Ministry of Justice call for views on the European Union Justice and Home Affairs Future Work Programme 2009-2014 (Stockholm Programme)

ILPA response

Introduction

ILPA is a professional association with some 1,000 members, who are barristers, solicitors and advocates practising in all aspects immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information on domestic and European immigration, asylum and nationality law and providing evidence-based research and opinion. ILPA is represented on numerous government and other 'stakeholder' and advisory groups.

The statement in 27 August 2009 briefing from Her Majesty's Government to members of the European Parliament (hereafter HMG Briefing) states[1]

> *"The Government welcomes the Commission's strong emphasis on promotion of citizens' rights, particularly the measures proposed to ensure a strategic approach to how we use data and the measures to ensure that freedom of movement rights are not subject to abuse."*

This captures both the ambivalence within the document itself and the ambivalence of the UK government toward it. Both data sharing and the emphasis on measures to ensure that freedom of movement rights are not subject to abuse carry with them risks of compromising, rather than promoting citizen's rights.

In ILPA's response we concentrate on those headings of particular relevance to ILPA, matters relating to free movement of EEA nationals and relating to third country nationals.

An EU that protects children from abuse

Summary of points made:

- **The UK should consider making its priority the broader recommendations on the protection of those most at risk, and not only children**
- **As concerns children, the UK should make one of its top priorities an EU that gives effect to the obligations in the UN Convention on the Rights of the Child. It should look more broadly than**

[1] HMG Briefing for UK Members Communication from the Commission to the Council and the European Parliament - An Area Of Freedom, Security And Justice
Serving The Citizen ('Stockholm Programme') EP Reference: COM(2009)262 Council Reference 11060/09

information sharing and data-exchange. Two points in particular on this broader approach:

- **The UN Convention on the Rights of the Child does not extend to Gibraltar, which is a UK Overseas Territory**
- **The UK should focus on the implementation of European Union and Council of Europe measures to protect children, for example by the appointment of guardians for separated children within the immigration system.**

The *Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen* [2]*Brussels*,
COM (2009) 262/4
Stockholm Programme says

> *"An EU strategy on the rights of the child must be developed. EU action for the protection of the vulnerable, women, victims of violence and dependent persons has to be strengthened."*

It is unclear why in the Ministry of Justice letter of 11th August 2009 inviting comments the protection of children from abuse has been highlighted without mention of other categories whereas the Commission treats of all three groups under the heading 'Protecting of the Vulnerable'. In the field of immigration children, women, victims of violence, dependant persons and other persons at risk ('the vulnerable') all require extra protection. The Commission also highlighted the protection of the Roma and we suggest that this should be a concern for the UK, within its own borders as well as in the wider European Union.

We draw particular attention to the exceptions to notification of removal that the UK has made as set out in the UK Border Agency Enforcement Guidance and Instructions includes the following provision:

> *60.6 Timing of Removal - Exceptional Cases*
> *An exception to the minimum 72 hour notification period (60.4 and 60.5) may be made where prompt removal is in the best interests of the person concerned due to:*
>
> - *Medically documented cases of either potential suicide or risk of self-harm,*
> - *In T*[hird] *C*[ountry] *U*[nit] *cases, removal of unaccompanied children in liaison with Social Services and the receiving country.*

That the published policy should provide for the denial of notice of removal, and therefore denial of access to the Court to the most vulnerable claimants - those with mental health problems and children is alarming. It carries with it a real risk that such people will be returned to a country where they are at risk, or where there are not adequate facilities to prevent them from self-harming, without there having been any opportunity to get in touch in advance with local medical services or family members who might be able to provide assistance on return. That this is stated to be on the basis of best interests is difficult to understand. If a person is suicidal or mentally ill and fears return, which is worse: to spend 72 hours concerned about an imminent removal, knowing that any legal arguments against removal are being advanced, or to wake up each day not knowing if that is the day on which the person will be removed.

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[2] COM (2009) 262/4

Third country cases include removals of children to other European countries under the Dublin II Regulation.[3] Separated children can only be removed under the Dublin Regulation in two scenarios: to reunite families and when children have previously applied for asylum in another member state. In some cases in which ILPA members have been involved, where children have previously applied for asylum in another member State the Government has sought to rely upon a presumption (and indeed in some cases little more) that the other member State will afford a child protection. In such cases, considerations of both child protection and international protection from persecution apply. In one case a child, accepted by the UK to be a child was returned to a European member State to claim asylum there. That country had not, when the child had been there previously, accepted the child as a child. The Third Country Unit of the UK Border Agency obtained no assurances that the child would be treated as a child if returned. The child was returned and was not treated as a child but was left in conditions of great risk and without any support until the UK representative managed to get back in touch with them and secure a court order that the child be returned to the UK. If the UK wishes to make one of its seven top priorities the protection of children from abuse then it is essential that it consider the position of age-disputes and the return of children under the Dublin II Regulation, as well as its own position on the notification of removal to children and to other adults at risk.

