ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
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ILPA's Response to the Commission's Proposed Directive on Common Standards and Procedures in Member States for returning illegally staying third country nationals, COM (2005) 391

Introduction

ILPA is fundamentally opposed the basic premise of this proposed Directive, that Member States should be compelled to expel non-nationals from their territories. We do not see that there is any real legitimacy for the European Union to be making mandatory forcible expulsion of non-nationals.

We would welcome a directive that sets minimum standards for the procedures surrounding the removal of non-nationals from the Member States. Given the tragedies that have occurred in a number of Member States during the course of forcible removals, it is apparent that it necessary to set standards for the protection of the individuals being removed. We find unacceptable the increasing use of detention and force in the context of forcible removals across the European Union. In our view the minimum standards set by a Directive on removals need to be sufficiently high and in compliance with international human rights law. At their core such standards need to protect those facing removal from arbitrary decision-making and unnecessary use of detention as well as ensure respect for human dignity and personal welfare.

Regrettably the proposed Directive does not achieve this. In addition to our fundamental objection to the basic premise of the Directive, it is ILPA's view that the proposed Directive does not set standards that can properly be described as "minimum". The proposed Directive in our view needs substantial amendment if it is to provide proper protection for the individuals facing forcible removal from the EU.

Impact Assessment and other pre-legislative scrutiny

There is an impact assessment report on the Proposal, SEC(2005)1057. It is structured around four options. It considers four general approaches: no change, non-binding legal instrument, gradual harmonisation by directive, and full harmonisation by regulation. No further formal consultation was carried out immediately before this Proposal was published so the Commission relies on the consultation that took place in 2002.

Although it appears that some further informal consultation took place in 2004 with 'Member State experts active in the field or return', ILPA was apparently not part of this further consultation and it is not clear how extensive it was. Most striking about the impact assessment is the lack of detail: the entire process seems taken up with comparing at a rather superficial level the costs and benefits of the four general

approaches above, with far less consideration of the actual substantive content of the partial harmonisation envisaged. There is very little detail indeed on any of the difficult issues addressed in this briefing note: coercive measures, an obligation to remove or expel, what exceptions might be if there is an obligation to expel, the extent and nature of procedural safeguards, exactly how and in what way will rights be safeguarded in this instrument, and so on. It is difficult to be confident that the full implications and rights impacts of all of these issues have been addressed fully and comprehensively this document.

The explanatory memorandum to the Directive states that the Proposal was 'subject to an in-depth scrutiny to make sure that its provisions are fully compatibility (sic) with fundamental rights as general principles of community law as well as international law, including refugee protection and human rights obligations derived form the ECHR. As a result, particular emphasis was put on the provisions dealing with procedural safeguards, family unity, temporary custody and coercive measures'. It is not made clear whether this is a reference to the impact assessment or to some other scrutiny. As noted, the impact assessment is rather short on detail and although it does mention fundamental rights, hardly qualifies as an in depth scrutiny of the proposal to ensure full compatibility with fundamental rights – it seems most likely that there is another document. Without sight of this document it is difficult to judge the extent or scope of this scrutiny and the extent of its impact on the final proposal.

Although there is fine-sounding talk about rights compatibility and rights protection in these documents, on their own they fall short of what pre-legislative scrutiny might achieve at its best and it is to be hoped that the next stages of development of the proposal continue this process to ensure that acceptable standards are the basis for the final text of any Directive.

Comments on Specific Provisions in the Proposed Directive

Article 1: Subject matter

As it stands, the proposed directive is concerned with the expulsion of those in an irregular position, which need not necessarily entail their return to a state of origin. This is clear from the definition of 'return' in Article 3(c). If that remains the case, the title of the directive and Article 1 ought to be changed to use the term 'expulsion'.

Article 2: Scope

Article 2(2), first sentence: In our assessment, the directive ought to apply to all cases of return/ expulsion from the territory. There is no reason to permit member states to designate 'transit zones' where the directive's safeguards do not fully apply. Jurisprudence of the European Court of Human Rights makes clear that transit zones do not fall outside State responsibility under the European Convention on Human Rights (*Amuur v France*, 10 June 1996, 22 EHRR 533). There is no justification in international human rights law for drawing a distinction between transit zones and other parts of State territory.

Equally, it should be made clear that the directive's safeguards apply where individuals are admitted to the territory on a provisional or temporary basis, for example to permit determinationof an asylum claim.

