ILPA Response to the Consultation on Draft Regulations Relating to Accession of 8 New Member States to the European Union

1. INTRODUCTION

The Immigration Law Practitioners' Association (ILPA) is the UK's professional association of immigration lawyers, advisers and academics practising or engaged in immigration, asylum and nationality law. ILPA has more than 1,100 members including lawyers, advice workers, academics and law students. Through its membership ILPA has access to a wide range of experience relevant to this consultation exercise.

This consultation is based on two documents which are currently draft regulations intended come into force on 1 May 2004:-

> *1. THE DRAFT ACCESSION (IMMIGRATION AND WORKER REGISTRATION) REGULATIONS 2004 ("the immigration regulations")*
>
> *2. THE SOCIAL SECURITY (HABITUAL RESIDENCE) AMENDMENT REGULATIONS 2004 ("the social security regulations")*

This response to the consultation is not intended as a detailed analysis of social security laws but as an examination of the overall scheme that is proposed for nationals of the 8 Central and Eastern European countries (A8) which will accede to the EU on that date and its compatibility with the Accession Treaty and other provisions of European Union law.

This response is intended for the Social Security Advisory Committee which is carrying out a public consultation exercise in relation to these regulations. It will also be provided to the Immigration and Nationality Directorate which we note has not considered it necessary to consult the public in relation to the proposed legislative changes.

2. PRELIMINARY OBSERVATIONS ABOUT THE PROPOSED SCHEME

ILPA welcomes whole heartedly the accession of the new Member States to the European Union. We were previously extremely pleased that the UK Government had stated its intention of granting full free movement rights to the nationals of the accession States immediately upon accession. In ILPA's view this would not only meet labour needs in the UK but also create an atmosphere in which new accession nationals felt welcome and equal in the UK. In light of previous problems relating to the acceptance and integration of nationals from some of the A8 nationals in the UK, in ILPA's view this would go some way towards social inclusion of these groups.

ILPA is therefore extremely disappointed that the Government appears now to have stepped backwards from full free movement of accession nationals in the transition period. Although the Government's intention is that A8 national workers will still be able to come to the UK to work, it is determined to ensure that they do not have access to benefits or security of residence, at least for the first 12 months. This is lamentable given the Government's recent emphasis on creating fair working conditions for migrant

workers and to end exploitation of such workers (Home Office Press Release **New measures to tackle illegal working** [16 March 2004] no. 120/2004). In ILPA's view it is socially irresponsible for the Government to exclude from access to benefits those who may have contributed to the UK economy for as long as 11 months.

ILPA is firmly of the view that some of the proposals are incompatible with European Union law and the Accession Treaty as outlined below.

1. THE DRAFT ACCESSION (IMMIGRATION AND WORKER REGISTRATION) REGULATIONS 2004 ("the immigration regulations")

ILPA's understanding is that apart from amending the Immigration (EEA) Regulations 2000 (SI 2000/2326) ("the 2000 Regulations") to include A8 nationals as qualified persons within the meaning of that Regulation, the draft immigration regulations are intended to create a separate immigration regime for certain A8 nationals.

The draft immigration regulations contain provisions on two main issues which will affect A8 nationals from the 1 May 2004

1. Create a legal requirement that A8 nationals register their employment during the first 12 months of employment in the UK. Failure to register will result in the person working in breach of immigration laws and an offence being committed by the employer.

2. Limit the right of residence for workers and work-seekers from the A8 countries.

    - Work-seekers from the A8 countries are not entitled to reside in the UK

    - A8 workers will only be lawfully resident in the UK if they have registered their employment and are working for authorized employers

    - A8 workers who cease to work during their first year of employment will only be lawfully resident for the remainder of the month in which they worked

    - The family members of A8 workers during the first year of employment will not be granted residence permits

2. THE SOCIAL SECURITY (HABITUAL RESIDENCE) AMENDMENT REGULATIONS 2004 ("the social security regulations")

As far as ILPA can see from the explanatory memorandum the main purpose of the social security regulations is to amend the *habitual residence test* in social security legislation so that only persons lawfully resident in the UK will be treated as habitually resident. The existing requirements of the habitual residence test will also have to be met.

Read together with the draft immigration regulations, it is clear that the intention is that the following categories of A8 national will **not** be eligible for public funds which are

dependent on satisfaction of the habitual residence test

- A8 work-seekers
- A8 workers who cease employment during the first year of employment
- the family members of A8 workers during the first year of the workers' employment

3. PERMITTED DEROGATIONS IN THE TRANSITION PERIOD

The Accession Treaty permits existing Member States to derogate from certain free movement provisions during the transition period. The provisions from which derogation is permitted are those contained in Articles 1–6 of Regulation 1612/68 which otherwise guarantee EU worker equal right of access to the labour market as own nationals. However, derogation is limited to those Articles.

