



IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

PRESIDENT: IAN MACDONALD QC

ILPA SUBMISSION TO HOUSE OF LORDS

SUB-COMMITTEE E

DRAFT COUNCIL DIRECTIVE ON A RIGHT TO TRAVEL FOR THIRD COUNTRY NATIONALS

1. These submissions set out the views of ILPA ("the Association") about the draft Council Directive on the right of third-country nationals to travel in the Community (COM(95)346 final) put forward by the Commission on 12 July 1995. This proposal was accompanied by two further proposed Directives¹. Together these draft directives are designed to complete the establishment of the internal market as required by Article 7a of the EC Treaty as regards persons.

2. The Association greatly welcomes this initiative by the Commission to take active steps towards the completion of the Internal Market as "an area without internal frontiers" and to clarify the position in law of the rights of third

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- Council Directive on the elimination of controls on persons crossing internal frontiers (COM(95) 347 final)
- European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (COM(95) 348 final)

country nationals to move within the European Community.

3. The Association considers that it is of the greatest importance that your Lordships consider the draft "right to travel" Directive, and the safeguards suggested by the Commission carefully in order to provide the basis for an informed decision by the Government when it will be called upon to decide on the adoption of these measures within the Council.

4. The Commission deliberately chose Article 100 of the EC Treaty as the legislative basis for the draft directive. Article 100 requires unanimity before the measures proposed by the Commission can be adopted. The measure proposed is important not only to the third country nationals who will benefit from its implementation but also for the United Kingdom and the European Community in fulfilling an obligation voluntarily assumed by them under Article 7a of the Treaty; an obligation that was inserted into the Treaty through the Single European Act, with the express consent of the United Kingdom government. It is too important to be left to be adopted (or rejected) without a proper debate about its merits and without proper parliamentary input into the position taken by the United Kingdom in the Council.

5. It is therefore to be hoped that the UK Government, the Commission and the Council will have the benefit of your

Lordships' consideration of these measures before any decision is taken on adoption or the exercise of a veto.

6. Article 7a of the EC Treaty provides:

"The Community shall adopt measures with the aim of progressively establishing the internal market over a period **expiring on 31 December 1992**, in accordance with the provisions of this Article and of Articles 8b, 8c, 28, 57(2), 59, 70(1), 84, 99, 110a and 100b and without prejudice to the other provisions of this Treaty.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." (emphasis added)

7. Of those freedoms of movement required by Article 7a, it is only the free movement of persons that has not yet been achieved². This is due to (a) the failure of the Member States to agree the complementary measures essential for the abolition controls on internal frontiers³ and (b) the lack of coordination of the laws of Member States on the entry and stay of third-country nationals.

8. More than three and a half years after the deadline for the

² see para. 2 of Explanatory Memorandum to COM(95) 347 final

³ These include *inter alia* the Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States, the Draft External Frontiers Convention which has repeatedly been on the agenda of the Member States, for the latest proposal from the Commission see: OJ 1995 C 11/6 and 15, as well as Regulation 2317/95 determining the third countries whose nationals must be in possession of a visa ("the Visa Regulation"), OJ 1995 L 234/1.

completion of the internal market had passed the Commission finally put forward these proposals which, pending the ratification of the complementary measures, would complete the abolition of controls on internal frontiers and clarify the legal position of third-country nationals in that internal market without internal frontiers.

9. As the Commission puts it in the introduction to its draft directives:

"This step constitutes a clear and unconditional obligation on the part of the Union stemming from Article 7a. In putting forward the proposals the Commission is also paying due regard to the legitimate expectations of the European Parliament and citizens of the Union."

10. Underlying the three draft directives is the Commission's long expressed view that:

"... the completion of the internal market, an area without frontiers, presupposes also the abolition of all controls at internal frontiers, whatever their form and whatever their justification. It is clear from the definition of the internal market that this objective must be attained in relation to all persons, whatever their nationality: any other interpretation would deprive Article 7a of the Treaty of any practical effectiveness.

