ILPA Submission to House of Lords Committee on the European Union : Sub-Committee E : Inquiry into the 'Human Rights Proofing EU Legislation'

1 The Immigration Law Practitioners' Association is a UK based, non-governmental organisation which is concerned primarily with immigration and asylum issues at the national and European levels. Its membership includes over 1,000 practitioners.

2 ILPA is grateful to be invited to participate in this inquiry into the European Commission's Communication on Compliance with the EU Charter on Fundamental Rights. Together with the other instruments referred to in the call for evidence, this is clearly a development of concern to ILPA in particular as regards access to fundamental rights both at the national, EU and Council of Europe levels by individuals, including citizens of the Union who have exercised their free movement rights and their family members of any nationality, third country nationals and refugees.

3 We note, as a starting place, that the protection of fundamental rights[1] in the European Union has been a matter of substantial concern for some time. As regards the EU legislator, there has there been a steady insertion of references to fundamental rights in the EU treaties from 1987 onwards. As regards the European Court of Justice, the frequency with which references to fundamental rights are made has increased dramatically over the past 10 years.[2] This increasing concern about fundamental rights in EU law at the EU institutional and judicial level has not, however, resolved the question of compliance. Not only have a number of constitutional courts in the Member States expressed their concerns about the protection of fundamental rights in the EU but the European Court of Human Rights is also being seized on an increasing number of occasions relating to the human rights consequences for individuals of EU legislation.[3] One conclusion might be that as statements of the EU's respect for fundamental rights have multiplied at the EU institutional level, skepticism at the reality of that respect has mushroomed at the national and ECHR level.

4 This also seems to be an appropriate moment to note that, not least at the behest of the UK Government, the EU Charter of Fundamental Rights adopted in 2000, was so adopted as a political document, not a legally binding one. The attempt to transform it into a legally binding 'bill of rights' through its insertion into the proposed EU Constitutional Treaty seems to have come to a halt with that draft Treaty for the moment.

5 Moving to the more specific field of concern of this Association, we would note that the Directive on Family Reunification (2003/86) in respect of which the UK has not exercised its 'opt in', was adopted well after the critical date of 13 March 2001 on which the Commission decided that all legislation must be accompanied by a fundamental rights check. Indeed, the last Commission proposal for a directive was published on 2 May 2002 (COM (2002) 225 final). However, the Directive contains three provisions of which the European Parliament is so concerned in respect of fundamental rights

compliance that it has commenced proceeding for annulment before the European Court of Justice.[4]

6 Thus our primary concern is that fundamental rights are actually secured better in the EU, not that the institutions spend more time reassuring us that they are protected better. In so far as a monitoring system integrated into the legislative process at the EU level contributes to better protection we are in favour of such a measure. Our concern, however, is that any compatibility assessments/statements/certificates and the like must not create a *prima facie* legal presumption that the legislative act is in fact fundamental rights compliant. The aggrieved individual who claims that his or her fundamental rights have not been respected must not be faced with a further legal hurdle to overcome in the quest for redress on account of the existence of a rights impact assessment or a fundamental rights certificate. The creation of fundamental rights impact assessments must not be legally cognisable to the disadvantage of the individual seeking to establish his or her rights.

The Commission's Communication

7 Two main practical measures of significance are suggested by the Communication which we will address in turn: the use of *integrated impact assessments* and the use of *Charter compliance/compatibility statements*. We start by saying that we give this initiative a cautious welcome and recognise that any development whereby fundamental rights compliance is rigorously and systematically monitored and built into the very earliest stages of policy and planning is to be welcomed. However, despite this cautious welcome, we do also wish to raise some concerns.

8 *Integrated impact assessments* (IAAs) have been used since 2002. A review was conducted of the first phase of implementation of the IAA programme during 2004. IAAs are now since 2005 to be used more systematically, and the guidance for those conducting impact assessments has recently been amended following the review.[5] These Integrated Assessments are structured in such a way as to examine social, environmental and economic impacts of proposed measures during their development. We are somewhat disappointed that the question of fundamental rights still does not rate a separate category alongside these other three impact categories, nor even a clearly separate particular sub-heading within the broader category of social impacts (where it is largely located now). We note the explanation that the diversity of rights contained in the Charter means that they find themselves scattered throughout the three categories of impacts studied, and recognise that fundamental rights impacts can and do find a place in the framework,[6] both before and after the recent amendments.