Article 2(2), second sentence: The proposal contemplates the application to those in transit zones of the safeguards in Article 8 (postponement), Article 10 (coercive measures), Article 13 (treatment pending return) and Article 15 (conditions of temporary custody). We take the view that, with suitable modifications, the following safeguards should also be applied to those in transit zones: Article 6(5) (Member state freedom to grant a residence permit), Article 11 (decisions to be in writing), Article 12 (judicial remedies) and Article 14 (decisions on temporary custody).

Article 2(3): In addition to those listed in the proposal, in our assessment, the following categories of third country national should be excluded from the Directive since they have either have directly effect Community law rights to reside or their removal would interfere with Article 8 of the European Convention on Human Rights:

- the family members of nationals of the state in question
- the family members of EEA and Swiss nationals who exercise rights under those agreements
- nationals of states with association agreements with the EU, and who have exercised rights under those agreements

Article 3: Definitions

Article 3 (c) 'return': We are concerned at the open-endedness of the phrase "going back to one's country of origin, transit or another third country." 'Return' must mean above all going back to a state of nationality. The circumstances in which return to state of transit is allowed – e.g. under the Dublin II Regulation - should be precisely defined. We do not consider that this proposed Directive is appropriate to set out the mechanism for Member States to remove third country nationals to countries other than their countries of origin. The safeguards and procedures for sending third country nationals to transit or other third countries should the subject of a separate document as different factors are relevant, such as admissibility into those countries, which will not necessarily be relevant in cases of return to country of nationality.

Article 4: more favourable provisions

We have no objection to this Article. We would argue however that nationals of countries with which the EU has an association agreement governing personal movement should not be covered by the directive in the first place (see comment on Article 2(3), above).

Article 5 – family relationships and best interest of the child

1. Article 5 places a duty on Member States, when implementing the Directive, to 'take due account' of the nature and solidity of the third country national's family relationships, the duration of his stay in the Member State and of the existence of

family, cultural and social ties with his country of origin. Member States must also 'take account of' the best interests of the child in accordance with the 1989 UN Convention on the Rights of the Child. This is complemented by a preambular provision, recital 18, according to which the best interests of the child and respect for family life 'should be a primary consideration' of Member States when implementing the Directive.

2. We recommend that the text of the Directive be amended, in order to strengthen the protection of children and family life, and align the wording of the Directive with respect of the best interests of the child, with existing Community measures such as the reception conditions Directive (Article 18) and the refugee qualification Directive (Article 20(5)). Recital 18 should replace current Article 5. New Article 5(1) should thus read:

> '*In line with the 1989 UN Convention of the Rights of the Child, the 'best interests of the child' should be a primary consideration of Member States when implementing this Directive. In line with the ECHR, respect for family life should be a primary consideration of Member States when implementing this Directive'*.

3. The best interests of the child and the protection of family life can be further enhanced by the insertion of a second paragraph in Article 5, modelled upon Article 23(2) of the temporary protection Directive, according to which, in cases of returns:

> '*The Member States may allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period*.'

4. Article 5 does not contain any provision on the protection of vulnerable persons. Their needs are taken into account only with regard to the conditions of temporary custody in the draft – according to Article 15(3), 'particular attention shall be paid to the situation of vulnerable persons'. We recommend that this provision is reiterated in the general part of the Directive - this will oblige Member States to pay attention to the situation of vulnerable persons in all cases when implementing the Directive. A new Article 5(3) can be inserted, stating that:

> '*When implementing the Directive, Member States shall pay particular attention to the situation of vulnerable persons, taking account of factors including age, mental and physical health and sex'*.

5. Finally, Article 15(3) obliges Member States to ensure that minors 'are not kept in temporary custody in common prison accommodation'. The words 'in common prison accommodation' should be deleted. Minors should never be kept in custody.

Article 6 – Return Decision

1. In the introduction we have set out our fundamental objection to the proposed Directive making mandatory expulsion of any non-national. We consider that this is a matter that must be left to the discretion of Member States.

2. Additionally we are of the view that the criteria for determining whether a return decision can be made should be made clearer. We consider that no return decision should be taken if there are compassionate or humanitarian reasons for the person remaining in the Member State. Plainly the forcible removal of a person in such situations cannot be condoned by the European Union and should not be left to the discretion of Member States. Further no return decision can be made if the return would breach the State's obligation under international human rights law. We do not consider that such obligations should be limited to the European Convention on Human Rights or particular provisions within that Convention.