The completion of the internal market requires therefore that, in principle all persons who are lawfully in one part of that market should have the right to move to other parts, and that such movements should not be subject to controls when the internal frontiers of the market are crossed."⁴

11. The draft "right to travel" directive is designed to give third-country nationals who are lawfully in the territory

⁴ paras. 3 and 4 of the Explanatory Memorandum to COM(95) 346 final; see also Commission Communication of 8 May 1992 (SEC(92)877 final)

of one of the Member States of the Union the **right to travel for a brief stay** to the territory of another Member State. It is expressly restricted to those who are lawfully within the territory of a Member State and will not affect their entry, across external frontiers, into the internal market.

12. Currently, only Union citizens have the **right to move and reside freely** within the territory of the Member States (Article 8a of the Treaty) without this right being dependent on the exercise of an economic activity⁵. Despite having the right to move freely, Union citizens as well as third-country nationals are subject to controls by the Member States when crossing an internal frontier.

13. However, unlike Union citizens, third-country nationals do not have a free standing, independent right to move from one Member State to another. The rights of free movement currently available to third-country nationals are all "derived" rights, ie. they are dependent on the exercise of free movement rights by a Union citizen (eg. Article 10 of Regulation 1612/68 and Article 1(1)(c) and (d) of Directive 73/148/EEC) or an employer established in a Member State (Case C-43/93 *Vander Elst v. Office des Migrations Internationales*, judgment of 9 August 1994). However, even when exercising that derived right of free movement, a third-country national may still be required to obtain a

⁵ see *inter alia* Directive 90/364/EEC

visa from the country to which he or she is moving, no matter for how short a period (eg. Article 3(2) of Directive 68/360/EEC and of Directive 73/148/EEC). Their rights are therefore, almost exclusively regulated by the domestic law of the Member States. This draft directive, if implemented, would *inter alia* provide those third-country nationals who already have a derived right of free movement with the right to travel for a short period without having to be accompanied by the Union citizen, on whom their right of free movement is dependent and without a requirement for a separate visa for each Member State.

14. The aim of the draft directive is to harmonise the domestic laws of the Member States regarding the entry and/or stay of third-country nationals, who are already lawfully present in another part of the internal market. The operation of the Directive will **not** affect the Member States' competence to determine whether to let a third-country national cross its external frontier into the internal market. It will also not affect current domestic or Community law about the right to stay for longer than a "short time" nor the law relating to access to employment or setting up in self-employment.

15. Though this draft Directive could easily be put into operation before such complementary measures as the Dublin Convention and the draft External Frontiers Convention have entered into force, it is drafted to look beyond that date

and to provide a remedy for certain inequalities that will arise unless the directive is implemented. The Commission proposal seeks to build on the experience of the countries who are members of the Schengen group⁶ and who have abolished all controls on internal frontiers between their respective territories without having experienced a negative impact on internal security. The proposal will ensure that once a common visa policy exists, third-country nationals who are lawfully resident in a Member State and have been granted a residence permit by that Member State will have the same rights of free movement as those who have been granted a common visa which is recognised in all Member States. As the Commission set out in its explanatory memorandum, commenting on the situation where these categories of persons did not have the same right of free movement:

"But this state of affairs is quite illogical: on the one hand, under the instruments referred to above [Visa Regulations and draft External Frontiers Convention], a person could enter the territory of a Member State on the strength of a residence permit or a visa issued by another Member State **if he comes directly from a third country**; on the other hand, that same person would not be entitled to enter the territory of the Member State in question if he was coming from another Member State of the Union in which he was lawfully present." (para. 9, emphasis added)

16. Under the draft directive (Article 3), those who hold a valid residence permit issued by another Member State would be permitted to travel to another Member State for a continuous period of **three months** provided they meet the

⁶ Belgium, France, Germany, Luxembourg, Netherlands, Portugal and Spain

following requirements:

- a. they possess a valid residence permit and a valid travel document; and
- b. they have sufficient means of subsistence, both for the period of stay or transit and for their return to the Member State that issued the residence permit.

These requirements are closely modelled on the conditions for access to the territories of the Member States laid down in the draft External Frontiers Convention.