The above highlights that work to ensure a Europe that protects children from abuse needs to look at more than the exchange of information on, and prosecution of those who have abused children. See also on a coherent, overarching approach to data exchange and protection below.

The Stockholm Programme (COM (2009) 262 final) says at 2.2

> *"The **rights of the child** – i.e. the principle of the primacy of the interests of the child, the child's right to life, survival and development, non-discrimination and respect for the child's opinions – as proclaimed in the Charter and the United Nations Convention on the Rights of the Child, potentially concern all EU policies. They must be systematically taken into account. Measures therefore need to be identified to which the Union can contribute added value. Children in particularly vulnerable situations will receive special attention, notably in the context of immigration policy (unaccompanied minors, victims of trafficking, etc.)."*

The UN Convention on the Rights of the Child, ratified by all Member states of the European Union, but never extended to Gibraltar, should be at the heart of a European Union which protects children from abuse. The Foreign and Commonwealth Office website states:

> *"The UK is encouraging Gibraltar to accept the extension of the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) at the earliest opportunity. The Government of Gibraltar has already expressed its willingness to extend the latter, as well as its Optional Protocol, subject to the necessary legislation being passed."*[4]

There is no corresponding information about any willingness of the Government of Gibraltar to accept the UN Convention on the Rights of the Child. If the UK is to

[3] Council Regulation (EC) 343/2003 of 18 February 2003

[4] http://www.fco.gov.uk/en/about-the-fco/country-profiles/europe/gibraltar/?profile=politics&pg=6

place as one of its top priorities the protection of children from abuse, the question of the Convention on the Rights of the Child and Gibraltar is going to arise.

As to the UK, on 4 December 2008 the Secretary General of the United Nations gave notice of having received from the UK a communication dated 18 November 2008 lifting the UK's reservation to the UN Convention on the Rights of Child in respect of children under immigration control. The UK has yet to live up to the obligations it has assumed by lifting the reservation. ILPA's concerns about the UK Border Agency treatment of children are set out in detail in ILPA's February 2009 submission to the Joint Committee on the Rights of the Child and ILPA's August 2009 comments on the UK Border Agency 11 June 2009 draft working document for statutory guidance on the duty to safeguard and promote the welfare of children.[5] In those documents ILPA highlighted for example the UK failure to give effect to its obligations under the European 'Reception Directive'[6] and Article 10 of the Council of Europe Convention on Action Against Trafficking in Human Beings[7] to appoint guardians for separated children. The Commission's focus in the Stockholm Programme on the need to ensure that European measures are not merely passed, but also implemented, is illustrated by this example. If the UK is to call for stronger measures to protect children, it must be ready to respect these measures.

We highlight by way of example of the work that needs to be done, both at national and at European level, to safeguard children from abuse, some of the other concerns raised in the ILPA responses cited in the previous paragraph:

- The forced returns of children to third countries and the UK's failure to respect its obligations under Article 3 (Best Interests) of the UN Convention on the Rights of the Child in such cases and failure to respect the duty of confidentiality owed to the child
- The UK failure to accord separated children recognised as refugees the same rights to family reunion as their adult counterparts.
- The prosecution of children who have been trafficked, e.g. for document offences or 'work' in cannabis factories.
- Problems with age assessment so that many children are treated as adults
- The detention of children under immigration act powers
- The use of destitution as an enforcement measure for families at the end of the asylum process who can be denied all support under s 9 of the Asylum & Immigration (Treatment of Claimants etc…) Act 2004) and other difficulties with support for persons under immigration control as these affect children, alone or in families.

It is also of concern that the steps taken to control the access of accession state nationals to the UK have limited their access to social benefits. This can put their children at risk, including at risk of child poverty.
Those accession nationals who become pregnant and are unable
to work, temporarily or over the long term are, as a result, particularly unlikely to be able to access benefits, again leading to child poverty.

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[5]Both available at www.ilpa.org.uk, Submissions page
[6] Directive 2003/9/EC Article 19
[7] CETS No. 197, opened for signature 16 May 2005, into force 1 February 2008, ratified by the UK December 2008

Similar problems can arise for any EU migrant families in the UK, particularly in cases of domestic violence. Economically inactive EU migrants in the UK often, in cases of domestic violence, face the choice between remaining with their partners or losing access to vital social assistance and social security benefits. The same is true of third-country national spouses of EU migrant workers in the UK, who also face removal if they leave their partners.