3. Furthermore we are concerned that if return decisions are not made third country nationals should not be left in limbo without any legal status in the Member State. If third country nationals are left without legal status it affects their ability to access services, employment and social support as well as leaving them unstable and insecure. The case of **Ahmed v Austria** will be recalled in this instance (9 October 1997, 24 EHRR 62). Mr Ahmed had been denied a residence permit confirming his right to stay in Austria following the decision of the European Court of Human Rights that removal would constitute his human rights. Tragically he took his own life as he was left without support or stability.

4. We recommend that Article 6(1) is therefore amended to read

> *"a) Member States may issue a return decision to any third country national staying illegally on their territory provided that:*
>
> *i) return would not constitute a breach of international human rights law and in particular the European Convention on Human Rights, the UN Convention on the Rights of the Child; or*
> *ii) there are no compassionate or other humanitarian reasons why the person should not be removed*
>
> *b) In the event that a return decision has already been made and there are compassionate or humanitarian reasons or the return would constitute a breach of international human rights obligations, that decision should be withdrawn.*
>
> *c) Where return would breach international human rights obligations or there are other compassionate or humanitarian reasons why the third country national should not be removed the Member State must issue the person with an autonomous residence permit or another authorisation granting a right to stay"*

5. As a consequence of the above amendment **Article 6(4)** should be **deleted** and **Article 6(5)** should be **amended** to read

"*Member States may, at any moment decide to issue an autonomous residence permit or another authorisation offering a right to stay for **[delete]** any reason to a third country national staying illegally on their territory. In this event no return decision shall be issued or where a return decision has already been issued, it shall be withdrawn"*

6. We consider that Article 6(8) should be mandatory on Member States since it is illogical for a return decision to be made if the individual has made an application for a residence permit or right to stay in the Member State which is pending consideration. A return decision made before the application for residence permit or stay is processed would be premature and could lead to administrative error where an individual is removed before the outcome of their residence permit application is known. Furthermore the provision should be clarified to including in procedure, any appeal against refusal by the administrative authorities, in order that an individual may not be subject of a return decision if they are exercising a right to appeal in relation to a residence permit application.

7. We recommend therefore that Article 6(8) is amended to read

"If a third country national staying illegally in its territory is the subject of a pending procedure, <u>including any appeal or judicial review</u>, for granting his residence permit or any other permit offering the right to stay, that Member State <u>shall</u> refrain from issuing a return decision, until the pending procedure is finished."

Article 8 – Postponement

1. We welcome the provision in Article 8(1) that the Member States may postpone enforcement of a return decision for an appropriate period in light of specific circumstances of the individual case. However we consider that if the enforcement of the return decision is to be postponed because of individual circumstances for an unreasonable period the Member State should be compelled to reconsider whether the return decision should be withdrawn. We consider that if there is non-enforcement of a return decision for reasons of ill-health, humanitarian reasons or due to the young age of the individual the individual should not be left in limbo with the threat of the return decision hanging above him or her.

2. The circumstances set out in Article 8(2) where the execution of a removal order must be postponed in our view are circumstances which engage with the individuals' human rights and the rights of the child. We are very concerned that a removal order could simply be postponed for an indefinite period of time with the threat of such removal hanging over the individual for that time. We consider that such threat can cause mental suffering and create insecurity that is highly undesirable and potentially itself in breach of international human rights obligations. We consider that if postponement of the removal order occurs for lengthy periods of time the removal order and return decision should lapse.

3. To this end we recommend that the following words are added to Article 8(1)

"… .*In the event that the Member State postpones enforcement of a return decision for longer than two weeks for reasons of ill-health, other humanitarian reasons or in the case of a minor, the State should consider whether the return decision should be withdrawn. In all other cases where the Member State postpones enforcement of a return decision for longer than four months, the State should consider whether the return decision should be withdrawn"*

4. We recommend that the following words are added to Article 8(2)

"… In the event that the execution of the removal order has been postponed for longer than four weeks due to circumstances set out in (a) or (c) above or for reasons of difficulty of removal in a humane manner with full respect for the third-country national's fundamental rights, the return decision and removal order will lapse automatically. Where the execution of the removal order has been postponed for longer than six months for any other reason, the return decision and removal order will lapse automatically."