17. The requirements set out at para. 16b) above (sufficient funds) also apply to those third-country nationals who hold a visa valid throughout the Community and who wish to exercise their right of travel. Any such person has the right to travel to another Member State for the period of stay permitted by the visa, provided they have a travel document bearing the valid visa.
18. Furthermore, those who are either exempt from visa requirements in all Member States or who are subject to visa requirements in some Member States will also have the right to travel for a period of no more than three months within six months from the first date of entry into the internal market. The latter, however, will only be permitted to travel to those countries where they are not subject to a visa requirement.

19. Again they are all subject to the requirements of sufficient funds and valid documents (Article 4(2) and (3)). This latter provision could act both as a transition provision until a common visa system is fully established (as required by Article 100c(1) of the EC Treaty) as well as dealing with those types of visa not exclusively covered by the common visa regime.

20. Wherever any of the above requirements are not met or where the third-country national in question constitutes a threat to public order, public security or to the host Member State's international relations that person may be expelled and the Member State that issued the residence permit is under an obligation to readmit that person, even if his residence permit has expired.

21. The draft directive would in no way restrict the Member State's power to extend the period during which a third-country national would be permitted to stay beyond three months nor their power to require persons exercising their right to travel to report their presence in the Member State's territory (Article 5). This latter power assumes even greater importance once the second proposal on the abolition of all controls on internal frontiers has been adopted.

22. In order for the draft Directive, which is the subject of these submissions, to be put into context a short

description of the proposals set out in the two complementary draft directives is set out below.

Draft Council Directive on the elimination of controls on persons crossing internal frontiers

23. The **second** proposed draft directive is without a doubt the most controversial of the three as it aims to eliminate all forms of control on any person crossing internal frontiers.

However, the Commission has rightly stated that:

"As the elimination of controls on persons crossing internal frontiers goes hand-in-hand with the implementation of the essential accompanying measures, Member States should be required to transpose the Directive by 31 December 1996 at the latest. Such a deadline should allow the Union and the Member States enough time to adopt and implement the last accompanying measures still pending.

However, the Commission undertakes here and now to present a proposal amending that date if it were to become clear after the adoption of this Directive that the accompanying measures could not be put into effect by 31 December 1996."

24. Article 1 of the Directive prohibits the use of any frontier control or formality in relation to persons of whatever nationality crossing a Member State's border with the remainder of the Community. This is, however, without prejudice to the normal use of law enforcement powers within the territory of a Member State and, where applicable, the obligation to possess and carry identity documentation. These powers and obligations can only be applied, however, subject to the general principles of Community law, such as non-discrimination and proportionality.

25. In cases of a "serious threat to public policy or public security" a Member State may reinstate frontier controls (though not frontier formalities) for a period not exceeding 30 days. Where the serious threat persists for more than 30 days, such frontier controls may be maintained for further periods of 30 days, following consultation with the Commission and the other Member States. The Commentary provided by the Commission makes it clear that:

"The existence of a general risk (eg. that of illegal immigration) is not sufficient to justify reliance on the safeguard clause: the other accompanying measures normally provide an appropriate response to such risks." (para. 10 of Explanatory Memorandum to COM(95)347)

26. Article 2(3) expressly makes the use of this exceptional power under the safeguard clause subject to the principle of proportionality. This has the consequence that not only may the reinstatement of frontier controls not last longer than strictly necessary but the controls themselves must also be limited to what is strictly necessary in order to counter the serious threat.

27. "Frontier control or formality" is defined as:

- "- any control applied, in connection with or on the occasion of the crossing of an internal frontier, by the public authorities of a Member State or by other persons, under the national legislation of a Member State;
- any formality imposed on a person in connection with the crossing of an internal frontier and to be fulfilled on the occasion of such crossing." (Article 3(4))

28. This definition is clearly intended to include not only the

checking of passports or travel documents by immigration officials but will also include the abolition for internal journeys of what the Commission calls "controls applied 'by proxy'", such as carrier liability. It should, however, be stressed that though the Directive will require the abolition of carrier liability for internal journeys, the draft External Frontiers Convention includes obligatory provisions for carrier liability in relation to journeys from third countries to the Community.