More detail will be found in the documents, but we suggest that these are the priorities for the UK in striving to be part of a Europe that protects children from abuse.

See also under Mutual Recognition of Judgments and Human Trafficking below.

ii) A coherent, overarching approach to data exchange and protection across the JHA agenda

Summary of points made

- **The statement of the second UK priority gives equal prominence to data exchange and data protection. We suggest that data protection is the most pressing concern. In particular we highlight:**
  - **The need for the UK to give effect to the decision of the European Court of Human Rights in *Case of S & Marper v United Kingdom* (Applications Nos. 30562/04 & 30566/04)**
  - **The need for other European Member States to take into account the UK's arrangements for sharing information from visa applications with the Department of Homeland Security in the United States in deciding what information it will share with the UK.**
  - **Legal Services Commission proposals for data sharing that may put individuals, including but not limited to, persons under immigration control at risk**
  - **The manner in which the UK Border Agency deals with data, including data from children which may cause the first of its seven priorities to conflict with this, the second.**

ILPA has highlighted concerns regarding the taking, retention and use, including exchange, of information and data in, for example, briefings on the UK Borders Bill and Immigration, Asylum and Nationality Bill.[8] The European Court of Human Rights has ruled on the human rights implications of retaining data, let alone exchanging it with other, including foreign, authorities, in *Case of S & Marper v United Kingdom* (Applications Nos. 30562/04 & 30566/04), finding in that case there to have been a violation of the applicant's Article 8 rights to private life. UK powers to take and retain data under the UK Borders Act 2007 and the Borders, Citizenship and Immigration Act 2009, are extensive and there is no clarity on how the UK will ensure that it complies with the *Marper* decision in such cases. Just as we are concerned about the UK's implementation of its obligations under European Union law, so we are concerned at the UK's implementation of decisions of the European

[8] See respectively the June 2007 'Second Reading in the House of Lords' and February 2006 'Information – Clauses 27 to 42' briefings available in the Briefings section of our website at www.ilpa.org.uk

Court of Human Rights, concerns that, in the case of the *Marper* judgment, are shared by the Joint Committee on Human Rights.[9]

The Foreign and Commonwealth Office has announced that

> *"From August 2009, the biometric data of applicants for UK visas in the USA will be transmitted from UK Government systems to the Department of Homeland Security (DHS) for checking against the department's watch list of criminals and immigration offenders. The outcome of the check will inform the consideration of the visa application.*
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> *NB. It remains the case that information provided by applicants for a visa for the UK may be disclosed to foreign government departments and agencies, including the Department of Homeland Security, where disclosure assists those bodies and the UK Border Agency to perform their functions."*

This should be a matter of concern for other EU member States sharing data with the UK.

ILPA drew attention in its July 2008 response to the Legal Services Commission consultation *Managing Legal Aid cases in partnership Delivery Transformation*[10] to concerns that the Legal Services Commission's proposals for a semi-public, if not completely open access database containing information about clients in receipt of legal aid would give rise to problems of child protection but also for those fleeing forced marriages or domestic violence. ILPA highlighted that there would be other groups of clients for whom similar risks could arise.

ILPA also refers to its observations in its February 2009 Submissions to the Joint Committee on Human Rights inquiry on children's rights[11] in relation to tracing and contacting authorities and others in a child under immigration controls country of origin.

As highlighted at the UK Border Agency's National Asylum Stakeholder Forum children's subgroup meetings in December 2008 and February 2009, there are unresolved concerns as to the intention to forcibly return separated children; and as to information exchange, in particular, between the UK Border Agency and local authorities. These concerns become all the more acute if the proposal is to widen the pool of people who have access to information.

iii) Implementation of the Migration Pact

Summary of points made

- **The UK priorities should include protection and promotion of the right to asylum and the protection of free movement rights**

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[9] See JCHR Legislative Scrutiny, Policing and Crime Bill, 10th Report of Session 2008-2009, HL Ppaer 68 HC 395 16 April 2009

[10] Available at www.ilpa.org.uk, Submissions page

[11] Op cit.

- **The promotion of human rights compatible approach to family reunion;**
- **An effective and coherent approach to irregular migration;**
- **The development of border controls which promote human rights and protection of the individual.**

The Commission's Communication on the Stockholm Programme states that implementation of the principles and objectives of the Pact on Immigration and Asylum will provide a basis for EU action in coming years and will regularly appear on the agenda of the European Council." The Commission has already produced a Communication entitled Tracking method for monitoring the implementation of the European Pact on Immigration and Asylum[12].

