Viviane Reding
Vice-President
Commission for Justice, Fundamental Rights and Citizenship
European Commission
Rue de la Loi 200
1049 Brussels
Belgium

9 December 2009

Dear Madam

Re: Communication from the Commission on guidance for better transposition and application of Directive 2004/38/EC; 2 July 2009

Following the above Communication, we are writing to highlight areas where further guidance on the transposition and application of Directive 2004/38/EC would be of assistance. We anticipate that the guidance the Commission has drafted will assist in the proper implementation of the Directive. The following comments focus on areas where we believe further guidance would be helpful. These comments have been divided according to the paragraph numbers of the Communication.

2.1 Family Members and Other Beneficiaries

We accept the Commission's guidance on family members and other beneficiaries. It would be helpful for the Commission to clarify how the ECJ ruling in *Metock (*C-127/08) affects the rights of durable partners.

In relation to durable partners, in its European Casework Guidance, Chapter 2 *Rights of Non-EEA National Family Members of European Economic Area (EEA) Nationals* the UK applies its national rules and requires two years' cohabitation, it appears, in every case, not "foresee[ing] that other relevant aspects (*such as for example a joint mortgage to buy a home*) are taken into account".

It is also presently the view of the UK Border Agency that the *Metock* judgment is not relevant to the situation of third-country nationals who are durable partners of EU migrants: these individuals are not entitled to a residence card, even if they clearly meet the requirements set out in national law as durable partners, if they do not have regular immigration status in the United Kingdom.[1] It would be helpful for the Commission to clarify this position.

Furthermore, there is at present a lack of understanding in the English courts as to which categories of family members benefit from the ruling in *Metock.* In the case of

[1] European Casework Instructions, Chapter 5.3.

SM [2] the appellant, who was the cousin of a German national exercising treaty rights in the United Kingdom was considered to be unable to benefit from the judgment in Metock, as he was considered to be an 'other family member' outside of the scope of Article 2 of the Directive, and accordingly he was considered to fall within:

> *'a different category of beneficiary from those in the core family member group referred to in Article 2 and considered in Metock.'*

In addition, the case of *Bigia*[3] illustrates that there is a lack of understanding concerning whether it is necessary for extended family members who are members of the household of the EU national exercising treaty rights under Article 3(2)(a) of the Directive, to have lived with the EU national *in the home Member State of the EU national* prior to moving with the EU national to the host Member State. When the determination of this issue is at point, the UK national courts refer to the Immigration (European Economic Area) Regulations 2006 (UK SI 2006/1003), in which regulation 8(1) and 8(2)(a) state:

> **8.** —(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under **regulation** 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—
>
> > (a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household.

As demonstrated in the case of *Bigia,* this is interpreted to cover;

> 'only those OFMs who have been present with the Union citizen in the country from which he has most recently come'[4]

which has been interpreted as being within the European Union.

This is demonstrated in the UK Border Agency Entry Clearance Guidelines, EUN 02 EEA Family Permits, issued to entry clearance staff on the handling of applications made outside the United Kingdom (enclosed). In paragraph EU2.22, the first 'suggested refusal wording[s]' for the refusal of an application for entry clearance by Extended Family Members states;

> 'I am not satisfied that you [are] lawfully residing in an EEA state in which the EEA national resides and are dependent on the EEA national or a member of his/her household. I am therefore not satisfied that you are an extended family member in accordance with Regulation 8 of the Immigration (European Economic Area) Regulations 2006'.

This suggested form of refusal demonstrates a lack of clarity in relation to the requirement of where the movement originates.

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[2] [2008] UKAIT 00075.
[3] [2009] EWCA Civ 79.

[4] *Op cit*., para 43.

2.2 Entry and residence of third country family members

We welcome the Commission's guidance on entry visas, and particularly the clarification that visas must be issued within four weeks. We also welcomes the Commission's emphasis on the fact that "the maximum period of six months is justified only in cases where examination of the application involves policy considerations" and hopes that the Commission will monitor deadlines carefully to see that a full six-month delay is exceptional.

The Commission is already aware of the various difficulties that family members of EU migrants have had obtaining residence cards in the UK. The UK has (of its own admission) violated various provisions of the Directive, including delays of more than six months in issuing residence cards, asking for documentation not required by the Directive, and asking for up-to-date information after having unlawfully delayed in issuing documents. We have received assurances from Eddy Montgomery of the UK Border Agency that efforts are being made to reduce processing times for EEA Family Permits. We would encourage the Commission to monitor delays in applications for residence cards, to ensure delays of 6 months become exceptional. We also note that the UK authorities frequently issue the residence card as a sticker in the passport, and not as a self-standing document.

