

House of Lords European Union Select Committee inquiry into Annual Policy Strategy 2008***The Lisbon Strategy***

The Commission has expressed its commitment to a renewed Lisbon strategy for growth and jobs. It confirms that this is a major vehicle for “promoting a more prosperous, environmentally responsible and socially inclusive European Union”. It is important to remember here that migration, both in the form of intra Member State movement of workers and other economically active citizens of the Union, and in the form of the admission of third country nationals for economic activities, is a central platform of the Lisbon Agenda. Permitting individuals to make the choice whether to cross EU borders to seek employment elsewhere in the Union free of state controls in the form of work and residence permits is a core freedom of the EU. The Member States have long agreed that this does not create pressure for the reduction of social protection standards in the Union but rather is compatible with high social security protections.

Encouraging citizens of the Union to move to seek better employment prospects in other Member States than that of their nationality is intended to be accompanied and promoted by the right of family reunification. However, in the UK (and a small number of other Member States such as the Netherlands) the principle of family reunification for citizens of the Union who move to exercise their free movement rights is under attack. For instance, the Border and Immigration Agency notified ILPA in March that it would be introducing DNA testing for family members of such citizens of the Union where considered appropriate. Further the UK authorities have advised that they will apply only national law as regards the issuing of visas outside the EU for family members to join their EU national principal in the UK. This means that for instance, many dependent parents and children will be refused visas even though they are entitled to family reunification under EU law. If the Lisbon Agenda is to be furthered, citizens of the Union must be protected against such intrusive and dissuasive measures which make moving to another Member State unattractive. The right to move and be joined by third country national family members in conditions of dignity should be a high priority of the Commission in its 2008 Agenda.

Further, equality in access to social benefits when a citizen of the Union is unemployed is fundamental to achieving the Lisbon Agenda. If workers and the self employed are not protected against indigence when their jobs or work vanish and before they are able to find new employment the objective of the Lisbon Agenda to make best use of human resources in the EU cannot be achieved. The UK's policy, pursued most vigorously since the admission of the 2004 Member States, to exclude EU nationals from social benefits runs counter to the objective and is counterproductive. The Commission's Policy Strategy 2008 should include as an objective ensuring that all citizens of the Union get equal access to social benefits in which ever Member State they find themselves. Any exceptions to this principle of equality should be very strictly limited.

Managing Migration Flows

The Commission indicates that managing migration flows to the EU is among the objectives of the Strategy. The first thing which should be remembered is that migration is never a one way phenomenon: EU citizens also migrate elsewhere in the world to find better jobs, gain experience and further their private lives. The treatment of third country nationals in the EU should reflect the same standards which the EU expects for the treatment of its nationals when they migrate elsewhere in the world. The perspective of migration as a positive phenomenon which enhances prosperity and diversity is true not only for the EU but for the whole world and includes our citizens of the Union

ILPA • Lindsey House • 40/42 Charterhouse Street • London EC1M 6JN • Tel: 020 7251 8383 • Fax: 020 7251 8384
EEmail: info@ilpa.org.uk Website: www.ilpa.org.uk

elsewhere as well as the national of third countries in the EU. Article 151 EC stressed the importance of cultural diversity in the EU as one of its strengths. This strength should not be forgotten or limited to within the confines of the EU's external border. The forthcoming directives on labour migration, conditions of entry and residence of seasonal workers and remunerated trainees need to reflect the respect for the individual and equality among workers. The standards of treatment should be equivalent to those provided to EU national migrant workers providing a high level of security of residence, employment and social protection. Differentiating between EU nationals and third country nationals in conditions of work, or worse, between different groups of third country nationals, is divisive and counterproductive to the smooth operation of the labour market.

The Commission states it is committed to preventing illegal migration, countering human trafficking and protecting the external border. Illegal immigration is fairly easy to tackle – as it is a construct of law, the key is to ensure that laws are designed in such a way that they do not create illegality in the migration process. For instance, the rapid and successive changes to immigration laws in a number of Member States has made it increasingly difficult for persons to know what their status is and to keep themselves within the ambits of the changing immigration rules. Bringing in substantial changes to rules without transitional periods, for instance as the UK has done recently, only creates confusion and illegality, as individuals find themselves in an impossible position as regards their status. One of the easiest ways to diminish illegal immigration in the EU is to permit individuals to switch their status without having to leave the Member State. Thus when an individual marries or is offered a job, instead of insisting that he or she leave the Member State to go back to his or her country of origin (which may well be in turmoil) to obtain a special visa (such as entry clearance) in order only to turn around and come straight back to the EU (often at great cost) the EU should design rules which permit rapid and simple procedures to switch from the earlier status to the new one at no or very low cost. This would have an immediate and dramatic effect in reducing illegal immigration in the EU.

