developing in the UK courts around deportations that are unlawful in the light of Chapter VI of Directive 2004/38. There are other issues affecting migrant EU prisoners that have attracted less attention but are just as worrying from the perspective of EU law.

33. Notably, EU migrants are refused transfer to an open prison or refused Home Detention Curfew (where individuals live at home but are 'tagged' to track their movements) in situations where British Citizens would be transferred because they are on an 'immigration hold' (i.e. the authorities are considering deporting them at the end of their sentence, but have taken no legal action to do so). This deprives EU citizens of the right to work (which is extended to those in these facilities or with a Home Detention Curfew). For many of the women prisoners the AIRE Centre has advised, this also means that they are unable to see their children regularly, whereas a similarly situated British Citizen would. This differential treatment is based uniquely on EU migrants'

status as foreigners and the hypothetical possibility of their deportation under Chapter VI of the Directive. This problem poses serious questions under Regulation 1612/68/EEC generally, Article 24 of Directive 2004/38, the Treaty on the Functioning of the European Union (Article 18, Article 20, Article 45) and the European Convention on Human Rights. In one case the AIRE Centre has advised on, involving a German citizen, she was moved to an open prison and moved back one week later, when the UK Border Agency found out about the move to the open prison and declared she was on an immigration hold. This was particularly unacceptable as the individual has resided legally in the UK for over five years, has children here, and requires specialist medical treatment unavailable to her in a closed prison but which the open prison was arranging to provide for her. The UK Border Agency had taken no action in relation to deporting this woman at the end of her sentence before apparently ordering her return to the closed prison.

34. There is also significant confusion about the relationship between Directive 2004/38 and provisions of European criminal law. Significant numbers of EU migrants are presently in prison in the UK waiting to be returned to other EU countries under the European Arrest Warrant (Framework Decision 2002/584/JHA), in some cases for very minor offences. This can deprive their family members in the UK of their residence rights, sometimes, it seems, needlessly. The Court of Justice addressed the relationship between the two instruments to some extent in Case C-123/08 *Wolzenburg*, but more clarification is needed. The same is true for the Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty (2002/909/JHA). Under that instrument (whose deadline for implementation is 5 December 2011), an EU migrant convicted of an offence in the host Member State can be transferred to a prison in her State of nationality without her consent (Article 6(2)(a)). This will pose a major obstacle to the free-movement rights of her family members who may wish to remain in the host State and be able to visit her regularly in prison.

IV. Recommendations

35. The Commission must raise the cost for Member States of violating EU law on the free movement of persons. The issue of excessive delays in issuing residence documentation, for example, must be seen in its context. Applications for such documentation are free under the Directive. Normally in the UK (as elsewhere in Europe), applications for residence documentation for third-country nationals under domestic immigration law are extremely expensive (in the UK, usually between £500 and £1,000). These 'free' applications may therefore appear to be a low priority for the UK Border Agency, as they do not generate income for the Agency. Such an approach is not acceptable: the prohibition on charging for these applications furthers the teleological aim of Directive 2004/38, which is to facilitate the free movement of persons and is supported by strict time deadlines which need to be enforced. A similar cost-benefit analysis applies to the other problems described above: at present, for the UK authorities, the cost of not respecting the rights of marginalised EU migrants does not outweigh the benefits (financial, political). In order to raise the cost of these EU-law violations, we recommend that the Commission:
    a. consults more frequently with national experts, particularly those working with vulnerable EU migrant populations (lawyers and NGOs), about legal problems;
    b. undertakes more oversight of domestic legislation and practice through frequent communication with Member States and NGOs about implementation issues affecting marginalised groups and those at risk.

36. The Commission must also clarify ambiguous aspects of EU law so as to ensure that Member States do not take advantages of ambiguities in ways that pose an obstacle to the exercise of free-movement rights. The Commission has provided some specific guidance in 2008 and 2009 on implementation of Directive 2004/38/EC, but that guidance was not comprehensive and did not cover some issues of importance to marginalised migrants, including: the rights of EU migrant victims of trafficking and exploitation; the rights of EU migrants who are victims of domestic violence; the correct approach to providing social assistance and social security benefits to EU migrants; the

circumstances in which EU migrants can be expelled on the basis that they are not exercising residence rights; and the rights of EU migrant prisoners and their families (particularly the relationship between Directive 2004/38 and other provisions of EU criminal law).

37. The AIRE Centre and ILPA are available to discuss these matters further with the Commission. Do not hesitate to be in touch.

Sophie Barrett-Brown
Chair
ILPA,

Adam Weiss
Assistant Director
The AIRE Centre

14 June 2010