Article 9- Re-entry ban

1. Article 9(1) as currently drafted would impose an obligation to Member States to include a re-entry ban when issuing removal orders – the necessity and legality of the imposition of such absolute obligation by Community law is questionable. It may cause the Member State to act in breach of individuals' human rights protected by the ECHR– for instance if the removal would separate the individual from family members and the individual's re-entry to rejoin family members is prohibited. The relationship between the first indent of 9(1), which imposes a mandatory duty to issue re-entry bans with removal orders, and the second indent, which leaves discretion to Member States to do so at the stage of issuing return decisions is unclear. Finally, the duration of the ban, if such ban is imposed by the Directive, should not exceed 5 years in the most serious of circumstances. In the light of these comments, Article 9(1) should be amended to read as follows:

'If Member States issue a removal order this may include a re-entry ban. This ban should be of a maximum of 5 years if the third country national concerned constitutes a serious threat to public policy or public security. Otherwise a re-entry ban may be of a maximum of 6 months'.

2. Paragraph 2 remains as it stands, with the **deletion** of its paragraph from "The re-entry ban' to 'public security'.

Article 10 – Removal

1. The phrase 'where Member States use coercive measures' may imply that the Directive **imposes a duty/authorises Member States** to use coercive measures routinely in carrying out removals. Coercive measures must always be a measure of last resort. We therefore recommend that Article 10(1) starts as follows:

'Member States may only use coercive measures where strictly necessary, in accordance with their national law, to carry out the removal of a third-country national who resists removal, Where such measures are employed their use shall be proportionate and shall not exceed reasonable force'.

Article 11 Form

We are concerned that decisions are only to be provided to individuals in a language they understand where they request a translation. Furthermore we are concerned that the language in which the information is provided is not one known to be understood by the individual but only one "reasonably" supposed to be understood. We recommend that Article 11(2) is amended as follows:

> "*Member State shall provide* **[delete words]** *a written or oral translation of the main elements of the return decision and/or removal order in a language the third country national* **[delete words]** *understands*."

Article 12 Judicial Remedies

1. We welcome the inclusion of provisions on judicial remedies. These are essential to ensure against arbitrary decision making, unlawful removals of third country nationals and decisions which interfere with individuals' fundamental human rights. However we consider that there should be judicial remedies available in respect of a re-entry ban issued under Article 9 above. We recommend that Article 12(1) is **amended** as follows:

> *"Member States shall ensure that the third-country national concerned has the right to an effective judicial remedy before a court or tribunal to appeal against or to seek review of a return decision, removal order and/or re-entry ban.*

2. We consider that suspensive effect of decision of a judicial remedy always be the case. We recommend that Article 12(2) is **amended** as follows:

> "*The judicial remedy shall* **[delete word]** *have suspensive effect* **[remaining paragraph deleted]**.*"*

3. We do not agree that the provision of legal aid should be subject to a test that it is necessary to ensure effective access to justice. The decision by a Member State to issue a return decision, removal order or a re-entry ban is a serious matter for the individual concerned. It may include forcible removal and prevent from re-entry to the territory for some time. Effective access to justice on such matters will always require provision of legal assistance where requested.

4. To this end we suggest that Article 12(3) is amended to **delete** the words "*insofar as such aid is necessary to ensure effective access to justice*".

5. In our view it is necessary to ensure that there is suspensive effect of any removal order or re-entry ban where the individual has brought or could bring an

appeal on grounds of asylum, subsidiary protection, temporary protection or other form of international protection. To this end we recommend the **addition** of a new Article 12(4)

> *'Without prejudice to Article 6(9), where an appeal is brought or is pending against a decision refusing an application for asylum, subsidiary protection, temporary protection, or any other form of international protection, including an admissibility decision, an appeal or review of a return decision, a removal order or re-entry ban shall have suspensive effect until the final decision on that application is taken'*

Article 13 Safeguards pending return

We welcome these provisions. We consider that it is entirely necessary for Member States to keep third country nationals fully informed in cases of postponement and to ensure that they are not placed in a position of uncertainty or insecurity.

Article 14 Temporary Custody

1. This provision, dealing with the detention of third-country nationals, must recognise as its starting point that the right to liberty is a fundamental right set out in universal and regional instruments, including Article 5 of the European Convention on Human Rights. We are concerned that the use of "temporary custody" may imply that the measure is less than detention and favour of the use of word detention throughout as it relates more accurately to international human rights law and other instruments of Community law.

2. We note from the Commission's Explanatory Memorandum that this Chapter seeks to limit the use of temporary custody to circumstances where it is necessary to prevent the risk of absconding. We support this limitation but are concerned that it should be spelt out in Article 14. We suggest that Article 14(1) should expressly state that Members States must not detain third-country nationals unless there is a risk of absconding.