One of the more problematic aspects of illegal migration is that connected to illegal work. Where third country nationals are offered jobs when their immigration status does not permit them to take up those jobs, illegality is created. Thus the strategy of the Commission to diminish this form of illegal migration is to ensure that the directives which it proposes for labour migration foresee the change of status of an individual while within a state from visitor or student to worker. The rules on the issue of work and residence permits need to include short deadlines within which state authorities must reach decisions so that companies and individuals can make their plans without undue disruption by state authorities. The legitimate concern of state authorities to protect the EU labour market must not be used as an excuse to delay or otherwise make unattractive the choice of the business regarding the individual to hire. The objective of effective protection of labour conditions and wages is better served by labour laws and collective/sectoral agreements than immigration laws which have the effect of creating illegality, which is then very difficult to regulate and promotes exploitation of workers.

The Commission indicates that ensuring freedom of movement within the EU is a key objective. Under this heading it proposes the extension of the European Borders Agency, FRONTEX, improving networking of sea border controls and a European surveillance system helping Member States to deal with “growing flows of illegal immigrants.” As the UK is on the far side of the EU's Schengen border, which is the border, which FRONTEX controls, these proposals are of direct concern to us. On the face of the document, the Commission appears to be suggesting that FRONTEX may be patrolling the English Channel to ensure that illegal immigrants do not move from the UK to the continent. It is worth remembering that not only are Ireland and the UK outside the Schengen external border of the EU but also the ten Member States which joined the EU in 2004 and the two which joined in 2007. Denmark is only on the inside of this border by reason of

an international treaty. Thus 14 Member States are outside the Schengen external border, one is inside only by virtue of a treaty and only 13 Member States are inside the Schengen external border. The measures which are suggested for the policing of the external border, in so far as they relate to the Schengen external border which is the relevant border for FRONTEX, cut through the heart of the Internal Market. Further, regarding the terminology used in the Strategy, exactly how a third country national can be an illegal immigrant before he or she has arrived in the state of destination and the state authorities have determined whether he or she is entitled to entry remains a matter of some mystery.

In any event, one of the keys to effective EU border management is to ensure that the border is a place where EU law is applied correctly and efficiently. This means that the Regulation entitled the Schengen Border Code must be fully and properly applied at all the EU's external borders (that is the Schengen External Borders). The Regulation specifies strictly the grounds on which a third country national may be refused admission at the EU's external border, provides for strict procedural requirements including written notice of the decision and grounds, a right of appeal and information about how to obtain representation to exercise that appeal right. FRONTEX should be centrally engaged in ensuring that the EU's external border is a place of law where the Border Code is fully and correctly applied.

The Commission also states that it plans the launch of the Visa Information System. The UK will be outside this measure as it is a continuation of the Schengen borders acquiesced out of which the UK has opted. However, it is a fact of border control policy that visa restrictions are much disliked by travelers. They present an obstacle to travel, they tend to be applied selectively – persons with the same nationality but resident in different parts of the world tend to be treated very differently – for instance the Bangladeshi national resident in Washington USA and his or her cousin resident in Dhaka. Different nationalities of persons subject to visa requirements tend to be treated very differently – for example Saudi nationals in comparison with Chinese – not only as regards the speed and rigor of the checks before visas are issued but also as regards the documents which are required to be presented. These types of difference do little for the EU's reputation as an area administered in a fair and coherent manner. Worse, such differences raise questions about whether disguised discrimination on a prohibited ground, such as national origin, is not at work. The rapid conclusion of the Visa Code, currently under consideration in the Council, with the inclusion, as proposed by the Commission, of a right of appeal against refusal of a visa, would be very welcome. The VIS should not be instituted until there is EU law about how visas are issued which is clear, consistent and readily available to the traveler.

The Commission does not refer to any revision of the visa black list – the list of those countries whose nationals require a visa to enter the EU. Nor is there any mention of the facilitated visa agreements which the EU has entered into with some countries, notably Russia, to ensure that nationals of those countries are not subject to the full vagaries of the EU visa system. Both a revision of the visa black list to take all countries in respect of which there is not an immediately public security risk off the list and the settlement of facilitated visa agreements with more countries would be very appropriate strategies for the Commission under this heading.

Common European Asylum System

The Commission states its intention to propose further steps towards a common policy on migration and measures to achieve a Common European Asylum System by 2010 in line with the Hague Programme. No further detail is given in the Annual Policy Strategy.