The transition arrangements are:-

- During the first two years following accession national laws will govern conditions of access to the labour market for A8 nationals except where the A8 national has been legally working for 12 months (this period includes time working legally in the Member State before accession)

- National laws govern conditions of access to the labour market because of derogation from Articles 1 – 6 of Regulation 1612/68 in respect of A8 nationals. However, national laws do not govern conditions of work, social and tax advantages or rights of residence of family members since these are contained in Articles 7 onwards of Regulation 1612/68 (which are not subject to the derogation).

- National laws governing conditions of access to the labour market may be kept in place by the existing Member States for up to five years (the Commission must be notified before the end of the first two years).

- After the first two years Member States may choose to apply provisions of Community law to the rights of access to the labour market.

    - Where family members accompany A8 workers during the period when national measures are in place, access to the labour market for those family members is restricted.

It is ILPA's firm view that derogation from any other provision of Community law during the transition period is prohibited. This means that there can be no derogation from Regulation 1408/71 (relating to social security) or any other right or provisions flowing from Article 39 of EC Treaty.

4. THE COMPATIBILITY OF THE DRAFT IMMIGRATION AND SOCIAL SECURITY REGULATIONS WITH THE ACCESSION TREATY

ILPA's view is that the draft regulations do not comply with the Accession Treaty and other provisions of European Union law in a number of important respects.

1. **Scope of the derogation**

In Regulations 4 and 7 of the draft immigration regulations reference is made to derogation from Article 39 of the Treaty establishing the European Community (EC) as well as Article 1 to 6 of Regulation 1612/68.

Derogation from Article 39 of the EC Treaty is not permitted by the terms of the Annexes to the Accession Treaty. Paragraph 1 of the Annex V (Czech Republic) to the Accession Treaty makes quite clear that Article 39 and Regulation 1612/68 will apply in FULL from the date of accession save where derogation is permitted. Paragraph 2 of the Annex permits derogation from Articles 1 to 6 of Regulation 1612/68 only reflecting the fact that it is only conditions of access to the labour market that can be limited in the transition period.

Reference to derogation from Article 39 of the EC Treaty should be deleted.

2. **Work-seekers**

Regulation 4 of the draft immigration regulations purports to deprive work-seekers from the A8 countries to any right of residence in the UK unless they are self-sufficient and can meet the conditions laid down in Directive 90/364.

The right of residence for work-seekers in Community law is derived from Article 39 of the EC Treaty itself rather than any secondary legislation such as Regulation 1612/68 (ECJ judgments in **Antonissen** (Case 292/89) and more recently in **Collins** (Case C-138/02) make this clear). Since such persons do not fall within the scope of Article 1–6 of Regulation 1612/68 such derogation is not permissible under the provisions of the Accession Treaty.

Apart from the incompatibility with the Accession Treaty, the provision is also incompatible with the stated intention of the UK to permit free access to the labour market during the transition period. Creating a whole class of persons without any legal status or residence documents attesting to their right to be in the UK cannot be in the public interest.

ILPA is concerned that the failure to recognize the legal right of work-seekers to reside in the UK will have undesirable consequences. It may affect the work-seeker's ability to open bank accounts, rent property and access other services in the UK. This will perpetuate any misunderstanding that the public has about the legal rights of A8 nationals post-accession.

3. **Workers who cease work during the first year**

Regulation 5 of the draft immigration regulations seeks to make unlawful the residence of an A8 national if he ceases work during the first year of employment thus depriving him of access to social security benefits or any other social and tax advantages that he might otherwise have obtained as a worker.

Access to social security benefits and other such social advantages are covered by Article 7(2) of Regulation 1612/68. The right of residence for workers who have temporarily ceased work similarly flows from Article 7(1) of Regulation 1612/68. These provisions falls outside of the permissible derogations under the Accession Treaty and thus derogation from these provisions is incompatible with the Accession Treaty.

In ILPA's view the draft regulations do not properly reflect the fact that whilst the UK is permitted to restrict access to the labour market during the transitional period it is not permitted to provide *less* protection or afford *less* social rights to A8 nationals it *does* admit to its labour market, than would be afforded to any other EU national. This is for the reason identified above that derogation is permissible *only* from the provisions of Articles 1- 6 of Regulation 1612/68.

ILPA also finds it incomprehensible why the Secretary of State would want to make illegal A8 nationals who have worked in the UK but who lose their jobs or cease work, perhaps through no fault of their own. If they have no reasonable prospect of finding a job Community law makes quite clear that they will not retain the right of residence in the UK (ECJ judgment in **Antonissen,** Case 292/89). However, six months or longer is seen as "reasonable" in this context, not the one month suggested by the regulations (Regulation 5(4)(b)).

4. **Calculating the first year of employment**

It is clear from the Annexes to the Accession Treaty that A8 nationals who have been legally working in a Member State (whether before or after accession) for at least 12 months will have unfettered access to the labour market in that Member State under conditions governed by UK law.

In calculating that 12 month period if it occurred prior to access, Regulation 2(7)(a) limits "legal working" to periods of work whilst the person had leave to enter or remain under the 1971 Act thus excluding periods of work whilst on temporary admission even if the person had work permission. The ECJ is unlikely in this context to tolerate the artificial distinction made between those on temporary admission and those with leave to enter or remain (case of **Yiadom**, Case C-357/98, refers) if the A8 national was permitted to work.