Draft European Parliament and Council Directive amending Directive 68/360/EEC and Directive 73/148/EEC

29. The **third** proposed draft directive is designed solely to amend the existing secondary legislation concerning free movement of persons in order to achieve the objectives set out by the previous two draft directives.

30. For that purpose the draft directive removes from Directives 68/360 and 73/148 (to which all the other Directives refer) those provisions which make the exercise of the right to free movement subject to the production of a valid identity card or passport (Article 2(1) in both Directives). However, the preamble to the draft directive makes it clear that

"Whereas it should be made clear that the objective of Article 7a does not imply that citizens of the Union and members of their families are entitled to travel without being in possession of the requisite travel document." (5th Whereas)

31. Furthermore, the amended Article 3(1) in both Directives

makes it plain that those exercising their right of free movement under Community law who are entering a Member State across an external border, the exercise of that right of movement remains conditional on the production of a valid identity document. A further Article 3(3) is added to both Directives, making express provision for rules of national law requiring possession of valid identity cards or passports.

32. In relation to the possibility of requiring family members to obtain a visa before exercising their right of free movement under the Article 3(2) of the Directives the Commission was of the view:

"That provision does not need to be amended, however, because, as presently worded, it can be interpreted as meaning that the right to require a visa from family members who are third-country nationals must not run counter to any other provision of Community law that might be applicable." (Explanatory Memorandum to COM(95) 348)

These provisions of Community law, would *inter alia* include those under the draft "right to travel" directive.

Impact of the "right to travel" directive on UK Immigration Law and Practice

33. Section 7 of the Immigration Act 1988 provides

"a person shall not...require leave to enter or remain in the UK in any case in which he is entitled to do so by virtue of an enforceable Community right or any provision made under Section 2(2) of the European Communities Act 1972".

34. This provision was finally brought into force in 1994. The proposed "right to travel" Directive would mean that third-

country nationals in the circumstances outlined above would have a Community law right to enter the UK and would therefore fall within section 7 of the 1988 Act. The consequences would not be dissimilar to the effect of the Immigration (Control of Entry Through Republic of Ireland) Order 1972 as regards non-visa nationals. This Order provides that, as a matter of law, a non-visa national entering the UK via the Republic of Ireland is deemed to have leave to enter and remain for a period of three months⁷. Of course, as the beneficiaries of the proposed Directive would fall within section 7 of the 1988 Act there would be no question of leave to enter or remain being required as their presence in the UK for a period of 3 months would be on the basis of an enforceable Community law right. However, such a right of entry and stay within the territory of the UK would not include any right to take employment or engage in business activities. Were the third country national to have such a right it would have to derive from some other aspect of Community law.

35. In practice, this will simplify greatly access to the territory for business visitors who are third country nationals and are transacting business in a number of different Member States in succession. They will no longer be required to obtain visas for every single state to which they intend to travel. It will also assist very

⁷ Regulation 4 of the Immigration (Control of Entry through Republic of Ireland) Order 1972, SI 1972 No. 1610

substantially third country nationals established in the UK or in other Member States and who wish to go on holiday from or to the UK. The Commission in its explanatory memorandum set out the following economic considerations that underlie its proposal for the draft Directive:

"As a direct consequence of the disparity between national laws and the lack of coordination between them, some planned intra-Community trips are not made. The formalities, the need to go to an embassy or a consulate which may be a fair distance from one's home, the need in some cases to go in person, the expense and time involved, or quite simply the withholding of the visa, are so many reasons why intra-Community trips are not made. This applies in particular to brief visits to a neighbouring Member State.

Thus one of the objectives of the internal market, namely that consumers should be able to obtain goods for their own use from wherever the terms seem to them to be the most favourable - an objective which has been translated into practice (with a few exceptions for certain products subject to excise duty) by the amendments made to the legislation on indirect taxation - has therefore not been achieved in its entirety. In view of the large number of third-country nationals lawfully resident in the Community, this situation is bound to have a strong economic impact.