ILPA welcomes the statement by the Commission that the right for asylum is an expression of European solidarity. In ILPA's view it is more than that however and strikes at the heart of

humanitarian law and basic human rights. The establishment of a truly European system of immigration and asylum law and policy which fulfils the EU's obligations regarding human rights must not only set out a fair and equitable system but also ensure justice for the individual.

ILPA recalls the Hague Programme's call to the Commission to conclude the evaluation of the first-phase instruments in 2007. An extensive assessment of the Community legislation adopted to date is necessary to determine where legal and practical gaps exist and may require further legislation or amendment. The European Commission has also a legal responsibility to monitor transposition and implementation of the directives into national law. Given the low standard of the safeguards contained in some of the instruments adopted in the first phase, strong monitoring of transposition of Community instruments into national law, taking into account the obligation to apply this legislation in accordance with the Geneva Convention and human rights principles and treaties, will be crucial in ensuring that member states maintain or adopt legislation and policies that are in line with international law.

Subject to evaluation of first-phase instruments and to making the required amendments in those areas that fall short of international standards, ILPA supports Member States' objective of supplementing and developing further the legal instruments in the common European asylum system, in accordance with the 1951 Refugee Convention and other relevant international law, provided that the EU's objective is to establish common high standards, rather than common low standards.

But ILPA is very concerned that Member States are not seriously co-operating at the European level: recent years have seen their constant efforts to tighten their own national legislation and increasing efforts to shift responsibility for processing asylum claims either to each other or outside of the EU altogether. The commitment to the principle of non-refoulement as regards the protection of asylum seekers is increasingly tenuous. While statements regarding the importance of the protection of refugees abound, the application of the principle of non-refoulement on which these statements are founded is increasingly lacking. Instead the vision of asylum seekers as floods and a menace is increasingly at the fore.

The single most fundamental objective of a Common European Asylum System must be to end the current asylum lottery and instead guarantee that every asylum applicant arriving in the EU has access to one fair and thorough asylum determination procedure. The Commission's objective must be to achieve this through revision of current legislation and introduction of new legislation in the future.

Accession Negotiations with Croatia and Turkey

ILPA welcomes the Commission's commitment to continue negotiations with Croatia and Turkey with a view to their accession to the EU. However ILPA is concerned at the spirit in which recent accessions to the European Union have been entered into in recent years. Since May 2004 twelve new States have joined the European Union. The Accession Treaties governing the accession arrangements have all included transitional provisions relating to the free movement of persons.

ILPA is extremely concerned at the attitude of existing Member States towards accepting that nationals of new Member States acquire full EU citizenship rights post accession. ILPA notes that in the UK for instance transitional provisions for Bulgaria and Romanian nationals have been interpreted in a least inclusive manner and since 2004 the UK government has taken deplorable steps to exclude accession State nationals from any welfare provision through legislation.

ILPA would urge the Commission to ensure that future accessions are not marred by the same negative approaches by Member States. To this end it is necessary for the Commission to make clear to the existing Member States that their obligations post an accession include equal treatment of accession State nationals and full recognition of their status as EU citizens.

Communication with Citizens

ILPA welcomes the Commission's commitment to communicate with European citizens about European issues. ILPA considers that such commitment should be made by the UK Government.

The UK Government has demonstrated its inability to communicate openly and honestly about European issues. Take for instance the "foreign national prisoners issue" where the Home Secretary made the following statement

"the immigration and nationality directorate has been taking a robust approach to the deportation of European Economic Area nationals, which has been defeated consistently in the courts. We will be changing the law to strengthen the link between criminality and deportation, but in the meantime we are no longer taking unproductive cases to the courts at the taxpayers' expense, with negative results." (9 October 2006 Statement to the House of Commons)

To blame the courts for IND's lack of success in deporting EEA nationals is deplorable. A responsible Government would have explained in clear terms to the public the circumstances in which an EU national may be deported according to Community law which the courts and IND are obliged to respect.

The UK Government has equally failed to communicate properly with the public on the issue of accession of new State to the EU. Instead of challenging populist opinion that accession State nationals would likely come to the UK in their masses to seek State benefits the Government embarked upon a legislative programme designed to ensure that European Union citizens are discriminated against in respect of access to social security and homelessness assistance despite the Social Security Advisory Committee amongst others urging against such steps.

In ILPA's view it is the responsibility of all European institutions and the Member States to ensure that European issues are communicated to the public in an open and honest manner.

Nicola Rogers and Elspeth Guild

20 April 2007