One of the positive aspects of the Pact is that it reaffirms the commitment of the Member States to the 1951 UN Convention Relating to the Status of Refugees and its 1967 protocol and promotes the strengthening of cooperation with the UNHCR. In the undated UK Written Comments on the European Commission's communication on the Stockholm Programme (hereafter UK Written Comments) the UK states on asylum that it wants to see 'faster and fairer' decisions. The language is perhaps unhelpful. Rather than seeing speed as an end in itself, which can militate against fair decisions, the focus should be on removing delay from the process, so that it is as fast as is compatible with efficiency. The delivery of a common European asylum system which provides international protection to those who are in need requires efficiency but even more, it requires fairness and the unswerving adherence to international standards. At the moment, the EU measures on asylum fail to do so. For instance the possibility of a national security exception to the protection of persons at risk of torture if returned to their country of origin does not comply with the standard set and maintained by the European Court of Human Rights in its constant jurisprudence.[13] The UK priority should be to ensure a full and comprehensive inclusion of international refugee and human rights commitments in the EU common European asylum system.

More problematic in the Pact is the suggestion that in consideration of family reunification rules, Member States should be able to take into consideration their "reception capacities and families' capacity to integrate". The concept of reception capacity is unclear. It carries with it the whiff of unlawful distinction where state authorities determine whether an individual is a burden to reception capacities. The second concept of integration capacity is equally problematic. It presupposes that there is a definable group in the society into which a non-national should be integrating as opposed to others. Our societies are diverse and represent many different groups. The suggestion that integration into one group is to be preferred over integration into some other group fails to respect this diversity.

The Pact details many steps to be taken in respect of "illegal" immigration. We would suggest that as a starting place the UK should resist the use of the term "illegal" in respect of migration which may be irregular or undocumented. Both the Council of Europe and the European Parliament have deplored the use of the term

[12] COM (2009) 266 final of 10 June 2009.
[13] Article 17 Directive 2004/83 and *Saadi v Italy* ECtHR 28 February 2008.

"illegal" immigration.[14] The experience of enlargement of the European Union has been one in which irregular migrants become regularized through their transformation into citizens of the Union. This is a process of dealing with undocumented migrants through a resolution of their status by a change of law needs to be taken into account and deployed more successfully. Illegality of an individual's present in the EU is the result of laws (often ones which change with dizzying rapidity). These laws can be formulated in ways which give rise to less irregularly and undocumented statuses than is currently the case. This approach should be promoted by the UK.

The Pact stresses the importance of making the EU's border controls more effective. While the UK does not participate in the Schengen Borders Code, the EU's external border agency, FRONTEX and in general in the Schengen acquis which provides for the lifting of inter Member State borders and the common external border measures, it nonetheless has expressed substantial interest in this project. In so far as the UK's voice has consequence in this area notwithstanding the fact that it is outside the Schengen area, it should raise concern about the continuation of drowning of persons seeking to arrive in the EU via the Mediterranean and Atlantic around the Canary Islands. EU external border controls must aim to protect the lives of all persons at the external border and ensure that there is no inadvertent or negligent loss of life because of the actions or inactions of EU border guards. The protection of human rights in the control of the EU's external border is a matter of grave concern for the UK as well as it lies on the far side of the EU external border control.

See also the points made under other headings which, in that they concern persons under immigration control, are all of relevance to this heading also.

iv) Mutual recognition as the cornerstone of both civil and criminal judicial cooperation

Summary of points made

- **The UK's position appears to be inconsistent in that it wishes to make mutual recognition a priority but makes an exception of mutual recognition of decisions to grant protection. There are substantive and procedural matters to be addressed.**
- To date too little attention has been paid in the Stockholm programme to remedying the defects of the system already in place and too much emphasis has been placed, as before, on forging ahead with mutual recognition in a context which it as yet remains inappropriate for this to occur.

The HMG Briefing says that

> *"The Government agrees with the Commission that mutual recognition should continue to be the cornerstone of co-operation in both civil and criminal justice.*

But Her Majesty's Government goes on to state that in asylum it has reservation about the mutual recognition of decisions to grant protection. The UK's position appears to be inconsistent.

[14] Recommendation 1755 (2006) on the human rights of irregular migrants of the Parliamentary Assembly.