3. It is particularly important that decisions to detain are taken on the basis of a full and substantive assessment of the individual case. We suggest that this is expressed in Article 14(1). Furthermore we do not accept that the use of detention can ever be made mandatory on the Member State.

4. On its current wording Article 14(1) places a duty on Member States to detain potential absconders where less coercive measures would not be sufficient. The mandatory nature of the provision fails to take account of:

(i) Humanitarian factors (such as mental or physical disability; pregnancy; age)

(ii) Circumstances where a person is genuinely unable to comply with less coercive measures (e.g. a person is unable for financial reasons to deposit a financial guarantee).

In our view, it is important that Member States should have discretion not to detain potential absconders where humanitarian factors or other personal factors would render detention disproportionate. Furthermore unaccompanied minors and families with children should never be detained. In cases where there is a risk of absconding, alternatives to detention should be utilised such as more frequent reporting or supervised accommodation.

5. In light of these comments we recommend that Article 14(1) is **amended** to read as follows:-

> *"Only where there are serious grounds…***[retain existing text]** *that risk, Member States may detain a third country national, who is or will be subject or a removal order or a return decision. Detention should never be used where humanitarian factors or other personal circumstances render the detention disproportionate. Detention should never be used in the case of an unaccompanied minor or families with children. A decision to detain should be taken only on the basis of a full and substantive assessment of the individual case.*"

6. In our view given that the liberty of the individual is at stake, temporary custody orders should not be issued, even in urgent cases, by administrative authorities: the decision to detain should always be judicial.

7. In order to ensure that detention is for the shortest possible period, an individual should be entitled to a review of his/her detention by judicial authorities whenever there is new evidence supporting release or whenever his/her circumstances change. We suggest that this is made clear in Article 14(2).

8. In light of these comments we recommend that Article 14(2) is **amended** as follows:-

> "*Detention orders shall be issued by judicial authorities.***[delete remaining text].** *A person subject to such order shall be entitled to a review of his/her detention by judicial authorities whenever there is new evidence supporting release or whenever his/her circumstances change.*

9.We are concerned that temporary custody orders may be extended by a long as six months. This long period is inconsistent with the regular judicial scrutiny which the Article seeks to establish elsewhere. We suggest that a maximum period of 60 days is more appropriate in all cases. To this end Article 14(4) should be **amended** to read

> "***Detention*** *may be extended by judicial authorities to a maximum of 60 days*"

10. We also suggest that Article 14 should stipulate that detainees must without delay be provided with written reasons for detention in a language they understand. They should also be informed of their rights to challenge a temporary custody order. We recommend the **addition** of a new Article 14(5) which reads

"Third country nationals subject to detention orders must be provided without delay with written reasons for detention in a language they understand. They should also be informed of their rights to challenge the detention order.

Article 15 Conditions of Temporary Custody

1. It is important that immigration detainees are subject to a security regime and have access to facilities which recognise that they are not detained by virtue of having committed a crime.

2. Article 15(1) should be expanded so that it places a duty on Member States to provide immigration detainees with access to useful activities such as education, physical exercise, recreational activities, and religious practice. To this end we recommend that the following words are **added** to Article 15(1)

"….*Member States shall provide immigration detainees with access to useful activities such as education, physical exercise, recreational activities, and religious practice*."

3. We welcome the emphasis in Article 15(2) on specialised temporary custody facilities but we do not believe that it goes far enough: there should be no circumstances in which immigration detainees should be accommodated in ordinary prisons.

4. In addition, we believe that Article 15 should stipulate that staff employed within temporary custody facilities should have adequate training related to the needs of immigration detainees rather than criminal prisoners.

5. We recommend that Article 15(2) is **amended** as follows:-

"*Detention shall be carried out in specialised detention facilities* **[delete remaining text].** *Staff employed at such facilities should have adequate training related to the needs of immigration detainees rather than criminal prisoners.*

6. We welcome the emphasis on vulnerable persons under Article 15(3). We consider it necessary to make clear that Member States are obliged to take account of age, mental and physical health and sex. However, as stated above children and families should never be detained. Accordingly Article 15(3) should be **amended** to read

"*Particular attention shall be paid to the situation of vulnerable persons* **[delete remaining text]** *and other relevant factors such as age, mental and physical health and sex of the detainee*."