The same applies, perhaps with even greater force, to the provision of services in the Community. Tourism is an example which springs immediately to mind: as it is often easier for a third-country national who lives in a Member State to visit his home country rather than another Member State, the tourism industry undoubtedly suffers as a result. By and large, the difficulties third-country nationals encounter when going to another Member State are an obstacle to the freedom of service providers established in that Member State to provide their services.

The current situation is also an obstacle to the provision of services by Community businesses employing third-country nationals. When such a business has the opportunity to provide a service in a Member State other than that in which it is established, it will either have to suffer the consequences of the visa requirement or abandon the idea of having work carried out by those of its employees it would normally have sent; either way, it

will come up against an obstacle to its freedom to provide services." (*ibid.* para. 10)

36. In relation to third-country nationals resident in the UK, who will no longer be stamped in and out of the UK, there will be additional consequences. For instance, persons with indefinite leave to remain who travel abroad, even to another Community Member State lose that status on leaving the UK and must re-establish it on their return in accordance with paragraphs 18-20 of the Immigration Rules (HC395). Under these Rules, the third country national will not be permitted to return to continue his residence in the UK if he has been away from the UK for more than two years or has taken up residence elsewhere. Though the right to travel is limited to three months, the abolition of border controls on such persons will make it difficult to monitor the two year rule. It may be appropriate to consider amending the rule in any event so that it only relates to persons who have spent more than two years away or taken up residence outside the European Union.

37. It is currently unclear what immigration status the UK government will designate as the equivalent to a "residence permit" for the purposes of the proposed Directive. This should certainly include persons with indefinite leave to remain but it should also include persons in categories leading to settlement such as spouses during the one year probationary period, persons recognised as refugees and persons in the UK for work related reasons such as in

accordance with work permits, admitted as businessmen or sole representatives. A positive approach to this question is vital as it will be virtually impossible to police the intra-Community travel arrangements of such persons. Under the Immigration Rules, persons in all of these capacities are expected to live in the UK. In respect of spouses during the probationary period the British citizen or person settled in the UK is expected to be present and settled in this country throughout the 12 month period before indefinite leave to remain will be granted to the third country national spouse⁸. As regards persons in business and employment categories these persons are expected to remain in the UK for a continuous period of four years before they will be granted indefinite leave to remain⁹. Should such persons have the right to travel under the proposal for a Directive their passports will no longer be stamped indicating the periods of time they have spent outside the UK which currently is used to ensure that they spend the relevant continuous period in the UK. Nonetheless, as the right to travel, which would be extended, is limited to 3 months on the territory of the other Member States there is no reason to think that this would present an insurmountable difficulty and allowance should be made for the exercise of this (limited) right to travel.

⁸ Paragraph 287 and 288 Immigration Rules HC395

⁹ For example, as regards work permit holders, paragraph 134, for sole representative, paragraph 150, for business persons, paragraph 209 of HC395 etc

38. Furthermore, the category of persons gaining the benefit of the right to travel should include students at UK institutions and other persons who are in the UK on a long term basis, such as persons with exceptional leave to remain in the UK.
39. There are good operational reasons for seeking to extend as widely as possible the list of persons staying in the UK who have the right to travel under the proposed Directive. This will be even more so once the controls at internal frontiers have been abolished. By including as many third country national UK residents as possible in the "resident permit" category the UK ensures that if they exercise their right to travel these persons will be lawfully in the territory of the other Member States for a period of at least three months. Once the controls at internal frontiers have been removed, persons excluded from the benefit of the right to travel will nevertheless be able to cross the border into another Member State. However on arrival in another Member State, as a matter of the domestic law of that State, they may be immediately deportable back to the UK as they do not derive a right from the Directive and the UK will be under an obligation to readmit them. Their deportation back to the UK will cause administrative headaches for the UK authorities who will have to investigate each person's immigration status on each occasion of a demand to accept the return of a third-country national being deported back to the UK.

Equally, too restrictive an approach to the category of beneficiaries under the draft Directive would not be welcomed by the other Member States as it would cause an unnecessary administrative and financial burden¹⁰ for them having to return the UK's third-country national residents.