2.3 Residence of EU citizens for more than three months

We welcome the Commission's comments on sufficient resources and sickness insurance.

As the Commission describes the proportionality test for determining if someone has sufficient resources, the test would appear to apply in two circumstances:

- when an EU national is applying for a registration certificate upon arrival in a host state;
- where an EU national has been exercising residence rights in a host state and has begun to access social assistance benefits.

The Commission also notes that "Only receipt of social assistance benefits can be considered relevant to determining whether the person concerned is a burden on the social assistance system". We infer from these statements that any EU national who has been recognised as exercising residence rights in a host Member State is automatically entitled to receive social assistance benefits (through operation of Article 24 of the Directive) until such time as the host Member State determines that she is an *unreasonable burden* on the social assistance system. This appears to be supported by the language of Article 14(3) of the Directive, which also indicates that an individual who has been exercising a right to reside does not automatically lose that right to reside because she has had recourse to the social assistance system of the State.

In relation to sickness insurance, **the UK Border Agency systematically asks EU migrants and their family members whose applications are made under Article 7(1)(b) or (c) of the Directive to provide proof of <u>private</u> health insurance**. This includes the following cases where the individuals concerned are clearly covered by comprehensive health insurance:

- students undertaking a course of study of more than six months in the UK, in which case they are covered by the National Health Service (NHS) regardless of their nationality by operation of UK law;
- anyone (e.g. students on a short stay) who is covered under the system of another Member State through the European Health Insurance Card system;
- cases where the EU migrant is self-sufficient and her family member (e.g. spouse) is working in the UK to support her family, in which case, again by operation of UK law, the family is covered by the NHS.

Indeed, in light of the Articles 3 and 13(2)(f) of Regulation 1408/71, it would appear that any self-sufficient EU migrant who is "habitually resident" in the UK,[5] as that term is used in the Regulation, is covered by the NHS. This is because he is subject to the legislation of the United Kingdom, and the NHS is a residence-based system providing comprehensive sickness cover to anyone ordinarily resident in the country. Under these circumstances, it would appear to be a violation of the non-discrimination provision of Article 1408/71, as well as Article 24 of the Directive, to refuse NHS care to a self-sufficient EU national who is habitually resident in the UK.

ILPA notes that the Commission has not addressed the implementation of **Article 13** in the Directive. In our experience, this has been particularly problematic, at least in the UK. Two problems have emerged in the context of divorces between EU migrants and third-country nationals:

- In cases involving domestic violence, the UK tends to apply the Directive literally to the detriment of extremely vulnerable individuals. For example, in cases where the abusive spouse leaves the UK before the divorce is complete, the authorities have denied that an individual can retain her right to reside, as she was still married (under the *Diatta* rule – see *Diatta* ***ECJ*** 267/83) and her EU migrant husband had left the host state. It is also extremely difficult for many domestic violence victims to obtain the necessary documentation of their spouse's exercise of treaty rights, and the UK authorities often delay applications for a retained right of residence for lengthy periods while they verify this (e.g. by looking at the spouse's National Insurance contribution record) or assert that the burden of proof is on the third-country national. The UK also requires a high level of proof of domestic violence.[6] **It would be helpful if the Commission would clarify how the domestic violence rule in Article 13(2) is meant to apply in practice, with examples.** ILPA would be happy to provide input based on real cases.
- Even in cases that do not involve domestic violence, third-country nationals have had difficulty obtaining documentation from their ex-spouses as to their exercise of treaty rights. The UK authorities assert that the burden of proof lies on the third-country national, although in many cases the authorities can access information through National Insurance contribution records. **It would be helpful if the Commission clarified Member States' obligations in these situations.**

3. Restrictions of the Right to Move and Reside Freely on Ground of Public Policy or Public Security

[5] Case 90/97, *Swaddling*.
[6] UKBA European Casework Instructions, paragraph 5.4.9.

We welcome the Commission's guidance on public policy and public security, which reflect the previous case law of the European Court of Justice and the Commission's previous guidance on this point. The Commission have emphasised the importance of several factors including:

- the number of offences committed;
- the individual's behaviour whilst in prison;
- the individual's behaviour once she has been released.

It would be helpful to clarify under what circumstances a single conviction would suffice to justify the expulsion of an EU migrant on the grounds of public policy or public security.