9 We also have some concerns that not providing at least a separate sub-heading for fundamental rights issues under 'social impacts' may serve to undermine the strategy of locking in a culture of rights awareness and of highlighting the commitment to identifying, assessing and evaluating potential rights impacts within this integrated framework. In particular, while it may be that Impact Assessments carried out by Directorates General which have a good awareness of fundamental rights impacts, we wonder whether this may always be the case where such impacts are less obvious and where the assessment is carried out primarily by others with less awareness and experience of fundamental rights issues. Reading the documentation on Impact Assessments, it comes across quite clearly that this integrated impact

assessment initiative is intended to further better regulation, competitiveness, and sustainability. There is bound to be some scepticism about the extent to which strategies developed with these aims in mind can be expected to translate comfortably to the rather different context of fundamental rights protection.[7]

10 Connected to these two points above, we consider that some more thought might be given to the process of assessing fundamental rights impacts and to greater transparency about how this will take place, and how it will be ensured that all Commission Officials drawing up impact assessments have appropriate levels of knowledge and expertise in fundamental rights issues. We understand[8] that guidance and directives is being drawn up by officials from the Freedom Security and Justice Directorate-General to assist others elsewhere in the Commission in drawing up human rights impact assessments, but little is said about this is any of the documentation we have seen; in particular we see no such specific guidance is referred to in the updated impact assessment guidelines[9] (although further guidance on competition impacts is referred to).

11 We also note that there are bound to be difficulties in determining the criteria against which compatibility assessments to be judged since these may vary substantially. For instance, the questions which would be asked by an executive anxious to avoid legal challenges will be different from the assessment which might be carried out by an NGO seeking to establish rights for the individual. Further within governments, assessments will be substantially different. For instance, a Treasury may seek a fundamental rights assessment which indicates the cost of fundamental rights while a Social Affairs Ministry may seek an assessment of fundamental rights from the perspective of social cohesion.

12 For this, amongst other reasons, we are also concerned to ensure that the widest possible range of organisations and voices from civil society are heard in assessing the potential impacts of proposals and measures fundamental rights. The Commission states that wider political and ethical issues can and should be addressed in impact assessments and we consider that evaluating potential fundamental rights impacts will be a critical test of the Commission's commitment to this openness and debate. This will be crucial in allaying fears that the impact assessment process – with its roots in better regulation and sustainability - may be of limited use in this somewhat different rights context, and even at its worst potentially unhelpful to the long term strategy of rights protection.

13 We are concerned that the Commission – and others involved later in the legislative process – should take very seriously the fundamental point that impact assessments are merely a guide to *assist* in the ultimate decision and not a substitute for it. The final determination on whether to act where negative fundamental rights impacts are anticipated and if so what kind of action to take (in particular the balance to be struck between protected rights and permissible exceptions, proportionality) *must remain with the properly allocated (and in some way politically accountable) decision-makers*. The EU processes of law and policy-making have sufficient accountability gaps already and care should be taken that these impact assessments are used in a way which enhances openness, transparency and quality of decision-making rather than exacerbating the difficulties that already exist.

14 Finally, we are concerned to ensure that the existence of impact assessments evaluating potential negative fundamental rights impacts does not lead indirectly to an approach whereby decisions with negative rights consequences may be regarded more lightly or easily. Pursuing policy options or legislative instruments whereby a certain degree of negative rights impact is anticipated may sometimes be necessary but should never be done lightly. In pursuing the Hague programme and the Agenda for Action implementing it we detect something of a shift away from existing rights paradigm. There is a worrying shift of framework regarding the relationship of rights and exceptions. While in EC law there has been a very clear focus on the rights of individuals either as EU rights or human rights against which exceptions must be justified by the Member States, in the Agenda for Action the motif is one of balance. There seems to be a transformation of the primacy of rights against which any exception must be justified by the Member State on very limited grounds into more of an equilibrium between exceptions and rights.