40. Those persons who are present in the UK in an extremely precarious position, for instance persons who have applied for political asylum at a port of entry and are in the UK on temporary admission are unlikely to be beneficiaries of the right to travel. This will mean that if they take advantage of the abolition of border controls on persons between the Member States and go for the weekend to France their position in France will be regulated entirely by French domestic law which may or may not make their presence there unlawful. The same situation will obtain as regards third country nationals in a precarious position in other Member States who travel, for instance, to London for a holiday. However if such persons apply to the authorities to remain in the UK it will be open to the UK to return them as illegal entrants to the other Member State from whence they arrived or, if they apply for asylum, in accordance with the safe third country rule (under the Dublin Convention).

¹⁰ Under paragraph 5 of the Annex to the draft Directive it is the Member State requesting the readmission of a third-country national that is responsible for the cost of removal, where the individual is unable to pay.

41. As regards existing UK law, Section 3(4) of the Immigration Act 1971 provides that:
- "a person's leave to enter or remain in the UK shall lapse on his going to a country or territory outside the common travel area (whether or not he lands there), unless within the period for which he had leave he returns to the UK in circumstances in which he is not required to obtain leave to enter; but if he does so return, his previous leave (and any limitation on it or conditions attached to it) shall continue to apply."
42. While the right to travel for third country nationals could possibly come within this provision it may cause problems. The concomitant right to re-enter the State of residence is not clearly stated though it may be implied. It would probably make more sense to expand the first part of Section 3(4) from "the common travel area" to the "European Union" so as to make it clear that the person's leave does not lapse.
43. As regards deportation and the limited right of appeal contained in Section 5 of the Immigration Act 1988, a person will have a restricted right of appeal if he or she was last given leave to enter the UK less than seven years before the date of the decision to deport. Where a third country national exercises the right to travel under the proposed Directive and returns to the UK, he or she would not have automatic leave to enter unless provision was made for a deemed leave to enter to be granted. However, if this was the policy choice made to accommodate the new right to travel it would prove extremely difficult to police. Such a system would rely on the honesty of the

individual in circumstances where the individual would have every incentive to forget about a trip to Paris which if remembered would effectively abolish his or her deportation appeal right. The preferable alternative option would be the extension of the wording of Section 3(4) of the Immigration Act 1971 as suggested in paragraph 42 above, so that a trip to another Member State would not break the 7 year period counting towards a full right of appeal in the event of deportation.

44. As regards naturalisation as a British citizen, Schedule 1 of the British Nationality Act 1981 requires an applicant to have lived in the UK for the preceding five year period with absences over that period not exceeding 450 days¹¹. An applicant is requested on the AN1 form to complete a section covering the days absence from the UK over the period which is then normally checked against the person's passport. With the abolition of passport checks at intra European Community borders, such a check against the passport would no longer necessarily provide the information substantiating the person's declaration. However, this position obtains at the moment as regards Community nationals applying to naturalise in the UK. In these cases the Nationality Division appears to accept other evidence of residence such as tenancy agreements, evidence from employers or schools etc.

¹¹ para 1(2)(a) Schedule 1, BNA 1981.

45. Accordingly, in practice the implementation of the "right to travel" Directive would not necessarily require substantial changes to current UK law. According to the Commission the full economic benefits that can be expected from the integration of national markets into a large single market cannot be achieved if some people are prevented from or have difficulty in moving in that single internal market¹². The completion of the internal market particularly as regards free movement of persons requires the adoption of these three Directives.
46. In view of the difficulties encountered in the process of drafting and ratifying the complementary measures, the Association respectfully submits that, out of these three proposals, the draft "right to travel" Directive could and should be adopted and implemented as soon as possible. The Commission has set a deadline for implementation of 31 December 1996. Though it is accepted that this is unlikely to be met, the implementation of this draft directive should not be delayed unnecessarily. The draft directive does not affect the admission of third-country nationals to the internal market while providing a substantial clarification and improvement of the legal position of third-country nationals wishing to travel to or through another Member State. It would further put in place one of the measures seen as crucial for the abolition of any

¹² Explanatory Memorandum, Commission, Brussels 12.7.95
COM(95) 346 final

controls on internal frontiers, a goal that should have been achieved by the end of 1992.

Tim Eicke
23 April 1996