It is also worth highlighting the procedural difficulties that arise in protection cases without mutual recognition. For example, the UK Border Agency's Immigration Directorate Instructions say of UK Certificates of Identity (formerly known as, 'brown travel documents', i.e. those issued to persons who are unable to travel on a passport from their own country but have not been recognised as refugees)

> *Note: The CID is not accepted as a valid travel document by many European countries'*[15]

The mutual recognition of civil judgments and the taking of steps to ensure that those who have committed serious criminal offences are brought to justice across Europe are clearly goals of the Stockholm programme. The UK Government should raise the question of whether safeguards are in place to ensure the concomitant mutual recognition of the standards, expectations and rights of the parties to civil and criminal proceedings. At present they are not. The mutual recognition of both civil and criminal proceedings affects both EEA nationals and third country nationals present in a member State. Whilst both regimes can have immigration consequences for both EEA nationals and third country nationals, the latter group are disproportionately affected by them.

The mechanisms in place at present such as Brussels II bis Regulation[16]and the European Arrest Warrant have a particular impact on the cross border movement of persons. They were introduced and adopted to bring about the mutual recognition of civil and criminal procedures without harmonisation of either the substantive or procedural provisions of the relevant national civil and criminal law and practice having taken place. They were predicated on the erroneous assumption that, because all States were parties to the European Convention on Human Rights there was, if not a uniform , at very least a sufficiently comparable system of civil and criminal justice in all twenty seven member States. There is not. Moreover, and of particular concern to ILPA, no consideration was given to the interface between these provisions and either the EU free movement of persons regime (now governed by Directive 2004/38/EC) or the consequences of the measures in national immigration law.

The instruments in question facilitate the mutual recognition of decisions taken by national judges in the context of their national legal systems. Such decisions are predicated on the assumption that both the substantive outcome and procedural safeguards which exist in their own jurisdictions will be reflected and respected in the other State(s). This is not the reality

Instruments such as the European Arrest Warrant completely fail to take into account the widely divergent systems which exist cross Europe.

A suspect, accused person or convicted offender , if sent to another European Member State under a European Arrest Warrant, will frequently be the subject of a totally different regime for investigation, prosecution, trial, and sanction from the regime to which those involved in the criminal justice system in the executing state

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[15] Immigration Directorate Instructions Chapter 22 section 1, Passport and Travel Documents at 6.3. Many parts of the document are out of date, for example the certificate of identity is now brown and not black.

[16] Council Regulation EC No 2201/2003 of 27 Nov 2003 repealing 1347/2000.

are subjected. As foreign nationals they are subject to a very different regime from nationals in the issuing state.

Those who are not nationals of the member State conducting the criminal proceedings or fluent in the language of those proceedings are disproportionately disadvantaged in having the time and facilities to prepare their defence (see Article 6(3)(b) European Convention on Human Rights. The draft Framework Decision on the right to interpretation and translation in criminal proceedings[17] recognises some of the problems. But even if it is adopted, it falls far short of providing solutions.

Non nationals are disproportionately liable to be refused bail or alternative pre-trial release and to be placed in pre-trial detention. The recent decision of the European Court of Human Rights in the case of *Mangouras v Spain* [18]illustrates this point. The Council proposal for an Framework Decision on a European Supervision Order[19] in pretrial procedures is an important development has many defects. Endeavours to set up a European Supervisory Order or Eurobail (which would allow accused persons to return to their state of residence pending trial) have become bogged down in delays.

The practical consequences of being merely accused of a criminal offence, and therefore returned under an European Arrest Warrant may thus be more serious than conviction for the same offence in the state of residence or the state of destination would be.

The European Arrest Warrants issued by the Polish or Lithuanian authorities which the UK is obliged to execute (at the UK's expense) are now as legendary as the failure of the issuing states to comply with the standards (particularly the reasonable time requirement) of Article 6 of the European Arrest warrants. The conditions in the prisons of certain member states have also been found recently to violate Article 3 ECHR.[20]

Of concern to ILPA is the consequences which are serious and may be totally disproportionate if – as a result of the undue length of the proceedings in the issuing state – those returned under European Arrest Warrant lose their residence rights in their " home" state.