We should also encourage the Commission to investigate the extent to which EU migrants have access, whilst in prison, to programmes, courses and other services designed to assist an individual in reintegrating into society. States' efforts to ensure that language barriers are not an obstacle are extremely important in this respect. It would also be helpful for the Commission to emphasise that certain privileges made available to prisoners – the right to leave prison during the day to work, for example, or to leave for weekend visits with families – fall within the scope of Article 24 of the Directive and therefore cannot be refused to EU migrants solely on the basis of their nationality.

The Commission also ought to encourage Member States to ensure that EU migrants who have been in prison have the opportunity, where appropriate, to reintegrate into society, instead of facing expulsion immediately upon finishing their sentence.

We welcomes the Commission's statement that "the personal and family situation of the individual concerned must be assessed carefully". It would be appropriate for the Commission to refer to Article 8 of the European Convention on Human Rights in this respect, while emphasising that the proportionality test for determining whether it is appropriate to expel and EU migrant is different from, and more stringent than, the test that applies to third-country nationals under the case law of the European Court of Human Rights under Article 8.

We accept that "Member States are not obliged to take **time actually spent behind bars** into account when calculating the duration of residence under Article 28 where no links with the host Member State are built". We nonetheless request that the Commission clarify what is meant by "where no links with the host Member State are built". It would appear, for example, that a tourist who has been convicted of an offence and who has no other connection to the host Member State should not be entitled to have such time taken into account. On the other hand, an EU migrant who has lived and worked in the host Member State for four years, and whose spouse and children have resided there, and who is sentenced to one year in prison in the host state has the necessary links and will continue to build those links whilst in prison. In those circumstances, it would appear appropriate for his time in prison to count towards calculating the duration of residence under Article 28.

The Commission explains that "there must be a clear distinction between normal, 'serious' and 'imperative' grounds on which the expulsion can be taken". It would be helpful to provide more guidance and examples of what the Commission means. For example, in the hypothetical case of the two sisters, "A" and "I" on the previous page,

would I's conduct justify her removal on serious or imperative grounds of public policy?

In addition, it would be particularly useful if the Commission could expand upon the reference made to persistent petty criminality.

In addition, it would be helpful if the Commission could expand upon the reference made to persistent petty criminality in Section 3.2, where it is stated that persistent petty criminality may represent a threat to public policy. It must be noted that expulsions of EU nationals must comply with Article 8 of the European Convention on Human Rights. In this regard, it is important to consider the European Court of Human Rights case of *Jakupovic v Austria* (App. no. 36757/97). In this case the applicant was a Croatian national who was deported from Austria where he had resided with his family since he was eleven years old, after committing several burglaries each of which resulted in a short prison sentence of between 10 weeks and 5 months. The Court considered in this case that there had been an unjustified interference with the applicant's right to respect for family life (Article 8), as it was considered that the persistent petty offences were not sufficiently serious to warrant expulsion which would infringe his Article 8 right to family life.

4.1.1 Concepts of abuse and fraud

We agree with the definition of "fraud" the Commission has put forth, as being "limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of residence".

It is ILPA's experience that in some cases, individuals may present fraudulent documents in order to confirm family relationships that do in fact exist (such as a traditional marriage recognised under the law of a third country). Such a situation should not automatically result in the refusal, termination or withdrawal of rights under the Directive if the family relationships the fraudulent documents are intended to demonstrate are genuine.

4.2 Marriages of convenience

We agree with the Commission's definition of a marriage of convenience as being those "contracted for the *sole* purpose of enjoying the right of free movement and residence under the Directive and that someone would not have otherwise". It may be helpful to clarify the role of the proportionality principle in this analysis, and to emphasise that, as a matter of EU law on the free movement of persons, once the marriage itself is genuine (i.e. not contracted for the sole purpose of enjoying the right of free movement), the various motives of the parties are no longer relevant.[7] We particularly welcome the statement that "the **burden of proof** lies on the authorities of the Member States seeking to restrict rights under the Directive" and would recommend that this be included in the introduction to any future communications about the Directive, as it applies to all of its provisions.

We are concerned about Member States' taking into account that "the couple divorces shortly after the third country national in question has acquired a right of residence"

[7] *Cf.* Case 53/81, paragraph 22.

as a factor indicating a marriage of convenience. The Commission should encourage Member States to consider whether there has been a situation of domestic violence in such a scenario and in all cases, and to consider whether the third-country national can benefit from the provisions of Article 13(2).