15 Both in EU law and international human rights law, rights are established which the individual is entitled to exercise, such as the right to free movement for economic purposes or the right to family life. A state which seeks to interfere with the right is only permitted to do so on the basis of the exceptions set out in the legislation and subject to the judicial supervision of the courts. As the European Court of Justice has clarified on many occasions, the exceptions are exactly that – exceptions to be interpreted narrowly as restricting rights which the individual is entitled to exercise. However, in the document there seems to be a change in this basic and fundamental principle of EU law. The relationship of rights and exceptions seems to be in the process of change and being recast into one of balance. This risks giving a weight to the exceptions to rights equation which elevates the exception to the same status as the right. We consider this to be a worrying and negative development. In the light of this, we are concerned that the impact assessment process should not be used in any way that would trivialise or marginalise the seriousness of any decision in which negative rights consequences are seen to be outweighed by benefits gained.

16 *Compatibility statements* are also used and greater attention will be paid to the reasoning behind measures. These compatibility statements are statements included in Proposals or the preamble to legislative instruments indicating that they comply with the Charter fundamental rights. We welcome the move to encourage more detailed and reasoned compatibility statements as we share the concern pointed out by they Commission that without such enhanced reasoning these statements may indeed be criticised for lacking substance and justification and being empty gestures or formalities. We raise two further concerns here: first, that these statements are only as good as the standards used to judge compliance. In particular we would raise concerns that too often these statements have been made in respect of measures - particularly those in the area of immigration and asylum law - which have been roundly condemned as being in breach of fundamental rights, and which are being or may be challenged in the Court of Justice as being incompatible with fundamental rights.[10] Care should be taken not just that these statements are made, but that before making them, rigorous and high standards of rights protection are used to judge whether compatibility may be stated.

17 We also wish to point out the risk that such statements could be used later as

a 'buffer' or a protection against proper and rigorous subsequent judicial scrutiny. In this respect, much will depend on the attitude of the Court of Justice which is somewhat problematic to predict. We are concerned that the combination of impact assessments and compatibility statements may, in practice, act as an obstacle in subsequent judicial scrutiny.

18 We are interested to note that the Commission reiterates its commitment to following through the results of rights impact assessments and charter compliance statements, even to the extent of suggesting that it may threaten to take legal action to annul measures if the standards of rights protection in its own Proposals are badly compromised during the subsequent stages of the legislative process. We look forward to the day when the Commission will match this high-sounding rhetoric with real action, but we remain to be convinced that we will see this any time soon.

Conclusion

19 We give this initiative a cautious welcome. Nonetheless, our expectations of what this strategy can achieve are modest, and we are concerned to ensure that the combination of impact assessments and compliance statements does not shift the balance too much in favour of deference towards executive and legislative decisions on proportionality, necessity of interference with protected rights, and overall standards of rights protection, at the expense of an appropriate standard of subsequent rigorous independent judicial scrutiny of such decisions. And we emphasise that this strategy must be combined with a real commitment to act in accordance with the highest levels of rights protection by the Commission and the Member States in the Council. Too often in the field of Freedom, Security and Justice, Member State governments, and to some lesser extent the Commission, have ignored concerns raised by the European Parliament and civil society during the legislative process. If this attitude persists we doubt whether this strategy alone can achieve much.

30 June 2005

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[1] While fundamental rights as a concept is not fully convergent with the concept of human rights the two do overlap, primarily in so far as human rights are internationally recognised fundamental rights while at the national level the concept of fundamental rights tends to include also the concept of civil liberties.

[2] Elspeth Guild & Guillaume Lesieur (editors), *The European Court of Justice on the European Convention on Human Rights: Who said what when*, Kluwer Law International, The Hague, 1997

[3] E Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, Kluwer Law International, The Hague, 2004.

[4] C-540/03.

[5] These comments may helpfully be read together with the most recent Impact

Assessment guidelines SEC (2005) 791.

[6] The documentation on impact assessments seems somewhat contradictory as to how clearly fundamental rights impact is singled out as a particular issue which should be addressed. Some do not do this clearly, while others do so more clearly and specifically, and the most recent high profile impact assessment that has serious fundamental rights impact implications (on the Visa Information System, COM (2004) 835) does in fact address fundamental rights impact within the social impacts category.

[7] See generally on impact assessments in the context of mainstreaming fundamental rights, pointing out some difficulties and concerns, De Schutter 'Mainstreaming Fundamental Rights' in Alston & De Schutter (eds) *Monitoring Fundamental Rights in the EU* (Hart Oxford 2005).

[8] De Schutter, above, p 54.

[9] SEC(2995) 791.

[10] We would particularly mention here the Family Reunification Directive and the Asylum Procedures Directive.