If the breadwinner of a family established in the UK under the EU free movement provisions is required to return to his or her country of origin to face charges for a more minor offence – and is refused the right to return to the UK during the often lengthy pre-trial period the family may be told they have lost the right to reside with the attendant disruption for spouses/partners and children. The problem is exacerbated if the spouse/partner and children are third country nationals

In pre-trial procedures, and even at trial, the provision of both interpretation and translation facilities is woefully inadequate in many member States to the degree that

[17] COM 2009 338 final
[18] App 12050/04 judgment of 8 January 2009 (to be heard by the Grand Chamber on 23rd September 2009)
[19] 506/08 COPEN 261
[20] See for example *Sulemanovic v Italy* (application no. 22635/03). Chamber judgment of 16 July 2009, *Isyar v Bulgaria* (application number 391/03, chamber judgment of 20 February 2009 (final)

the rights enshrined in Articles 5 and 6 of the European Court of Human Rights – particularly Article 6(3) (b) (adequate time and facilities for the preparation of the defence) are not respected . The proposal for a Framework decision recognises this but does not address many of the problems of detail.

Even if the individual is convicted as a result of a fair trial, the disparity in sentencing policies and practice for identical offences between the member States of the European Union creates anomalies. In some member States the vast majority of offences carry a maximum sentence of five years imprisonment and the number of offences carrying a longer maximum sentence is very small. In other member States sentences of ten years or more are very far from uncommon. The same offence can attract very different sentences in different member States.

These are not just issues of fairness and equality of treatment. The lack of consistency between member States can have very serious consequences for the residence rights of those affected and their family members. The degrees of protection against expulsion vary according to the length of residence . The United Kingdom delegation to the Permanent Representative Council put forward on 18 November 2008 a paper entitled Free movement of persons: abuses and substantive problems - Draft Council Conclusions.[21] These state, without citing authority for this, that time spent behind bars does not count towards residence.[22] No distinction is made in the UK draft conclusions between post conviction and pre-trial detention.

In European Arrest Warrant cases where those who are nationals of the issuing state (such as most of those returned from the UK under Polish European Arrest Warrants , many of whom are sought for minor offences) , they and, more importantly, their dependant family members - particularly children settled in school in the member State where they reside - may be told they have lost their "right to reside" in the member State where they live as a consequence of the execution of the European Arrest Warrant.

This is despite the offence of which the breadwinner is still only suspected being one which would not – even if he or she were to be convicted- justify exclusion under the Citizens Directive. This problem is even more acute if the family members of the surrendered individual are third country nationals.

The problems continue after the trial is over. Whilst the creation of an area of freedom justice and security across Europe means that nationals of member States of the European Union (and third country national long term residents) can be moved across Europe to stand trial, if convicted they are not accorded by Member States a corresponding right to return to their home state to serve their sentence near their families (see e.g *HS v UK* 16477/09 recently communicated by the European Court of Human Rights to the UK Government).

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[21] 15903/08, MI 462, JAI 653

[22] For UK caselaw on the point See LG (Italy) [2009] EWCA 1371 and GN (EEA Regulations: Five years' residence) Hungary [2007] UKAIT 00073

Some Third Country Nationals may have lost their residence rights through absence although the offence of which they have been convicted would not have justified their expulsion/deportation.

The UK may wish to take into consideration the Dutch approach . The Dutch have refused to surrender their residents under European Arrest Warrants if they are not given a guarantee that, if convicted, the offenders will be permitted, if they wish, to serve their sentences in the Netherlands. Such guarantees should be in place across the European Union.

The regime of which Brussels II *bis* is a part sits at the heart of the area of the mutual recognition of civil judgments. The returns of wrongfully removed or wrongfully retained children under Brussels II *bis* are predicated on the assumption that both the child and the parent will have no difficulty in returning to the original jurisdiction to resume residence. The retaining parent may be a third country national who has separated from the spouse/partner left behind . A return order may be meaningless if the parent cannot obtain a visa to return with the child in execution of the Brussels II bis order.

It is also of concern that the question to be determined as a matter of EU law under Brussels II *bis* of whether a child is "resident" in a particular Member State is determined without reference to the *lex specialis* of the Citizens Directive.

To date too little attention has been paid in the Stockholm programme to remedying the defects of the system already in place and too much emphasis has been placed, as before, on forging ahead with mutual recognition in a context which it as yet remains inappropriate for this to occur. The failure to cross-refer the mutual recognition provisions to the provisions of either the Citizens Directive or of the Associaition Agreement with Turkey (Ankara agreement) and similar agreements with third countries are matters the UK should highlight.

See also under Combatting organized crime below.

vi) Combatting organised crime

ILPA focuses in this response on steps to combat trafficking in people.