ILPA's view is that Regulation 7(a) of the draft immigration regulations must be amended to include those on temporary admission who were working with work permission.

5. **Residence Permits for A8 national workers and their Family Members**

Regulation 5(5) of the draft immigration regulations provides that family members of A8 national workers are not entitled to residence permits. Regulation 5(6) makes clear that A8 national workers during their first 12 months of work will not be entitled to residence permits either.

ILPA is concerned that absent the issue of residence permits the legal position of A8 workers and their family members will be ambiguous. Provision should be made in the legislation for the legal basis for such persons to remain in the UK.

The right of workers to install their family members is provided in Community law by Article 10 of Regulation 1612/68. Since this is not a provision that the UK is permitted to derogate from, the right of A8 nationals admitted to the labour market of the UK to install their family members should be clearly provided for, which the draft regulations fail to do.

6. **Scope of Family Members**

The draft immigration regulations purport to define "family member" of a worker

(Regulation 2(9)(c)) as the worker's spouse and his children who are under 21 or dependent on him. Article 10 of EC Regulation 1612/68 which defines a family member of a worker for the purposes of EU law is considerably broader and includes dependants in the ascending line as well as other dependent relatives. In ILPA's opinion since no derogation from this provision is permitted, the limited definition of family member under the draft immigration regulations is impermissible.

ILPA is further concerned that the family members of self-employed A8 nationals do not appear to be exempt from registration (Regulation 2 (6)(b) of the draft immigration regulations) whereas the family members of workers, self-sufficient persons, retired persons and students are exempt. This is inexplicable given the fact the family members of self-employed nationals plainly have the right to work as a matter of EU law (**Commission v France,** 7 March 1996).

7. **Registration of A8 national workers**

Part 3 of the draft immigration regulations is concerned with the requirement for an A8 national worker to register his work and the entitlement only to work for an authorised employer. An employer is only an authorised employer if the worker applies for a registration certificate (Regulation 7(2)(b)). A worker is not lawfully resident if he is not working for an authorised employer (Regulation 5(2)). An employer who employs an A8 worker without such registration certificate creates an offence (Regulation 9(1)).

In ILPA's view this provision is unnecessarily draconian and disproportionate. Notwithstanding the administrative difficulties already facing employers, these provisions are likely to lead to discrimination against A8 nationals. Furthermore the creation of a new class of "illegal" worker is contrary to the stated intentions of the Secretary of State. ILPA considers it wholly undesirable that the arrival of A8 national workers should be shrouded in bureaucracy and technical changes.

8. **Amendments to the Habitual Residence Test**

The main aim of draft social security regulations is to change the habitual residence test to ensure that only those lawfully resident in the UK have access to income based benefits. This change is justified on the basis that this will ensure that A8 national work-seekers and workers who have worked for less than a year are excluded from obtaining income-based benefits.

In ILPA's view these amendments to the habitual residence test are entirely misguided and make UK legislation further incompatible with EU law.

As regards newly arrived work-seekers, the proposed amendment to the habitual residence test is unnecessary since work-seekers with no connection to the UK were never entitled as a matter of either EU or UK laws to gain access to social security benefits such as job-seekers allowance (unless they had transferred such benefit from their countries of origin under Regulation 1408/71). Only work-seekers with sufficient connection with the UK would be entitled to access to benefits.

With respect to workers, regardless of the length of time they have worked providing that it was "genuine and effective" work, they are entitled as a matter of EU law to be treated as the host Member State's own nationals with regards access to income based benefits. This is made clear by Article 7 of Regulation 1612/68 and the ECJ has treated access to benefits for those who have become unemployed as falling within the scope of this provision (**Martinez Sala**, Case C-85/96, [1998] ECR I-2691). Furthermore the co-

ordination of certain social security benefits is provided for in Regulation 1408/71 and EU national workers are entitled to unemployment benefits on the same basis as own nationals. The UK is not permitted to derogate from either Article 7 of Regulation 1612/68 or any provision of Regulation 1408/71 under the Accession Treaty. To deprive A8 workers of access to benefits simply on the basis that they have not worked for a full 12 months is plainly discriminatory and contrary to EU law.

ILPA is very concerned that the draft social security regulations appear to take no cognisance of the recent judgment of the European Court of Justice in the case of **Collins** (Case C-138/02, 23 March 2004). This case makes clear that the UK is not permitted to discriminate between EU nationals and UK nationals in access to job-seekers allowance. Whilst the UK is permitted to test the connection that the work-seeker has to the UK and whether they have genuinely sought work for a reasonable period of time, it is not permitted to discriminate on the basis of nationality in access to such benefits.

ILPA considers that rather than amending social security legislation to make the habitual residence test more stringent for A8 nationals, the Government should urgently amend its social security legislation to remove discrimination against all EU nationals, including A8 nationals. ILPA considers the introduction of further discriminatory provisions to UK social security legislation does not comply with the ECJ's ruling in **Collins** or with the terms of the Accession Treaty.

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