UK Entry Clearance Officers considering applications for EEA Family Permits (the visas provided for under Article 5 of the Directive) appear to take decisions that marriages between EU migrants and third-country nationals are not genuine on a regular basis, in violation of the Commission's Guidelines and in a manner "as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights". For example, ECOs have refused applications when evidence that the marriage is genuine has been provided, and in one case refused to consider evidence that had been sent (an envelope with photographs of the wedding was returned unopened).

At present, in the UK, third-country nationals are required to obtain a Certificate of Approval in order to marry or enter a civil partnership. The authorities used to charge a fee of £295 to obtain a certificate, and only ceased doing so after legal action was brought in the UK courts[8] declaring the scheme incompatible with Article 12 of the European Convention on Human Rights (right to marry). The scheme as it currently operates restricts the right to marry in the UK to third-country nationals have certain forms of immigration status.[9] We encourage the Commission to investigate the operation of the scheme as it relates to the rights of fiancé(e)s or proposed civil partners of EU migrants in the UK, to determine if these provisions, which are arguably still not in accordance with Article 12 of the European Convention on Human Rights, violate Directive 2004/38.

4.3 Other forms of abuse

We welcome the Commission's comments on the application of the *Surinder Singh* principle (see *Surinder Singh* C-370/90 [1992] ECR I-4265). From the Commission's use of the term "genuine and effective"[10] and the example given, it appears that the EU migrant involved would have to have exercised a right to reside in another Member State in accordance with Article 7 of the Directive. It would be helpful for the Commission to clarify that this is correct, and if there is a duration of the exercise of residence rights (e.g. three months, in line with Articles 6 and 7 of the Directive) indicative that the EU migrant's residence in another Member State has been genuine and effective.

We draw attention to the example on page 18 ("J." and "S.") and note that there is nothing in this scenario which could give rise to an inference that the relationship itself is abusive (i.e. "entered into solely with the purpose of obtaining the right of free movement and residence under Community law").

The UK has implemented the *Surinder Singh* principle through Regulation 9 of the Immigration (European Economic Area) Regulations 2006 which we believe is

[8] [2008] UKHL 53.
[9] See UKBA Guidance, http://www.ukba.homeoffice.gov.uk/sitecontent/documents/visitingtheuk/coaguidance.pdf.
[10] *Cf.* Case 316/85.

incompatible with the case law of the European Court of Justice. We reproduce the Regulation here:

> ***9.*** *— (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a United Kingdom national as if the United Kingdom national were an EEA national.*
>
> *(2) The conditions are that—*
>
> *(a) the United Kingdom national is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom; and*
>
> *(b) if the family member of the United Kingdom national is his spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in that State before the United Kingdom national returned to the United Kingdom.*
>
> *(3) Where these Regulations apply to the family member of a United Kingdom national the United Kingdom national shall be treated as holding a valid passport issued by an EEA State for the purpose of the application of regulation 13 to that family member.*

The Regulation fails to comply with Community law in the following respects, in our view:

- It only applies to returning UK nationals who have been **working or self-employed** in another Member State. While this is logical in light of the language of the *Surinder Singh* judgment, that judgment took place in a different context, before self-sufficient EU migrants and students acquired free movement rights under the legislation. As a result, a UK national who has, for example, been living in another Member States as a student and who wishes to return to the UK with a third-country spouse will have to rely on the UK Immigration Rules, which may make her spouse's entry impossible. ILPA requests that the Commission clarifies this point.
- The Regulation merely places the UK national in the position of an EU migrant citizen for the purposes of the Regulations, which means that the UK national will, under the terms of the Regulation, have to be a jobseeker, worker, student, or a self-employed or self-sufficient person. Therefore, a returning UK citizen who has been working in another Member State and who returns with his third-country spouse would be unable to reside in the UK with his spouse if, upon return to the UK, he was economically inactive and in receipt of social assistance. This clearly contradicts the European Court of Justice's clear jurisprudence in the *Eind* case.[11]

The AIRE Centre and ILPA hope that the new Commission will take up these matters with the United Kingdom government as soon as possible.

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[11] Case 291/05.

Yours sincerely
Nuala Mole, Director, AIRE Centre, Sophie Barrett-Brown, Chair ILPA.

Sophie Barrett-Brown
Chair
ILPA

Nuala Mole
Director
AIRE Centre

cc. Michael Meduna, European Commission, Rue de la Loi 200, 1049 Brussels, Belgium