Summary of points made

- **The UK should opt-in to Directive 2004/81/EC**
- **The focus on trafficking as 'organised immigration crime' fails, *inter alia,* to address the trafficking of nationals of European Union within the European Union.**

ILPA agrees with the statement in the UK Written Comments that the EU is a key player in the fight against trafficking but finds it difficult to reconcile this statement with UK's continued opt-out from Council Directive 2004/81/EC of 29 April 2004.[23] Following the UK's ratification of the Council of Europe Convention on Action

[23] *on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities* Official Journal L 261 **,** *06/08/2004 P. 0019 - 0023*

against Trafficking in Human Beings, the UK should take steps to opt-in to the Directive and any sucessor measures to it (see below).

The UK Written Comments state (under the heading *Human Smuggling'*)

> *'It is important to recognise that human trafficking is only one aspect of the much wider criminal industry of organised immigration crime'*

In the case of the trafficking of persons within the UK there may be no immigration crime, for EU nationals are free to move between member States. There are likely to be violations of human rights, and criminal offences against the person, including, but not limited to, the crime of trafficking in such cases, but these are not immigration crimes. In considering action to combat trafficking at a European level it is vital that the trafficking within the EU of nationals of EU member States, is not tagged on as an afterthought. In support of this proposition we draw attention to the Commission's Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA (the Proposed Framework Deciison)[24] which states

> *"While Directive 2004/81/EC provides for the issue of a resident permit to victims of trafficking in human beings who are third country nationals, and Directive 2004/38/EC regulates the exercise of the right to move and reside freely in the territory of Member States by citizens of the Union and their families, including protection from expulsion, this Framework Decision establishes specific protective measures for any victim of trafficking in human beings, and does not deal with the conditions of their residence in the territory of Member States or any other issue falling within the Community competence."*

Thus it lays emphasis on treating non-EU nationals and EU nationals equally.

The Proposed Framework Decision includes some measures designed to enhance the protection of persons who have been trafficked. The UK should make it priority to press for a high level of protection during the negotiation of this Framework decision and in particular to press for it and any other successor measures to Directive 2004/81/EC to incorporate residence rights for EEA nationals who have been trafficked who may not be covered by Directive 2004/38/EC./

ILPA has also repeatedly highlighted its concerns at the focus on the enhancement of border controls as a primary method of tackling trafficking in human beings.[25] The focus must be on disrupting the activities of the traffickers and the crossing of a border is only one part of these activities and, we repeat, the crossing of the border by the person being trafficked may breach no immigration laws or rules.

Statements such as that made in section (4) (Legitimate travel is facilitated and illegal immigration reduced) in the HMG briefing;

> *"We need to counter…people trafficking…by using the EU's weight to secure quick returns for those who aren't entitled to stay."*

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[24] Com (2009) 136 final, 2009/0050 CNS of 25 March 2009

[25] See ILPA's January 2006 comments on the European Commission Communication: Fighting trafficking in human beings - an integrated approach and proposals for an action place COM(2005) 514 final , available at http://www.ilpa.org.uk/submissions/ECCommunicationonTrafficking.htm

may be examples of the same confusion. They also fail to understand that very often the fear of expulsion may be a reason that a trafficked person without an immigration status does not approach the authorities and remains in the thrall of the trafficker. In the light of such comments, the commitment to regarding trafficking from a human rights perspective, as a crime against the person, seems more illusory than real.

The UK's Written Comments include the statement

> *"…we must recognise that being a victim of a serious crime such as trafficking should not provide an automatic route to a particular migration status"*

This appears to be incompatible with the UK's obligations under the Council of Europe Convention on Action Against Trafficking in Human Beings, which the UK ratified in December, that victims of trafficking should all benefit from a reflection period. While there are many ways of describing a reflection period it is at least in one sense an immigration status since it affects whether a person can be removed from the UK. If the focus is on disrupting the traffickers then it becomes clear that merely removing the person who has been trafficked from the territory of the member State that found them may displace human trafficking, but offers no promise of preventing it nor of protecting the person trafficked.

As described above, in our comments on the priority of protecting children from abuse, while the UK has ratified the Council of Europe Convention on Action Against Trafficking in Human Beings, it has failed adequately to implement it, for example in failing to make provision for guardians for trafficked children.

Given that the UK also identifies mutual recogntion as a cornerstone of judicial cooperation as a priority we suggest that it would be helpful to consider the enforcement of compensation orders benefiting trafficked persons in other EU member States. Even if one secures a compensation order against a trafficker, which in the UK is a very rare occurrence, the chances of enforcing the order when the traffickers assets are in another State may be slim.

