ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION (EUROPEAN ECONOMIC AREA) ORDER 1994

ISSUES ARISING FROM DEBATES:

HOUSE OF LORDS: 29 APRIL 1994
HOUSE OF COMMONS: 9 MAY 1994

The Immigration (Economic Area) Order 1994 was debated in the House of Lords on 29 April 1994 after which it was adjourned. It was subsequently debated in the House of Commons on 9 May 1994.

In the two debates some clarification was provided on behalf of the Government and a number of issues were raised about the compatibility of the Order with the law of the European Union. Further to our memorandum to your Lordships of 24 April 1994 on this issue we now added our comments resulting from the two debates and hope that these may be of assistance to your Lordships when the Order again comes before you.

Provisions of the Order which Offend European Union Law

1. The exclusion from the family reunion benefits of the Order of British citizens who have exercised their right to live and work in another Member State.

The European Court of Justice rejected in terms the UK Government's position that British citizens returning to the UK after such an exercise of rights were liable to national family reunion provisions (**Surinder Singh** [1992] 3 All ER 798). National law has not been amended to reflect this.

2. The definition of a spouse for the purposes of the Order as excluding 'a party to a marriage of convenience'.

Whatever this term may mean, and it finds no definition in European Union law, there is no power to a Member State to limit the right of migrant citizens of the Union to family reunion with spouses.

3. Family Permits: European Union law does not recognise the term. Third country national family members of migrant citizens of the Union may be required to obtain a visa before travelling here. However, once they are here whatever sort of visa 'or equivalent document' (which would include leave to enter the UK) they must be granted the right of residence (Directive 68/360 Arts 3(2) and 4(1)).

As currently drafted, the Order requires the mandatory refusal of an application for variation of status from within the UK of any third country national family member of a migrant citizen of the Union if the family member arrived (albeit some time earlier

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or before marriage) in the UK without the family permit. The refusal would not give rise to a right of appeal (s10 the Asylum and Immigration Appeals Act 1993) which is contrary to Art 8 of Directive 64/221 which requires the provision of legal remedies for citizens of the Union and their families.

4. Failure to transpose Art 52 EC, Directive 73/148 and Regulations 1612/68, 1251/70: Article 52 EC entitles citizens of the Union to establish themselves in self-employment anywhere in the Union. Directive 73/148 sets of the rights attaching to the exercise of self-employment including family reunion. Regulation 1612/68 sets of the entitlements of migrant workers including family reunion and Regulation 1251/70 the right to remain in a state after employment.

The European Court of Justice has held:

"if a provision of national law which is incompatible with the EEC Treaty (even a Treaty provision which is directly applicable in the national legal order) is retained unchanged this perpetuates uncertainty and therefore itself constitutes an infringement of the Treaty by the Member State" (Re Freedom of Establishment: EC Commission v Italy [1988] 1 CMLR 580).

The failure of the Government to transpose fully and faithfully all regulations, directives and treaty provisions relating to freedom of movement is an infringement of European Union law.

Further, this failure is also a breach of Art 5 EC which requires Member States to "take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

It is not sufficient as has been suggested in both Houses by the Government that as these provisions have direct effect it is not necessary to introduce implementing measures in respect of them.

For instance the duty to facilitate or favour the admission of family members who are dependent on the worker or lived under his or her roof in the country of former residence is in no way reflected in domestic law. Indeed, our national Immigration Rules only permit the admission of such relatives where they are living alone in the most exceptional compassionate circumstances (para 56 HC 251 as amended). This is clearly a very different test from that envisaged by Union law.

5. Vocational Training: The Joint Committee on Statutory Instruments has already, and with good reason, expressed concern that Art 6(2)(h)(ii) of the Order regarding students may be ultra vires. Further to this point we would draw your Lordships' attention to the finding of the European Court of Justice:

"Any form of instruction which prepares a person for

qualification in a specific profession, trade or employment is vocational whatever the age or educational level of the pupils or students." (Gravier v City of Liege [1985] 3 CMLR 1).

We would reiterate our concern to your Lordships that this Order does not have the character of a 'technical measure' as suggested on behalf of the Government in both Houses. It does not implement European Union law either faithfully or completely.

As expressed in our earlier memorandum the Order seeks to preempt decisions of the European Court of Justice, avoid decisions of that Court which are considered unhelpful to domestic immigration policy, overlook provisions of Union law which must be implemented, contort provisions to the detriment of citizens of the Union, insert unauthorised limitations on citizens' rights and hinder the implementation of the Single Market.

Further, where aspects of the provisions being implemented do not touch upon the domestic immigration preoccupations of the Government no attempt is made to clarify them. Rather the Government lamely suggests that it is relying on the wording of the directives. We refer specifically to the Government's reply to queries about the difference between social assistance and social security (Hansard, 29 April 1994 col 983, House of Lords).

In our opinion this Order is deeply unsatisfactory and does not deserve your Lordship's approval.

We remain at your disposal should you have any queries regarding the Order.

Attached please find for your assistance:

1. Our previous memorandum to your Lordships

2. Hansard [Lords] 29 April 1994

3. Hansard [Commons] 9 May 1994

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