7. We suggest that Article 15(4) should expressly give international organisations the right to unlimited access to places of detention and the right to move inside such places without restriction. International organisations should have the

right to interview detainees in private and communicate freely with anyone who can provide information. This would provide the same safeguards as are provided by visits of the European Committee for the Prevention of Torture.

8. In addition, Article 15(4) should stipulate that all detainees should have access to a procedure dealing with complaints about conditions of detention.

9. Article 15(4) should be amended to have the following words **added** at the end of the existing text

> *"…. International organisations shall have the right to unlimited access to places of detention and the right to move inside such places without restriction. International organisations shall have the right to interview detainees in private and communicate freely with anyone who can provide information. Member States shall have in place a procedure for detainees to complain about conditions of detention.*

Article 16 – Apprehension in other Member States

1. According to this provision, the principle on which the Directive on mutual recognition of decisions on the expulsion of third country nationals (2001/40) is based that is to say the automatic recognition of such decisions is abandoned (though in any event even under the Directive the Member States were not obliged to accord mutual recognition to an expulsion decision). Recital 13 of the proposal announces the repeal of the Directive in total.

2. In place of the principle of mutual recognition of expulsion decisions, the new proposal provides for four alternatives. Where one Member State has already taken an expulsion decision against a third country national which individual is then apprehended in another Member States the options are:

(a) to recognise the expulsion decision of the first Member State and execute it seeking financial compensation from the Member State which took the decision;
(b) request the first Member State to take back to individual; (the first Member State being under an obligation to take back unless the individual left the territory after the issue of the expulsion decision);
(c) start new expulsion proceedings under its national legislation;
(d) issue a residence permit for compassionate, humanitarian or other reasons after consultation with the first Member State (as foreseen in article 25 Schengen Implementing Agreement).

3. In fact, this list of options covers fairly fully all of the possibilities open to a Member State so it can hardly be considered as a step towards harmonisation or even approximation in the field. Although, as far as we are aware, there are no statistics on the use of the directive on mutual recognition of expulsion decisions, from anecdotal evidence we understand that this has been extremely rare. Our criticisms of that Directive remain relevant to option (a) of the proposal. We do not consider that mutual recognition is a lawful way to proceed in light of the potential human rights breaches which may result. For instance, if an expulsion decision is made in one

Member State which fails to take into account the duties of the Member States toward long resident third country nationals with family members in the state under Article 8 ECHR, the second Member State in executing the decision may also be in breach of Article 8 ECHR (*T.I. v UK* by analogy).

4. Clearly the most tempting course of action is for the second Member State to seek to return the individual to the first Member State. However, we are concerned that such an approach may be used as a ground for the further extension of databases and access to information about individual's immigration status across and within EU borders. In our view the collection, retention and transmission of such information which may be highly prejudicial to the individual needs to be very carefully controlled and tested against the right to privacy which is embodied in Article 8 ECHR.

5. As the first option has proven highly unattractive to the Member States under the existing directive and as the second option has what we consider to be inherent flaws, the third option – commencing with a new expulsion decision becomes the default preferred position. At least under this option the individual will have an opportunity to make his or her case to remain in the territory. However, we would insist that this option must be accompanied by a right of appeal against the decision to expel which has suspensive effect. Expulsion is a very serious interference with the private life of an individual. The longer term consequences as regards family life, ability to continue economic activities and the visit friends in the former host state can be very dramatic. Thus the individual must be given the opportunity to counter any decision to expel him or her before a judicial authority which has the power to take into consideration all the relevant facts of the case in reviewing the decision.

6. We are content that the power in subsection (d) to issue a residence permit is not limited to compassionate or humanitarian reasons but also includes others as well. However we consider that it would be advantageous to specify in an **annex** the circumstances in which there will be a presumption in favour of issuing a residence permit. In our view these would include:

(a) where the individual is married to or in a stable relationship with a citizen of the Union or a third country national with lawful residence on the territory;
(b) where the individual has a child on the territory with whom the individual has contact and which child has a right of residence on the territory;
(c) where the individual has substantial family links within the EU albeit not in one Member State alone and few links left in the country of origin;
(d) where the individual has resided within the Union for a period in excess of five years albeit irregularly or with a mix of regular and irregular stay;
(e) where the state is constrained by international human rights obligations from expulsion – including where the individual is a refugee, or a person entitled to protection on the basis of Article 3 ECHR or Article 3 UNCAT;
(f) where the individual is gainfully employed and there are no reasons of public policy, public security or public health to justify his or her expulsion from the state.

ILPA

24 November 2005