There are real questions about whether the UK has given sufficient priority to action at the level of the European Union either in its Action Plan on tackling human trafficking[26] or in practice. The only references that will be found in the July 2008 action plan to the European Union are:

> *"The UK Government will be bringing forward legislation to extend the relevant existing Government funded voluntary returns programmes to include victims from the European Economic Area victims of trafficking in the next Parliamentary session"* [Action point 59]

and

> *"Co-operation on human trafficking is currently being undertaken by the European Police Chiefs Task Force. The work is linked to partnership working plans in action point 29. [Action point 29 is about enabling more successful prosecutions against traffickers]."*

[26] Home Office and Scottish Executive, revised version July 2008

A related question is that of the division of labour at the European Union level. In the Council of Europe there is a body of work around the Council of Europe Convention on Action Against Trafficking in Human Beings . The Office for Security and Cooperation in Europe has also done considerable work on trafficking in human beings. It is important that work at the level of the European Union complements and does not duplicate, or worse still cut across, other cooperation between States who are members of the European Economic Area.

ILPA has repeatedly highlighted its concerns about the UK's approach to persons who have been trafficked, most recently in ILPA's March 2009 further submissions to the Home Affairs Committee Inquiry into human trafficking.[27]

One consideration is that of legal aid. Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings, which states

> '1 Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.
> 2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law. …'

In the HMG briefing it is stated that

> *"The UK has the most generous system of legal aid, in terms of cost, in Europe, and we could not therefore contemplate any measure that extended our current obligations."*

In practice in trafficking cases there is a real risk that the obligations are being extended but the legal aid budget is not. Where a person is not a British citizen nor an EEA national, the decision as to whether there are reasonable grounds for believing that they have been trafficked is dealt with by the UK Border Agency. The case proceeds alongside the asylum, human rights or other immigration case (for example renewal of a visa as a migrant domestic worker or other worker). No legal aid impact assessment was been carried out of the implications of these proposals. There was no consideration of the question of challenges to the decision of the 'competent authority' or of the need to adjust the fixed fee in these cases to take account of the extra work that will be involved in dealing with the question of whether there are reasonable grounds for believing that a person has been trafficked within the timescales required by the decision-making process. The Legal Services Commission had not been consulted on these matters and it was left to ILPA to bring these matters to the attention of the Commission.

The UK highlights in the UK Written Comments the importance of 'detection by law enforcement agencies'. It is unclear whether this is a reference to detection of traffickers, or people who may have been trafficked. If the UK is to protect people who may have been trafficked, it needs to get better at detecting them. Too often

[27] Available on the Submissions page of www.ilpa.org.uk

they are prosecuted. In *R v O* [2008] EWCA Crim 2835, O who had been trafficked into the UK for the purposes of sexual exploitation and escaped from the trafficker, had obtained a Spanish ID card and was apprehended at Dover fleeing to France. Although age was disputed she was charged and prosecuted as an adult (there being no finding as to her true age). She was advised to plead guilty to an offence of possessing an identity document which related to someone else with intent to use it to establish facts about herself, contrary to section 25(1)(c) of the Identity Cards Act 2006. Notwithstanding detailed information about her experience of trafficking being available pre-trial and the possibility of a defence of duress under the two Crown Prosecution Service trafficking-related Protocols,[28] she was sentenced to 8 months imprisonment.

An out of time appeal was brought against her conviction and sentence. Laws L.J, giving lead judgment in the Court of Appeal allowed O's appeal against her conviction and sentence. He referred to the disturbing facts of the case and, with a view to providing guidance, expressed the Court's desire that such events as occurred in O's case would not be repeated. The Court of Appeal recognised the clear intention of the UK Government, in signing the Council of Europe Convention on Action against Trafficking in Human Beings, to protect the rights of victims of trafficking in the UK and that these obligations require that both prosecutors and defence lawyers are "to make proper enquiries" in criminal prosecutions involving individuals who may have been trafficked.

Other comments

ILPA considers that the question of legal aid should be one of the priorities for the UK. It was, as cited above, stated in the HMG briefing that

> *"The UK has the most generous system of legal aid, in terms of cost, in Europe, and we could not therefore contemplate any measure that extended our current obligations."*

is no answer to the comments made by in the Stockholm programme about legal aid. When contemplating new legal measures, and new ways of working, as does the Stockholm programme, it is vital to consider the legal aid impact of any programme of change. Failure to do so can mean that the changes made to the law are not reflected in the assistance made available to individuals or that a legal aid budget is asked to pick up extra costs resulting from the new measures. When government decides to introduce measures that will have implications for demand for legal aid, and for overall costs to the legal aid budget, government must make adequate provision for legal aid.

Alasdair Mackenize
Acting Chair
ILPA
17 September 2009

[28] See http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/